Terry PERRY *v.* STATE of Arkansas

CA CR 84-189 689 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered May 1, 1985

Herman H. Hankins, Jr. and *Steven G. Beck*, for appellant.

Steve Clark, Att'y Gen., by: *Joyce Rayburn Greene*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Terry Perry appeals from his conviction of the crime of theft by deception. He contends only that the trial court erred in not suppressing a statement made by the appellant after he had asserted his right to counsel. We find no error.

It is a general proposition that once a suspect in custody requests counsel all questioning must cease and cannot be reinitiated by the police officers. However, if the accused initiates further contact with the authorities and knowingly and intelligently repudiates his previous request for counsel, a voluntary statement may be made. *Rhode Island* v. *Innis*, 446 U.S. 291 (1979); *Edwards* v. *Arizona*, 451 U.S. 477 (1981); *Oregon* v. *Bradshaw*, ___ U.S. ___, 77 L. Ed.2d 405 (1983); *Dillard* v. *State*, 275 Ark. 320, 629 S.W.2d 291 (1982); *Trollinger* v. *State*, 285 Ark. App. 184, 686 S.W.2d 796 (1985).

The prosecuting attorney testified that the appellant came to his office with three or four of the officials of the company which employed him. The employer stated that he wished to make a complaint against appellant for retaining monies belonging to the employer. He stated that the appellant joined in the conversation and discussed with his employers "the pros and cons of what they did and did not do." After listening to them the prosecutor determined that the appellant might be charged and called the sheriff's department for an officer to transport the appellant to the county jail. At that point the appellant asked the prosecutor to call his attorney, which he did. The attorney advised that he would see the appellant at the jail.

A deputy sheriff testified that he was sent to the prosecutor's office to take the appellant into custody. When he arrived the appellant and two or three others were in the office with the prosecutor. He overheard the appellant talking about money and saying that he had only taken what was his. He heard only "bits and pieces" of the conversation. There was no evidence that either the officer or prosecuting attorney participated in these discussions.

While the deputy was transporting the appellant to the jail the appellant tried to talk to him about the incident. The deputy

advised him to withhold further conversation until he got to the jail and had been fully advised of all of his rights. He continued to talk about calling for money orders from Western Union and taking only that money due him. He never asked the deputy for an attorney and the deputy was unaware that he had already made contact with one.

At the police station the appellant was informed of all of his rights and acknowledged in writing that he understood them. Two other officers testified that at no time did they hear him mention the attorney. An officer testified that after the rights had been explained to him the appellant made a full and complete statement of the events. The officer testified that he was aware of his obligation to stop and interview at any time the right to counsel was asserted and that he had never interviewed any accused after such a request.

The appellant denied that he had attempted to discuss the matter with the deputy after his assertion of right to counsel and that he did not understand the *Miranda* rights as they were read to him. He stated that during the interrogation he asked the deputy sheriff for his attorney but was told that he could call the attorney after the interview was completed. This was denied by the officers. The appellant also offered testimony that he had a learning disability and did not understand many things he had read and had difficulty understanding normal conversations. The trial court denied the motion to suppress. We find this situation distinguishable from that in *Scroggins* v. *State*, 276 Ark. 177, 633 S.W.2d 33 (1982). There the accused was questioned on the day of his arrest but the questioning was discontinued when he asserted his right to counsel. The next day another detective began questioning the accused and obtained a statement. There the court concluded that the detective, and not the accused, had initiated contact on the second day. The conviction was reversed on a holding that the accused could not be interrogated later except on his own request or by otherwise initiating further contact with the police.

In *Innis, Dillard* and *Trollinger*, however, the questioning did cease upon assertion of the right to counsel and further conversation was then initiated by the accused. In this case also, after asserting his right to counsel the accused continued to have a discussion with his employers in the presence of the prosecuting

attorney. These discussions continued in the presence of the deputy sheriff when he arrived. In route to the jail he initiated further conversation with the deputy who cautioned him not to do so. After his rights were explained to him and he understood them, he executed a written waiver of all of those rights, including the right to have his attorney present. His continued discussion of the merits of the case with the police evidences the desire on his part to continue the discussion without the presence of his attorney.

The only question remaining is whether appellant's waiver of his right to counsel and revocation of his former request were intelligently and knowingly made. In support of his testimony that he did not understand his rights when they were explained to him, the appellant introduced testimony of a close relative about his learning disability. The police officers testified that they explained his rights to him fully, that he did understand them, and that in their contact with him they had no reason to believe that he did not fully understand any questions propounded to him or statements made by him.

On appeal we review these matters independently, considering the totality of the circumstances and do not reverse the trial court unless its ruling is clearly erroneous. *Harris* v. *State*, 278 Ark. 612, 648 S.W.2d 47 (1983); *Coble* v. *State*, 274 Ark. 134, 624 S.W.2d 421 (1981).

In doing this we note that appellant testified at the hearing and had no trouble responding intelligently to the questions. His answers were clear and concise, and so far as we can tell from the written record given without hesitation. We find no error.

Affirmed.

MAYFIELD and CORBIN, JJ., agree.

Maurice COLEMAN *v.* STATE of Arkansas

CA CR 84-192 688 S.W.2d 313

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 1985
[Rehearing denied May 29, 1985.]

Bill E. Ross, for appellant.

Steven Clark, Att'y Gen., by: *Joyce Rayburn Greene*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. On September 9, 1980, the appellant entered guilty pleas to the crimes of burglary and theft of property in case number CR80-174A and breaking or entering and theft of property in case number CR80-179. Imposition of sentence in both cases was suspended for a period of five years, subject to certain conditions, including payment of costs, restitution, and a fine. As a further condition, the appellant was required to serve six months in the Mississippi County jail.

A felony information was filed on October 26, 1983, charging the appellant with the crimes of burglary and theft of property. The State filed a petition to impose sentence in cases CR80-174A and CR80-179. The trial court granted the State's motion, based on the fact that the appellant was found guilty of burglary in connection with the charges filed against him in October, 1983. The court sentenced him to two twenty-five year terms which were to run consecutively to the sentence (5 years) imposed in CR83-321, the case filed in October, 1983. From that decision, comes this appeal.

On appeal, the appellant argues that, on September 9, 1980,

in cases number CR80-174A and CR80-179, the court sentenced him to two five-year terms in prison, but suspended the sentences. Therefore, says the appellant, upon revocation, the court could only sentence him to the balance remaining on those sentences. We disagree.

The judgments in the above-referenced cases are clear in indicating that suspension of imposition of sentence was ordered. The appellant argues, however, that because one of the conditions of the suspended imposition of sentence required the appellant to serve six months in the county jail, the sentence was actually imposed, thus limiting the court, on revocation, to a sentence of the balance remaining on the five-year sentences.

[redacted] Under Ark.Stat.Ann., Section 41-1201 (Repl. 1977), the court was authorized to suspend imposition of sentence, subject to certain conditions. Section 41-1204(1) authorizes the court, as a condition of probation or suspended imposition of a sentence, to require a period of confinement in an authorized local detention facility, and subsection (3) limits the "period actually spent in confinement" to "ninety (90) days in the case of a felony, . . ." It appears that in CR80-174A and CR80-179, the appellant entered guilty pleas to four felonies. Arkansas Statutes Annotated, Section 41-1204(3) may allow stacking of the 90 day sentences that may be imposed as a condition of the suspended imposition of sentence (which point is not argued by the State on appeal), but even if it does not, we find no merit to the appellant's argument. As noted above, subsection (3) limits *the period actually spent in confinement* to ninety days, and we find nothing in the abstract of pleadings and testimony to indicate that the appellant ever served even one day of the six month concurrent sentences which were imposed as conditions of the suspended imposition of sentences. Therefore, we find this point to be without merit.

The appellant argues that he should be given credit for jail time of six months against the sentences imposed upon revocation. Again, we are unable to determine whether the appellant ever served any of the six months, so, even assuming that he would be entitled to such credit, he has not demonstrated his entitlement to it. See Ark.Stat.Ann., Section 41-904 (Repl. 1977).

The appellant also argues that even assuming the court could sentence the appellant to more than the balance of the five years

remaining on his original sentences, the sentences imposed, two twenty-five year terms, were in excess of that authorized by law. We agree with the appellant that the court could not have sentenced him to fifty years in prison on the crimes charged, but we do not agree that the appellant could not have been sentenced to a total of twenty-five years.

The appellant contends that in case number CR80-174A, he was found guilty of burglary and misdemeanor theft. The judgment does not mention the grade of the theft charge, and the record does not otherwise inform us whether the theft was a felony or misdemeanor. In case number CR80-179 the same situation arises; the judgment does not mention felony or misdemeanor as regards the theft charge. However, before sentencing the appellant after the revocation hearing, the trial judge reminded the appellant that he had told him in 1980, when imposition of sentence was suspended, that if he violated the conditions of his suspension he could be sentenced to as much as forty-five years. At the time of the commission of the offenses which resulted in the charges in the two earlier cases, burglary was a class B felony, and the imprisonment range was three to twenty years; felony theft of property, a class C felony, carried an imprisonment range of two to 10 years; and breaking or entering, a class D felony, carried a five year maximum sentence. When the court imposed the sentences in the two cases, there was no specification as to what term of years was being imposed for each crime; the court stated that it was revoking in both cases and was imposing sentences of twenty-five years, to run consecutive to the five year term the appellant received in the 1983 case. We are unable to discern what the trial court intended.

It is clear that the court could have sentenced the appellant to twenty years on the burglary in CR80-174A and five years on the breaking or entering in CR80-179, running those sentences consecutive to each other and to the five year sentence imposed in CR83-321. Also, if the thefts were felonies, up to ten years could have been imposed in each case. Since we are unable to discern what the trial court intended, we remand to the trial court with instructions to state which sentences are being imposed; i.e., burglary, burglary and theft, burglary and breaking or entering, or some other combination. The appellant should be allowed, at that time, to present his argument concerning credit for the six months served in the county jail (presuming he served any of that

time).

Reversed and remanded.

CLONINGER and GLAZE, JJ., agree.

Mary A. KISTLER, et al *v.* Miriam H. STODDARD

CA 84-300 688 S.W.2d 746

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 1985

Daggett, Van Dover, Donovan & Cahoon, by: *Jesse B. Daggett*, for appellant.

Preston G. Hicky, for appellee.

JAMES R. COOPER, Judge. Margaret Barrett (hereinafter "Barrett") owned Riverdale Plantation, located in St. Francis County, Arkansas. She died in 1979, and Riverdale Plantation was devised to the appellant, Mary A. Kistler, (hereinafter referred to as "Kistler"). The appellant R.A. Ashley, Jr., (hereinafter referred to as "Ashley") was appointed administrator of Barrett's estate. The appellant Shannon Brothers Enterprises, Inc., (hereinafter referred to as "Shannon") purchased Riverdale

Plantation in March, 1982. The appellee, Miriam H. Stoddard, is the executrix of the estate of William K. Stoddard, her husband, who, prior to his death, had leased 208 acres of Riverdale Plantation for over twenty years on an annual, oral basis. After Barrett's death, Ashley required a written lease for the 208 acres; the first written lease covered a term which ended December 31, 1980. Another lease was executed which covered 1981. In the fall of 1981, Stoddard planted winter wheat, which was to mature in the spring of 1982. He had done the same thing in 1980, and had harvested the wheat in the spring of 1981. Shannon purchased Riverdale Plantation in March, 1982 and harvested the wheat planted by Stoddard. Stoddard made demand on Shannon for the costs of planting and Shannon refused payment. Stoddard filed suit, and the chancellor awarded Stoddard $5,711.93, finding that to do otherwise would result in Shannon's being unjustly enriched by that amount. From that decision, comes this appeal.

The chancellor found that: Shannon was aware that the wheat crop was planted at the time of the purchase; the value of the wheat crop did not enter into the price negotiations for the plantation; Shannon did not elect to plow the wheat under but chose to reap the benefit of Stoddard's labor; Stoddard was unaware, at the time he planted the wheat, of the proposed sale to Shannon; and that Stoddard was justified, considering the past practices of the parties (Stoddard and Barrett and the executor of Barrett's estate), in planting the wheat crop with the expectation of being able to harvest it the next spring.

The appellants argue that Stoddard should not be allowed to recover because he planted wheat only a few months before his lease term was to expire, knowing that the wheat would not mature during the period of his lease. Further, they argue that the wheat crop was part of the realty and that, when Shannon bought the land, the crop went with the realty. They correctly argue that Stoddard had no right to enter onto the land for the purpose of harvesting the wheat once his lease expired on December 31, 1981. However, Stoddard made no claim to any such right. He only claimed a right to the cost of his efforts, the benefit of which inured to enrich Shannon. We agree that Stoddard's efforts were undertaken in good faith, since he reasonably could have relied on past practices and was unaware of the impending sale to Shannon until well after planting time.

The question remaining is whether, on the facts of this case, the chancellor correctly decided that the doctrine of unjust enrichment required that Shannon reimburse Stoddard for his costs in planting the wheat. We agree with the chancellor.

The doctrine of unjust enrichment is an equitable one, providing that one party should not be allowed to benefit at the expense of another because of an innocent mistake or unintentional error. *Brookfield* v. *Rock Island Improvement Company*, 205 Ark. 573, 169 S.W.2d 662 (1943). Here the chancellor correctly determined that, absent restitution being paid to Stoddard, Shannon would without justification reap the benefits of Stoddard's labor and expense. It is true that Shannon, once the purchase was finalized, owned the wheat crop and that Stoddard had no legal or equitable claim to the crop itself. But resolution of that issue does not mean that Shannon is entitled to be unjustly enriched in the amount expended to plant the crop.

We review chancery cases *de novo*, but we do not reverse the chancellor's decisions on factual question unless those decisions are clearly erroneous or against the preponderance of the evidence. ARCP, Rule 52(a). Since the chancellor's findings are neither clearly erroneous nor against the preponderance of the evidence, we affirm.

We express no opinion as to whether Shannon may have a valid claim against Kistler or Ashley, as administrator of Barrett's estate, because that issue has not been raised before this Court.

Affirmed.

CLONINGER and GLAZE, JJ., agree.

WILDMAN STORES, INC. *v.* CARLISLE DISTRIBUTING CO., INC., and Diane CARLISLE, Personal Representative of the ESTATE of John CARLISLE

CA 84-377 688 S.W.2d 748

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 1985

R. David Lewis, for appellant.

Joel C. Cole, for appellee.

JAMES R. COOPER, Judge. Carlisle Distributing Co., Inc. delivered a check in the amount of $10,000.00 to William Paladino, who pledged the check to the appellant as security for

an $8,000.00 loan (which was later repaid in full). Subsequently, the appellant delivered to Paladino a check for $8,200.00, who endorsed it over to John Carlisle in payment of past indebtedness. Some 17 months later the appellant attempted to negotiate the $10,000.00 check, but the payor bank dishonored it. The appellant then sued the appellee Carlisle Distributing Co., Inc. on the $10,000.00 check and later filed suit against John Carlisle's estate to recover the $8,200.00 he received after Paladino endorsed the appellant's check to Mr. Carlisle.

The trial court sitting without a jury dismissed the appellant's complaint, finding that the $10,000.00 check lost its character as a negotiable instrument through age. The court made no specific finding relating to the $8,200.00 check. From that decision, comes this appeal.

The appellant argues on appeal that the trial court erred in failing to grant judgment against the appellee corporation, the maker of the $10,000.00 check, after finding that the appellant was a holder in due course of the negotiable instrument. First, we note that the trial court did not make a specific finding that the appellant was a holder in due course. However, because of our disposition of this case, we need not address that issue.

The trial court ordered that the appellant's complaint be dismissed for failure of proof. In explaining its rationale for refusing to hold the appellee corporation liable on the $10,000.00 check, the court stated that the check had lost its character as a negotiable instrument through age (in the 17 months during which the appellant held the check without presenting it for payment). The trial court erred because the check did not lose its negotiability by the mere passage of time. Also, even if the check for some other reason was nonnegotiable, that fact alone would not discharge the appellee corporation from liability as the drawer of the check. It appears that the trial court misconstrued the relationship between various statutes relating to negotiable instruments, namely Ark. Stat. Ann., Sections: 85-3-503(2)(a) (Add. 1961), which prescribes the time for presenting a check for payment, after which time the check becomes stale; 85-3-601(1)(i) and 85-3-502(1)(b) (Add. 1961), providing for discharge of a drawer's liability upon unexcused delay in presentment; 85-3-304(3)(c) (Add. 1961), attributing notice to the purchaser of an overdue instrument; 37-209 (Repl. 1962), the

statute of limitations for commencing actions founded upon written instruments not under seal; and 85-3-104 (Add. 1961), which sets forth the requisites of negotiability.

The drawer of a dishonored check, the appellee corporation in the case at bar, remained secondarily liable on the check until the statute of limitations ran or until its liability was otherwise discharged. The statute of limitations on instruments not under seal is five years under Ark.Stat.Ann., Section 37-209 (Repl. 1962), and thus the action against the appellee corporation was not barred by limitations.

Arkansas Statutes Annotated, Section 85-3-601 (Add. 1961), sets forth the conditions under which a party may be discharged from liability on an instrument; subsection (1)(i) deals with discharge due to unexcused delay in presentment, notice of dishonor or protest. When presentment is delayed beyond the time when it is due, the drawer of an instrument is discharged only if the conditions provided for in section 85-3-502(1)(b) (Add. 1961) are present. Section 85-3-503(2)(a) (Add. 1961) should not be read in conjunction with Section 85-3-601(1)(i) so as to discharge the drawer of a check merely because it was stale. See *Kaiser* v. *Northwest Shopping Center, Inc.*, 544 S.W.2d 785 (Tex.Civ.App., Dallas 1976).

We must reverse and remand this case for a new trial, since the record before us does not indicate whether or not the conditions for discharge were met and that issue was not addressed by the trial court. This Court cannot act as a factfinder in cases appealed from circuit court. *Rowland* v. *Worthen Bank and Trust Co.*, 13 Ark.App. 192, 649 S.W.2d 841 (1983).

The trial court made no findings as to the appellant's claim on the $8,200.00 check. Since we have reversed and remanded for a new trial as to the $10,000.00 check, the issues related to the $8,200.00 check can also be fully developed on retrial.

Reversed and remanded.

CLONINGER and GLAZE, JJ., agree.

MARION HOSPITAL ASSOCIATION *v.* Mary LANPHIER

CA 84-254 688 S.W.2d 322

Court of Appeals of Arkansas
Division II
Opinion delivered May 1, 1985

Smith & Kelly, by: *Michael E. Kelly*, for appellant.

Donald J. Adams, for appellee Marion County Board of Governors.

Frederick S. "Rick" Spencer, for appellee Lanphier.

DONALD L. CORBIN, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission ruling that appellant, Marion Hospital Association, was not immune from liability to appellee, Mary Lanphier, for Workers' Compensation benefits.

The main issue in this case is whether the Commission's decision that appellant failed to sustain its burden of proof that it was an institution maintained and operated wholly as a public charity so as to come within one of the enumerated exceptions to employment contained in Ark. Stat. Ann. § 81-1302(c)(1) (Repl. 1976), is supported by substantial evidence. We reverse and remand.

Since Arkansas has no case law construing Ark. Stat. Ann. § 81-1302(c)(1), we will examine cases which defined charitable institutions for purposes of taxation or tort immunity for guidance. In *Williams* v. *Jefferson Hospital Ass'n.*, 246 Ark. 1231, 442 S.W.2d 243 (1969), summary judgment was granted in favor of Jefferson Hospital Association on the basis of the doctrine that charitable institutions were immune from tort liability. Williams had brought a tort action against Jefferson Hospital Association and two doctors alleging their negligence in abandoning him after assuming professional responsibility for his treatment. Williams did not controvert the finding that Jefferson Hospital fell into the category of charitable institutions, but argued instead that Arkansas' doctrine of charitable immunity from tort should be abolished. Citing numerous reasons for not abandoning this doctrine, the Court affirmed the trial court's order finding Jefferson Hospital to be a charitable institution. In its discussion the Court reviewed previous cases and stated as follows:

> Appellant argues that the harshness of the doctrine requires its abandonment. Concededly that attack would be more persuasive if our court applied the doctrine in a broad and liberal manner, as has been true in some jurisdictions. Our court has in fact given the term 'charitable immunity' a rather narrow construction. 'A hospital * * * *free to all who are not pecuniarily able*, and supported partly by private contributions and partly by fees from patients, but producing no profit, is a purely public charity.' (Italics supplied.) That statement is found in the early case of *Hot Springs School Dist.* v. *Sisters of Mercy*, 84 Ark. 497, 106 S.W. 954 (1907). In *Crossett Health Center* v. *Croswell*, 221 Ark. 874, 256 S.W.2d 548 (1953), reference was made to those agencies, including hospitals, entitled to the immunity and they were described as created and maintained *exclusively for charity*. (Italics supplied.) In that case the hospital was found to fall short of 'purely benevo-

> lent and charitable purposes essential to clothe its property with trust attributes.' A tort judgment was affirmed. In *Helton* v. *Sisters of Mercy*, 234 Ark. 76, 351 S.W.2d 129 (1961), we discussed the many factors which led to the conclusion that the hospital was a public charity. Those were the articles of incorporation; that exemption from all forms of taxes, the free labor of the Sisters; and 'its doors are always open to anyone, regardless of creed, needing hospitalization' irrespective of ability to pay . . .

In *Burgess, Judge* v. *Four States Mem. Hosp.*, 250 Ark. 485, 465 S.W.2d 693 (1971), the Arkansas Supreme Court stated that since all moneys received by Four States Memorial Hospital were expended for its maintenance and improvement, the hospital was within the scope of the constitutional exemption from taxation.

In its decision holding that appellant was not within the exception to employment contained in Ark. Stat. Ann. § 81-1302(c)(1), the Commission listed the following factors it believed should be followed in determining whether or not a particular hospital is an institution "maintained and operated wholly as" a public charity:

> (1) Do the articles of incorporation provide that the purpose of the hospital is charitable in nature?
>
> (2) Is the corporation maintained for the private gain, profit or advantage of its organizers, officers or owners either directly or indirectly?
>
> (3) Does the hospital have capital stock or does it have provisions for distributing dividends or making a profit?
>
> (4) Does the hospital derive its funds from public and private charity as well as those who are able to pay?
>
> (5) Do all 'profits' go toward maintaining the hospital and extending and enlarging its charity?
>
> (6) Is the hospital open to all who are not pecuniarily able?
>
> (7) Are those patients who are unable to pay received into the hospital without charge, without discrimination on account of race, creed or color and are they given the same care as those who are able to pay?
>
> (8) Is the hospital exempt from the payment of both state and federal taxes?

The Commission found that appellant met all of the above enumerated factors with the exception of part of (7) which provides that non-paying patients must be given the same care as those who are able to pay. The Commission concluded that "Although we feel that the Association was intended to be a charitable hospital, we do not feel they sustained their burden of proving that the hospital was, in fact, operated and maintained as a wholly charitable hospital." This conclusion was based in large part upon the testimony of Helen Paxton, a patient of the hospital over a five-year period. Helen Paxton testified that she felt that as long as her insurance and Medicaid benefits paid bills she incurred while a patient in the hospital, she was provided adequate care. However, she stated that after her insurance and Medicaid benefits ran out, the hospital's attitude towards her changed. Helen Paxton testified that the nurses would not come as often when she called for them. During one of her hospitalizations, she stated that she received a letter from a collection agency in Tulsa, Oklahoma, informing her they were going to take her home away from her. Objection to this testimony was sustained by the administrative law judge. She testified further that she received a visit from a woman who worked in the office of the hospital informing her that all of her back bills had to be paid and that she would have to leave the hospital the following day. Helen Paxton stated she called her husband who contacted their attorney. She testified that their attorney talked to the administrator of the hospital who later visited Helen Paxton in her room. He informed her that she had a very large bill and that they would have to work something out. She told him she would just have to go home and the administrator informed her that he would not make her go home. She also stated that the administrator told her that she was not going to get good treatment in the hospital. Helen Paxton testified that night she was refused pain medication. She also testified to another incident while a patient in the hospital where she could not get assistance from the nursing staff after she had vomited and defecated in her bed during the night shift.

The Commission stated that the above testimony by Helen Paxton was evidence that appellant did not treat all of its non-paying patients as it would its paying patients and that appellant placed undue pressure on those who did not pay their bills. Although Helen Paxton was never denied admittance by appellant and was eventually relieved of her obligation to pay her bill,

the Commission stated that appellant was less than charitable on occasions.

A decision of the Workers' Compensation Commission will be affirmed if there is any substantial evidence to support it. *Chism* v. *Jones*, 9 Ark. App. 268, 658 S.W.2d 417 (1983). Before a decision of the Commission may be reversed on appeal by this Court, it must appear that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.*, 2 Ark. App. 185, 618 S.W.2d 573 (1981). We cannot say that the decision reached by the Commission in the case at bar is supported by substantial evidence.

We believe appellant established a prima facie case of exemption under Ark. Stat. Ann. § 81-1302(c)(1). The Commission relied heavily upon the testimony of one witness in its decision although it acknowledged that Helen Paxton was never denied admission to the hospital and her bill of approximately $23,000 was forgiven by appellant. While she may have been treated rudely, there was no showing that it was done under the authority of appellant nor that it was anything more than an isolated event.

The record reflects that Marion County Hospital facility was built in the 1950's with a Hill-Burton Grant and county funding and managed by the Marion County Hospital Board of Governors. In June 1978 the Board of Governors leased the county facility to appellant Marion Hospital Association which was a non-profit corporation under the laws of Arkansas. It was exempt from state and federal income taxes and was operated so that no part of any income or receipts would be distributed to the incorporators or officers. Any income was used exclusively for payment of costs and maintenance. Officers of the association testified that it operated with an open door policy refusing services to no person because of inability to pay. The association was bound by Hill-Burton regulations concerning indigent care. A management services agreement was entered into in September 1978 between Marion Hospital Association and Hospital Management Associates, Inc., a Kentucky corporation. Don Regnier, chairman of the Board of Directors of the association, testified that the Board instructed the administrator to not refuse services to anyone. He also stated that compliance with the

policies of the hospital concerning Hill-Burton money and government regulations in the grant were made clear to Hospital Management Associates and there was a requirement that they be complied with. David Doshier, vice-president of the association, testified that gross patient revenue was $1,609,522 from July 10, 1978, until July 16, 1980. He stated that 68% to 75% of that amount was Medicare and $334,022 was uncollectible. He stated further that Hospital Management Associates told the association that it should set up a rule that admittance would be contingent upon a patient's ability to pay, but that the association refused to do so. He was not aware of an association policy requiring cash only in the emergency room.

In view of the above testimony as well as appellant's articles of incorporation, we cannot say that fair-minded persons with the same facts before them could reach the conclusion that appellant failed to sustain its burden of proving that it was an institution maintained and operated wholly as a public charity so as to come within the exception contained in Ark. Stat. Ann. § 81-1302(c)(1). Accordingly, we reverse and remand with directions to the Commission to enter an order dismissing the claim.

Reversed and remanded.

CRACRAFT, C.J., and GLAZE, J., agree.

Linda Elenia ASKEW TRUST, John D. ASKEW, Trustee
v. Doyle HOPKINS

CA 84-197 688 S.W.2d 316

Court of Appeals of Arkansas
Division II
Opinion delivered May 1, 1985
[Rehearing denied May 29, 1985.]

James F. Dickson, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, for appellee.

MELVIN MAYFIELD, Judge. White and Chapman owned certain real estate in Fort Smith which they leased in September of 1969 to Evelyn Hills Shopping Center. The lease contained an option to renew for nine consecutive five-year terms, provided written notice was furnished the lessors at least ninety days prior to the expiration of the existing lease term. In July of 1971, Evelyn Hills assigned its interest in the lease to the appellant Linda Elenia Askew Trust, and after spending more than $200,000 for improvements to the property, the Trust subleased it

back to the shopping center for rental payments of $3,493.15 per month.

In May of 1977, the Trust and Evelyn Hills assigned their interest in the prime lease to Edgar E. Bethell, Trustee, who agreed to pay the appellant the rentals due by Evelyn Hills. The assignment also contained a provision granting Bethell the right to exercise the options to renew the prime lease in the name of the Trust and Evelyn Hills. Bethell was trustee for the appellee Doyle Hopkins and in June of 1977, Bethell, Trustee, assigned all of his interest in the prime lease to Hopkins.

Hopkins subsequently expended more than $500,000 for improvements to the property but in 1979 he failed to notify the owners of the prime lease, within ninety days prior to its expiration, of his intent to renew the lease for another five-year term. When the attorney for the appellant Trust discovered this omission, approximately sixty days prior to the expiration date, he attempted to get the owners of the prime lease to forgive the time element and renew the lease, but they refused. Hopkins then successfully renegotiated directly with them and leased the property under an entirely new lease, thus, effectively bypassing the Trust.

This suit was filed by the Trust against Hopkins seeking damages resulting from the loss of its rentals and alleging the breach by Hopkins of an implied duty to give the Trust notice if Hopkins elected not to exercise the option to renew the prime lease. The trial court granted Hopkins' motion to dismiss that complaint for failure to state facts upon which relief could be had, but the Trust was allowed to file an amendment. A first amendment was filed, but also dismissed, and a second amendment was filed alleging an oral modification of the assignment from the Trust and Evelyn Hills to Bethell, Trustee. The modification alleged was that Bethell, as trustee and attorney for Hopkins, agreed he and Hopkins would either exercise the option or notify the Trust of their intention not to exercise it in ample time to allow the Trust to exercise the option.

At trial, after the presentation of the Trust's case to the jury, Hopkins moved for a directed verdict which was granted on the basis that the Trust had failed to present sufficient proof of the subsequent modification of the written contract to raise a jury question; that any claim to enforce a subsequent oral modifica-

tion, if made, would be barred by the statute of frauds; and that Bethell had no authority to bind Hopkins to an oral modification without ratification by Hopkins and that no ratification was shown. On appeal, the Trust contends that all three grounds relied on by the trial court were erroneous. We agree and reverse.

First, appellant argues that the trial court erred in granting appellee's motion for directed verdict on the ground that the appellant had failed to adduce sufficient proof of the subsequent oral modification of the written contract to raise a jury question. The attorney for the Trust, E. J. Ball of Fayetteville, testified that Bethell, an attorney in Fort Smith, called and made an appointment for Bethell and Hopkins to come to Ball's office. Ball testified that he was made aware that Bethell was acting as Hopkins' attorney and that Hopkins wanted to acquire an interest in the lease of the shopping center, to be taken in Bethell's name as trustee. He said Bethell presented him with a prepared sublease containing a paragraph about the exercise of the prime lease option. Ball said he was concerned about protecting the Trust's interest in the property from a failure to exercise the option and that before the signed documents were delivered to Bethell there were conversations between them about this paragraph in the sublease. He testified that Bethell agreed that he and Hopkins would have the obligation to either exercise the option or, if they chose not to do so, to notify the Trust of their intentions far enough in advance that the Trust would have ample time to exercise the option. Ball testified that this agreement was to be confirmed in writing by letter from Bethell to Ball. However, it was not so confirmed, and Ball said he overlooked that fact until Hopkins failed to exercise the option on time. A letter was introduced which Ball wrote to Bethell with reference to the lease and the telephone conversation in which the oral agreement about the option was reached, but it does not specifically set out the agreement. Appellant asserts that Ball's testimony alone is sufficient evidence of the existence of the oral agreement to warrant allowing the jury to decide that issue.

The test of the propriety of a directed verdict was stated by the court in *Pritchard* v. *Times Southwest Broadcasting*, 277 Ark. 458, 642 S.W.2d 877 (1982), as follows:

> In determining on appeal the correctness of the trial court's action concerning a motion for a directed verdict by

> either party, the test is to take that view of the evidence that is most favorable to the party against whom the verdict is sought and to give it its highest probative value, taking into account all reasonable inferences deducible from it, and to grant the motion only if the evidence viewed in that light would be so insubstantial as to require that a jury verdict for the party be set aside. *Dan Cowling and Associates* v. *Clinton Board of Education*, 273 Ark. 214, 618 S.W.2d 158 (1981).

It is also a well-established rule of law that a subsequent parol agreement can modify the terms and provisions of a prior written contract. *O'Bier* v. *Safe-Buy Real Estate Agency, Inc.*, 256 Ark. 574, 509 S.W.2d 292 (1974); *Treat* v. *Safe Buy Real Estate Agency*, 240 Ark. 861, 402 S.W.2d 682 (1966); *Afflick* v. *Lambert*, 187 Ark. 416, 60 S.W.2d 176 (1933). It is not uncommon for the oral modification to be asserted by one party and denied by the other. In *Afflick* the court said whether there was a modification, as testified to, was a question of fact for the jury.

Appellee cites *APCO Oil Corp.* v. *APCO Marine*, 270 Ark. 715, 606 S.W.2d 134 (Ark. App. 1980), for its holding that "before the terms of a written agreement can be altered or reformed by oral agreement the evidence thereof must be *clear, unequivocal*, and *decisive*." But, in the instant case, the appellant was not attempting to alter or reform a written agreement. Here, the appellant was attempting to prove the subsequent modification of a prior written agreement. We believe that Ball's testimony was sufficient to make a question for the jury as to the existence of an oral modification of the sublease.

The trial court, however, found that Bethell had no authority to bind Hopkins to this modification of the lease; but the appellant contends the court erred in this regard also. Clearly, there is evidence that Bethell was both attorney and trustee for Hopkins and that Hopkins clothed Bethell with the apparent authority to act on his behalf. An agent acting within the apparent scope of his authority may bind his principal. *Mack* v. *Scott*, 230 Ark. 510, 323 S.W.2d 929 (1959). The face of the sublease in this case shows that Bethell leased the property as trustee for Hopkins. The record does not contain a copy of the trust agreement, but if the trustee had authority to execute the

lease for appellee's benefit, we believe it was for the jury to decide whether the trustee had authority to make the subsequent agreement about the manner in which the option to renew the prime lease would be exercised.

Next, appellant argues that the trial court erred in granting a directed verdict on the ground that any claim to enforce the oral modification would be barred by the statute of frauds. The appellant contends that it relied to its detriment on appellee's assurances that he would renew the option, or let appellant know that he was not going to in time for appellant to renew, and that this estops the appellee from using the statute of frauds as a defense to the oral agreement.

[redacted] We agree that under the law, estoppel was an issue of fact to be decided. *See Wells* v. *Everett, Director*, 5 Ark. App. 303, 635 S.W.2d 294 (1982); *Conley* v. *Johnson*, 69 Ark. 513, 64 S.W. 277 (1901). According to *Wells*, there are four elements of estoppel: (1) the party to be estopped must know the facts—here, the jury could find that Bethell was Hopkins' agent and under the law Bethell's information acquired in negotiating for the sublease was imputed to Hopkins. *Trinity Royalty Co., Inc. v. Riggins*, 199 Ark. 939, 136 S.W.2d 473 (1940); *Bond v. Stanton*, 182 Ark. 289, 31 S.W.2d 409 (1930); (2) one must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe the other party so intended—here, there is evidence that Bethell assured the Trust that the option would be exercised and the Trust had every right to believe this since Hopkins had spent more than $500,000 improving the property; (3) the party asserting the estoppel must be ignorant of the true facts—here, there is evidence that the Trust was ignorant of the fact that Bethell and Hopkins had failed to renew the lease until it was too late for it to be renewed; and (4) the party asserting the estoppel must rely on the other party's conduct to his injury—here, there is evidence that the appellant relied on Bethell and Hopkins to renew the lease or notify it that they were not going to renew and, by this reliance, appellant lost the land lease rentals and a $200,000 building.

For the reasons set out above we reverse and remand for a new trial.

Reversed and remanded.

CRACRAFT. C.J., and COOPER, J., agree.

ARKANSAS KRAFT CORPORATION et al *v.*
Marvin W. COBLE, et ux

CA 84-315 688 S.W.2d 319

Court of Appeals of Arkansas
En Banc
Opinion delivered May 1, 1985
[Rehearing denied June 5, 1985.*]

Friday, Eldredge & Clark, by: *William H. Sutton* and *William M. Griffin, III*, for appellants.

Guy Jones, Jr., P.A., for appellees.

TOM GLAZE, Judge. After a three-day trial on a tort action arising out of an automobile accident, a jury sitting in Conway County Circuit Court returned a verdict for appellees in the amount of $22,000. Appellees moved the trial court for a new trial

* Cooper and Mayfield, JJ., would grant rehearing.

based on irregularities in the jury selection, and the court so ordered. Appellant is appealing from the order granting a new trial.

The facts are undisputed. After extensive voir dire examination of the panel by the court and both attorneys, the clerk called eighteen jurors' names. The parties used their three peremptory challenges, each using one on the same juror, leaving thirteen jurors. The court called the first twelve jurors on the list and discharged those remaining. After the jury was sworn, the court recessed for lunch. During the lunch break, one of the jurors had a family emergency and was excused by the court. The court then recalled the thirteenth juror who had not been struck by either party. Voir dire was again conducted on the juror by the court and both attorneys were given the opportunity to voir dire him. Over the objection of both attorneys, the court informed the dismissed juror that he would become a replacement juror. Appellees moved for a mistrial, and their motion was denied.

In replacing the excused juror, the court did not follow the procedure for an alternate juror as contained in Arkansas Rule of Civil Procedure 47(b). Had the court used this procedure, each side would have had a peremptory challenge to use. Appellees urge that the court's action in recalling an excused juror to use as a replacement, thus denying them an extra peremptory challenge, is an irregularity which materially affected their substantial rights under Rule 47(b). While we can conceive of circumstances that would require a new trial because of the trial court's failure to follow Rule 47(b), appellees have failed to show any in this cause.

In *Falcon Zinc Co.* v. *Flippin*, 171 Ark. 1151, 287 S.W. 394 (1926), the court was presented with a similar set of facts. In that case, thirteen jurors remained after each side had used its three peremptory challenges. Rather than follow the statute which provided that the first twelve names remaining on the list shall constitute the jury, the court substituted another name from farther down the list. On appeal it was argued that this substitution constituted reversible error. The court held that all the names left on the list were deemed acceptable to the parties and that it was no violation of appellant's rights to change the order in which names were chosen for the jury. The court stated: "In other words, the parties cannot complain of any change or substitution

by the court among those who have been duly accepted by the parties." *Id.* at 1153, 287 S.W. at 395. Although this was not an appeal of an order for a new trial, the court did rule that this irregularity did not prejudice the complaining party.

The grounds upon which a trial court may grant a new trial are stated in Arkansas Rule of Civil Procedure 59. The pertinent provisions are contained in Rule 59(a):

> A new trial may be granted to all or any of the parties and on all or part of the issues on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party:
> (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial. . . .

The appellees fail to demonstrate any irregularity materially affecting their substantial rights to a fair trial. When the court recalled the dismissed juror, appellees had the opportunity to question him but declined. The appellees made no attempt to challenge the juror for cause, nor did they suggest to the trial court that they were entitled to an additional peremptory challenge. The replacement juror had not missed any substantive part of the trial; as a matter of fact, all that had transpired was that the jury was sworn. Finally, the verdict rendered by the jury was favorable to the appellees and was signed by the juror about whom they are objecting. From our review of the record, appellees made no showing of prejudice, and in view of their failure to do so, we believe the holding in *Falcon Zinc Co.* v. *Flippin, supra*, is controlling. Therefore, we conclude the trial court clearly abused its discretion in ordering a new trial, and we reverse and remand with direction to reinstate the jury's verdict. *See Landis* v. *Hastings*, 276 Ark. 135, 633 S.W.2d 26 (1982).

Reversed and remanded.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the decision in this case because, in my judgment, the majority have exercised the wrong standard of review and have usurped the trial judge's discretion in order to express their own.

The majority concede that the trial judge seated an "alter-

nate" juror without following the procedure required by Rule 47(b) of the Arkansas Rules of Civil Procedure, but say there is no showing by the appellees that the irregularity materially affected their "substantial" rights. To support their holding, the case of *Falcon Zinc Co.* v. *Flippin*, 171 Ark. 1151, 287 S.W. 394 (1926), is cited.

In the first place, *Flippin* is not even concerned with the issue involved in the instant case. Here, the procedural irregularity involved is the seating of an "alternate" juror after twelve regular jurors had been chosen. ARCP Rule 47(b) provides that alternate jurors may be called to replace regular jurors who are unable to perform their duties, but the rule provides that when a person is impaneled as an alternate juror each side is entitled to an additional peremptory challenge. When the trial judge excused the regular juror, he asked if the parties would agree that the thirteenth juror on the regular list could be seated. *Neither* party agreed to that procedure and the judge stated for the record that he was seating this juror over the *objection of both parties*. Not only that, but *both* parties asked for a mistrial at that time.

In the second place, in the *Flippin* case there was a direct appeal on the question of whether the jury selection procedure in that case constituted a reversible error. In such a case it is clear that the appellant has the burden to show that an error occurred which prejudiced his right to a fair trial. Here, the appeal is from the granting of a new trial, the issue is whether the trial court abused its discretion in granting the new trial, and the burden is on the appellant to show that the trial judge abused his discretion. In *Garner* v. *Finch*, 272 Ark. 151, 612 S.W.2d 304 (1981), the Arkansas Supreme Court said:

> The trial court is vested with a wide latitude of discretion in acting on a motion for a mistrial or a new trial and will not be reversed on appeal absent a manifest abuse of discretion. *General Motors Corp. et al* v. *Tate*, 257 Ark. 347, 516 S.W.2d 602 (1974); and *Dickerson Construction Co.* v. *Dozier*, 266 Ark. 345, 584 S.W.2d 36 (1979). The showing that a trial judge has abused his discretion must be stronger when a new trial has been granted than when it has been denied, as the beneficiary of the verdict set aside has less basis for a claim of prejudice than does the unsuccessful movant for a new trial. *Security Insurance* v.

Owen, 255 Ark. 526, 501 S.W.2d 229 (1973).

272 Ark. at 152. The court concluded as follows:

> In the granting or denying of a motion for mistrial, we give due consideration to the fact the trial judge, having personally observed the entire proceedings, is in a better position than we to evaluate the merits of the motion. When we consider all the circumstances during the trial proceedings, we cannot say that appellant has sufficiently met his burden of demonstrating the trial judge manifestly abused the wide latitude of discretion allowed him by setting aside the jury's verdict.

272 Ark. at 155.

Thus, the issue in the case at bar is not, as stated by the majority, whether the *appellees* have shown that they were prejudiced by the trial court's action. The issue here is whether the *appellant* has "sufficiently met his burden of demonstrating the trial judge manifestly abused the wide latitude of discretion allowed him by setting aside the jury's verdict."

The appellees filed a motion and brief for new trial in this case stating that because no alternate juror was properly selected the trial judge's action in seating the thirteenth juror on the regular list forced them to go to trial without the right of exercising an additional peremptory challenge on the juror which the trial court treated as an alternate juror. The record shows that the verdict was agreed to by only nine jurors and one of them was this thirteenth "alternate" juror selected contrary to the provisions of ARCP Rule 47(b) and in a manner that deprived appellees of the right to use an additional peremptory against him.

The trial judge granted the motion for new trial and his order states "the Court finds that, based on the record and the pleadings herein, that error was created and occurred at trial necessitating new trial." Although the appellant suggests that the verdict for appellees in the amount of $22,000.00 was sufficient and they should be satisfied, the appellees and the trial judge have a different view. I would affirm the trial judge for the reasons stated by the Arkansas Supreme Court in *Garner* v. *Finch, supra.*

COOPER, J., joins in this dissent.

HELENA-WEST HELENA SCHOOL DISTRICT *v.*
Dewey STILES,
Director of Labor, and Edward EVANS

E 84-90 688 S.W.2d 326

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 1985

David Solomon, for appellant.

Allan Pruitt, for appellee Dewey Stiles, Director of Labor.

Sam Whitfield, Jr., for appellee Edward Evans.

TOM GLAZE, Judge. Appellant, Helena-West Helena School District, is appealing a decision of the Board of Review awarding benefits to the claimant after finding that he was terminated for

reasons other than misconduct in connection with his work. Ark. Stat. Ann. § 81-1106(b)(1) (Supp. 1983). Claiming it received no notice of the Board's hearing at which the claimant was awarded benefits, appellant asks this Court to remand this cause and afford it the opportunity to present evidence to the Board to show that claimant was discharged for misconduct related to his work.

Claimant was a school teacher who was terminated on November 22, 1983, after being on probation for about a month. The claimant filed for unemployment benefits and was found ineligible. He appealed the agency decision and the appeal tribunal set a hearing for January 10, 1984. Claimant's attorney could not be present and asked for a postponement. Instead, the appeal tribunal on January 25, 1984, entered a default judgment against the claimant as a result of his failure to appear at the January 10 hearing. Claimant appealed the default judgment to the Board of Review which scheduled a hearing for March 21, 1984. Claimant's attorney again was unable to be present, but the employer-representative agreed to claimant's request for postponement. On April 4, 1984, an appeals referee conducted a telephone hearing for the Board of Review, and on this occasion, the appellant/employer was not represented. As a result of the April 4 hearing, the Board of Review, on May 17, 1984, entered its decision reversing the appeal tribunal and finding the claimant was discharged for reasons other than misconduct connected with the work. On appeal, appellant claims that it received neither notice of the April 4 hearing nor a copy of the May 17 decision of the Board of Review.[1]

Under Ark. Stat. Ann. § 81-1107(d) (Supp. 1983), the Board of Review is required to promptly notify the parties to any proceeding before it of its decision, including its findings and conclusions in support thereof. Furthermore, appeal tribunals and the Board of Review are mandated by law to conduct hearings and appeals in a manner that will determine the substantial rights of the parties. If they fail to do so, we have a correlative duty to remand these cases to require it to be done. *Mark Smith* v. *Everett*, 6 Ark. App. 337, 339-B, 642 S.W.2d 320,

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[1] The transcript at page 2 reflects that a copy of a notice of the April 4 hearing was mailed to Helena-West Helena School, 216 Biscoe, Helena, Arkansas 72342, but the word NO (with no further explanation) is inscribed above the appellant's name and address.

322 (1982). Accordingly, in cases when the Board denied claimants the opportunity of a hearing to explain that their untimely appeals were caused by circumstances beyond their control, we have remanded, stating due process requires the claimants be afforded a hearing on their contentions. *E.g.*, *McBride* v. *Daniels*, 269 Ark. 705, 600 S.W.2d 425 (1980); *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (1980). We believe this same due process requirement should be extended the appellant/employer in the instant case. Here, the appellant clearly was not present at the April 4 hearing when the claimant presented his side of the case. The appellant contends that its absence resulted from its not receiving notice, but no hearing has been held on this notice issue. Therefore, we remand to determine whether or not notice was given to the appellant of the April 4 hearing.

Remanded.

COOPER and CLONINGER, JJ., agree.

Wardell ALFAY *v.* STATE of Arkansas

CA CR 84-224 688 S.W.2d 951

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 1985

William R. Simpson, Jr., Public Defender, by: *Thomas J. O'Hern*, Deputy Public Defender.

Steve Clark, Att'y Gen., by: *Sandra Tucker Partridge*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant was convicted of aggravated robbery under Ark. Stat. Ann. § 41-2102 (Supp. 1983) and sentenced, as an habitual offender, to thirty years imprisonment under the provisions of Ark. Stat. Ann. § 41-1001 (Supp. 1983). His sole argument on appeal is that there was insufficient evidence to sustain his conviction on the charge. Our review of the record persuades us that the evidence was sufficient, and we affirm the judgment of the trial court.

Ark. Stat. Ann. § 41-2102 provides, in pertinent part, that:

> (1) A person commits aggravated robbery as defined in Section 2103 of Act 280 of 1975 (Arkansas Statutes Annotated 41-2103) and he:
>
> (a) is armed with a deadly weapon, or represents by word or conduct that he is so armed . . .

Appellant contends that the evidence upon which he was convicted was insufficient because the State did not prove the statutory element of his having represented himself "by word or conduct" as being armed with a deadly weapon. He cites *Fairchild* v. *State*, 269 Ark. 273, 600 S.W.2d 16 (1980), for the principle that, in the absence of the victim's belief that a suspect is armed, there is insufficient representation on the suspect's part to satisfy the requirements of aggravated robbery, even when the suspect approaches the victim with a hand concealed beneath his shirt. In *Fairchild*, the appellant rushed up to the State's witness and demanded her money. His right hand was hidden under his

shirt. When the witness denied having any money on her person, Fairchild "grabbed her dress lightly and insisted that she was lying." The witness then turned to go inside a private club, "displaying only car keys in her hands." At that point Fairchild withdrew. After his arrest, he volunteered information that he had attempted to induce the witness to believe that he was holding a gun. The Supreme Court noted that the witness appeared not to "attach any special significance" to Fairchild's conduct nor to feel threatened by it. Indeed, she did not mention the concealed hand until she was prompted by the prosecutor's leading question. In consequence, the court reduced the judgment from aggravated robbery to the lesser included offense of robbery.

The testimony in the present case enables us to distinguish it from the circumstances of *Fairchild*. Vivian Stewart, an employee of a convenience store, testified that appellant came into the store complaining about having to pay to pump air into his tires. No one else was in the store at the time. Appellant spoke with Stewart for a few minutes and then left. The witness stated that she listened for the sound of appellant's car being driven away because appellant's attitude and behavior had made her nervous.

Appellant suddenly returned and stood over Stewart, who was sitting down. His right hand was concealed inside a facial tissue box. He said to her, "Do you want me to cut you?" Startled and confused, the witness replied, "What?" Appellant then said, "Do you want me to castrate you?" Stewart was attempting to make sense of appellant's remark when he threatened to "cut" her again and ordered her to open the cash register. She rose from her seat, backed up, and opened the register. Appellant took all the money out and ran outside, leaving a trail of bills behind him. Stewart followed him in order to close and lock the door and noticed that he had backed his car up to the door. She noted the license plate, locked the door, and phoned the police, who later arrested appellant.

In her testimony, the State's witness emphasized that appellant's attitude and behavior had made her nervous during their initial contact. She stated that she saw the box covering appellant's right hand and believed that he was concealing a knife or another weapon. She specifically said that she gave appellant the money because he threatened to "cut" her. Finally, she

asserted that she had been frightened by the entire incident.

In determining the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the jury's verdict. *Cook* v. *State*, 2 Ark. App. 278, 621 S.W.2d 224 (1981). Substantial evidence is that evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

Applying our standard of review to the case before us, we find that the evidence presented through Stewart's testimony was of sufficient force and character to compel the conclusion that the witness was responding to appellant's commands in the belief that he carried a weapon within the box and that she would be harmed if she failed to follow his instructions. This subjective apprehension on the witness's part, combined with appellant's objective conduct, more than meets the *Fairchild, supra*, requirement and satisfies our standard of review.

Affirmed.

COOPER and GLAZE, JJ., agree.

Jerry W. MORGAN, et al. *v.* George MORGAN, et al.

CA 84-337 688 S.W.2d 953

Court of Appeals of Arkansas
Division II
Opinion delivered May 8, 1985

Bill W. Bristow, P.A., for appellant.

Ponder & Jarboe, for appellee.

DONALD L. CORBIN, Judge. Appellants appeal from a Partition Decree rendered by the Lawrence County Chancery Court on 104 acres of land. We reverse and remand.

In 1938, Joe Morgan died intestate as owner of 104 acres of land. He was survived by six children. There was a mortgage on the property which was satisfied by two of the sons in 1945. Two of Joe Morgan's sons then divided the property by a fence with one son, appellant Theodore Morgan, holding sixty acres, and the other son, appellant Fred Morgan, holding forty-four acres. Appellant Theodore Morgan, before his death, conveyed the sixty acres he was in possession of to his son, appellant Jerry Morgan, in 1978. Three of the other siblings, George Morgan, June Morgan Huskey, and Mae Morgan De Los Santos, appellees herein, filed suit in 1982 for partition of the property. Appellants, Jerry Morgan, special administrator of the estate of Theodore Morgan, deceased, Fred Morgan, Quinton Morgan, Jerry Morgan and his wife, Rita J. Morgan, alleged in their response that appellees' complaint for partition should be denied as they were not owners of any interest in the land and had no standing to sue. Appellants'

counterclaim alleged that they had acquired title to the property by adverse possession and that a decree should be entered confirming their title in the property. The trial court ordered the property sold and found that appellants had not acquired title by adverse possession.

On appeal, appellants argue that the trial court erred in failing to sustain their defense and counterclaim of adverse possession and laches. The general rule for establishing title by adverse possession is set forth in *Utley* v. *Ruff*, 255 Ark. 824, 502 S.W.2d 629 (1973), as follows:

> Title to land by adverse possession does not arise as a right to the one in possession; it arises as a result of statutory limitations on the rights of entry by the one out of possession. Possession alone does not ripen into ownership, but the possession must be adverse to the true owner or title holder before his title is in any way affected by the possession, and the word 'adverse' carries considerable weight . . . One of the cardinal principles of adverse possession in order that it may ripen into ownership is that the possession for seven years must have been actual, open, notorious, continuous, hostile and exclusive, and it must be accompanied with an intent to hold against the true owner.

The law is well settled that the possession of one tenant in common is presumed to be the possession of all and, further, stronger evidence of adverse possession is required of co-tenants related by family than one where no such relation exists. *McGuire* v. *Wallis*, 231 Ark. 506, 330 S.W.2d 714 (1960); *Phillips* v. *Carter*, 222 Ark. 724, 263 S.W.2d 80 (1953). We believe *Ueltzen* v. *Roe*, 242 Ark. 17, 411 S.W.2d 894 (1967), cited by appellants, provides a clear understanding of the purview of the law as it applies to the facts of the instant case. In *Ueltzen*, *supra*, the Arkansas Supreme Court stated:

> Our courts have ordinarily held that to constitute estoppel, adverse possession or laches with reference to a cotenant, that no one or two specific acts, and sometime even more, necessarily, of themselves amount to a disseisin, but the following each are items to be considered in determining whether the possession is adverse, or the individual is estopped or guilty of laches and they include

> such acts as (1) possession of the property; (2) payment of taxes; (3) enjoyment of rents and profits; (4) making of improvements (particularly of a substantial nature); (5) payments of insurance made payable to himself; (6) holding possession of lands for a long period of time, such as 30 years; (7) treating property as one's own; (8) selling timber; (9) executing leases; (10) assessment of property in one's own name; (11) selling crops; (12) the execution, delivery, and recording of a deed by one cotenant which purports to convey the entire property; and (13) generally treating property as his own.

Upon examination of the facts of the case at bar within the framework of the 13 criterion listed in *Ueltzen, supra*, it is evident that there was a mortgage on the acreage at the time of Joe Morgan's death in 1938. There is evidence that appellant Theodore Morgan, shortly after 1938, attempted to get help from his other siblings to pay on this mortgage. When he was not able to do so, he attempted to make the payments himself. Finally, appellant Theodore Morgan got $500 from his brother Fred in 1945 and they were able to pay the mortgage off. Evidence in the record indicates that if this had not been done, the mortgagor, Clay Sloan, had made arrangements to sell the land to someone else. There was testimony that the land was worth no more than the mortgage against it.

Appellants Theodore and Fred Morgan divided the property in 1945 with Theodore taking sixty acres and Fred taking forty-four acres. A fence was put between the property and has been there for many years. Appellant Fred Morgan lived in a house on the forty-four acres at all times and continues to live there. It is undisputed that he rebuilt the house on the property making substantial improvements. There was testimony of a neighbor, Syble Penn, concerning improvements made by appellant Fred Morgan on the house. Taxes were paid by Theodore and Fred Morgan since the 1940's, with no tax payments made whatsoever by appellees.

It is undisputed that the first action taken by appellees to in any way assert a claim to the property was in July of 1980. It is also undisputed that substantial improvements were made between 1978 and the summer of 1980 by Jerry Morgan on the property he purchased from appellant Theodore Morgan in 1978.

Appellees made no attempt to question the ownership of appellants Fred or Jerry Morgan, who were claiming under a deed from Theodore Morgan until July of 1980. At that time appellee George Morgan had a conversation with Fred about the ownership of the property. There was further delay by appellees until 1982 when this suit was filed.

Appellant Quinton Morgan, one of the six children of Joe Morgan, candidly testified that he never thought that he had any claim to the property. He further testified that he had never heard appellees say anything to indicate that they thought they had any claim to it. Quinton Morgan indicated that when the mortgage was in effect, the land was worth no more than the mortgage against it. He stated that Theodore had asked him to have the other siblings pay their part which would be some $200 each. He testified that he asked appellee George Morgan if he could pay his share on the mortgage and George said that he did not have the money. Quinton stated that he also talked with appellee June Morgan Huskey's husband about her contribution to the mortgage payoff. Quinton Morgan confirmed that appellant Fred Morgan had paid $500 to be used on the mortgage and that Fred and Theodore Morgan had divided the property with a fence and Fred had lived on his part all of his life. In summary, Quinton testified that none of the appellees ever said anything to indicate their ownership of the property.

Appellant Fred Morgan testified that appellee George Morgan had lived in the Lawrence County area all of his life and that George had never said anything to indicate any claim of ownership in the property until three or four years prior to trial. He also stated that his sisters had never claimed an ownership interest in the property.

Dale Morgan, a son of Theodore Morgan, testified to a conversation where appellee June Morgan Huskey asked Theodore about buying some of the land from him in late 1970's. He indicated that she said nothing to Theodore in this conversation to in any way claim that she owned an interest in the property.

Syble Penn, a neighbor, testified that she didn't have any opinion other than that Fred and Theodore owned the land. They had taken care of the land and farmed the land. Fred had always taken particular care of his house. It was the general understanding of the people in the area that Fred and Theodore owned the

property.

Bill Nunnally, another resident in the Lynn area, testified that he thought Theodore had owned one side and Fred had owned the other side. He testified as to receiving permission from Theodore to haul gravel off the property for seven or eight years in the 1950's. He also spoke of Fred improving his house.

Another neighbor, Patricia Sanders, said that she had lived within forty acres of the Morgan property for the last 29 years. She said that she understood that Theodore and Fred owned the property in dispute. She received permission from them to get gravel out of the creek that ran through the 104 acres. She remembered Fred working on his house. She referred to Theodore damming up the creek and dredging it for drainage purposes in the 1950's.

Garland Bristow testified that he had lived in a house on Theodore's property which he rented from Theodore. He could not pinpoint a specific date but indicated that he had lived in his present house for more than twenty-six years and that it had been several years prior to that when he had lived on Theodore's property. He indicated that he worked for Theodore for ten or more years and confirmed the building of the levee, the keeping up of fences, the cutting of sprouts, all as being acts of ownership which he had observed on the part of appellant Theodore Morgan.

The most convincing evidence in the record are the admissions of appellee June Morgan Huskey that she and appellees, George Morgan and Mae Morgan De Los Santos, had talked about the acts of ownership by appellants each time she returned to Arkansas. This occurred every six to eight years through the 1950's, 1960's and 1970's. This is a substantial period of time in which appellee Huskey admitted actual notice of the acts of ownership exercised by appellants.

The acts of appellants place them squarely within the thirteen criterion listed in *Ueltzen, supra*, and title to the lands in question is vested in appellants Fred Morgan and Jerry and Rita Morgan by virtue of adverse possession. The decision of the chancellor granting a partition is clearly erroneous, ARCP Rule 52(a), and is reversed. We remand to the trial court to enter an order consistent with this opinion.

Reversed and remanded.

COOPER and GLAZE, JJ., agree.

Bobby J. ALEXANDER *v.* LEE WAY MOTOR FREIGHT, et al.

CA 84-416 689 S.W.2d 3

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 1985

Hilburn, Calhoon, Forster, Harper & Pruniski, Ltd., by: *Nick Thompson*, for appellant.

Friday, Eldredge & Clark, by: *Elizabeth J. Robben*, for appellee.

MELVIN MAYFIELD, Judge. One issue in this case involves a decision of the Workers' Compensation Commission holding that Act 444 of 1983 was substantive and, therefore, not retroactive. The Act went into effect on July 4, 1983, and amended Ark. Stat. Ann. § 81-1311 (Supp. 1983) to allow an injured employee to have chiropractic care. This change provided by the Act is emphasized in the following quotation of a portion of section 81-1311:

> If the employer selects a physician, the claimant may petition the Commission one time only for a change of physician, and if the Commission approves the change, with or without a hearing, the Commission shall determine the second physician and shall not be bound by recommendations of claimant or respondent; *provided, however, that if the change desired by the claimant is to a chiropractic physician, the claimant may make the change by giving advance written notification to the employer or carrier.*

It was stipulated that the claimant sustained a compensable injury to his cervical spine on April 15, 1982, and that he was first treated by the company doctor who then referred him to Dr. Thomas Fletcher. Dr. Fletcher released him to return to work on July 20, 1982, but claimant continued to have problems and on July 12, 1983, pursuant to Act 444, he gave written notice to his employer that he intended to seek treatment from a chiropractor. He went to Dr. Gaylon Carter and upon respondent's refusal to pay for this treatment, a claim was filed and a hearing was held before an administrative law judge. The claimant contended that Act 444 entitled him to this treatment since it was in effect on the day he gave the written notice. The employer contended the Act was not retroactive, and the treatment was not for the injury

received but for discomfort associated with claimant's long-standing degenerative disc disease.

Claimant testified that after his release by Dr. Fletcher his problem reoccurred in about six months. He said he returned to Dr. Fletcher who prescribed medication for him but when it did not relieve his pain and his restricted movement, he decided to visit Dr. Carter. Claimant admitted that he had been treated by Dr. Fletcher in 1977 for degenerative disc disease.

Dr. Fletcher testified that claimant's injury should have healed in about six months and that any recurring pain was most likely due to the degenerative disc disease which claimant had in 1977 and which was temporarily aggravated by the injury. Dr. Carter, however, reported that the injury "would cause this to be symptom expressive" because of the underlying weakness.

The administrative law judge held that Dr. Carter's treatment was not reasonably necessary as a result of the injury sustained in April of 1982. However, she held that based on the case of *Popeye's Famous Fried Chicken* v. *Willis*, 7 Ark. App. 167, 646 S.W.2d 17 (1983), Act 444 was procedural rather than substantive, and since the notice was given after the Act became effective, the claimant was entitled to the change of physicians to Dr. Carter. The Commission reversed the law judge on both points holding that while claimant's treatment by a chiropractic physician was causally related to the compensable aggravation of claimant's degenerative cervical disc disease, Act 444 of 1983 created new rights and obligations of a substantive nature, and must be characterized as substantive law not entitled to be retroactively applied to injuries occurring prior to its effective date. Both parties appeal.

We affirm the decision of the Commission holding that the treatment was causally related to the claimant's compensable injury. On review the evidence and all inferences deducible therefrom must be viewed in the light most favorable to the findings of the Commission. *Roberts* v. *Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). It is the duty of the Commission to weigh medical evidence as it does any other evidence and, if that evidence conflicts, the resolution of the conflict is a question of fact for the Commission. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981); *Turner* v. *Lambert Construction Co.*, 258 Ark. 333, 524

S.W.2d 465 (1975). We will not reverse a decision of the Commission unless reasonable minds could not reach the same conclusion. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Although the evidence was directly contradictory, there was substantial evidence to support the Commission's decision on this point.

[redacted] However, on the second point, we hold that the Commission erred in ruling that Act 444 of 1983 should be characterized as substantive law and not entitled to retroactive application. Statutes are generally construed as having prospective application except when they are remedial acts or statutes which do not disturb vested rights or create new obligations. *Aluminum Company of America* v. *Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982). We think this case is controlled by the case of *Popeye's Famous Fried Chicken* v. *Willis, supra*, which held Ark. Stat. Ann. § 81-1311 to be procedural and stated:

> Section 81-1311 already contained a provision allowing the commission to authorize a claimant to change doctors and section 3 of the 1981 act did not disturb any vested right nor create any new obligation. It merely supplied "a new or more appropriate remedy to enforce an existing right or obligation". . . .

[redacted] Likewise, the amendment to section 81-1311 provided by Act 444 of 1983, does not disturb any vested rights or create any new obligations, it merely removes certain procedural barriers and allows an injured employee to seek additional medical treatment. The claimant's right to seek treatment from a chiropractor is not unconditional; he still must prove the treatment is reasonable and necessary and causally related to his compensable injury.

Therefore, we remand this case to the Commission for further action not inconsistent with this opinion.

Affirmed in part; reversed in part and remanded.

COOPER and CLONINGER, JJ., agree.

Ricky KENNEL *v.* STATE of Arkansas

CA CR 84-205 689 S.W.2d 5

Court of Appeals of Arkansas
Division II
Opinion delivered May 15, 1985

Herman H. Hawkins, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Jack Gillean*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was charged with theft of property. He was convicted by a jury and sentenced to seven years in the Arkansas Department of Correction. From that decision, comes this appeal. The appellant's sole point for reversal is that the State's case was based on the testimony of an accomplice and that the accomplice's testimony was insufficiently corroborated, mandating a dismissal. The appellant moved for a directed verdict at the end of the State's case and the trial court denied that motion. The appellant failed to renew his motion at the close of all the evidence.

The accomplice testified that the appellant broke into a building at a wood yard and stole two chain saws. The owner of the business testified that his business was broken into and two chain saws were taken. The appellant's brother testified that he visited the appellant in jail and that the appellant informed him that the police had charged him with the theft of two chain saws. The brother testified that, although the appellant denied stealing the saws, he acknowledged that he knew where the saws were located. The appellant's brother got the chain saws and delivered them to the police. The owner of the two saws testified that the two saws were stolen from him, and he testified as to their value.

After the trial court denied the appellant's motion for a directed verdict, the appellant took the stand in his defense and testified that he was on the victim's property the night of the burglary. He testified that he was there for the purpose of stealing an alternator from a vehicle and that he intended to use it on his car. The appellant also testified that, after being unsuccessful in finding a car with an alternator which would fit his vehicle, he found Burton, the accomplice, by a building. He testified that both he and Burton left without taking anything. Later, according to the appellant, while he was in a crap game, Burton borrowed his vehicle. When Burton returned, according to the appellant, he had the two chain saws. Burton allegedly assured him that the saws were not stolen and that he had obtained them

in exchange for an ounce of marijuana. The appellant stated that he then took the saws and sold them for Burton.

For reversal, the appellant argues that the evidence adduced at trial which tended to corroborate Burton's testimony was insufficient under Ark. Stat. Ann., Section 43-2116 (Repl. 1977). We disagree.

The testimony of an accomplice must be corroborated by other evidence which tends to connect the defendant with the commission of the offense. Ark. Stat. Ann., Section 43-2116 (Repl. 1977). The test for determining the sufficiency of corroborating evidence is if, taken independently of the accomplice's testimony, the evidence establishes the crime and tends to connect the accused with its commission. *Linell* v. *State*, 283 Ark. 162, 167-8, 671 S.W.2d 741, 744 (1984); *Walker* v. *State*, 13 Ark. App. 124, 129, 680 S.W.2d 915, 918 (1984). While the evidence need not be sufficient to convict, it must to a substantial degree connect the defendant with the commission of the crime. *Rhodes* v. *State*, 276 Ark. 203, 210-11, 634 S.W.2d 107, 111 (1982); *Coston* v. *State*, 10 Ark. App. 242, 243-4, 663 S.W.2d 187, 188 (1984). Even though a single circumstance may not be sufficient, all of the circumstances in evidence may constitute a chain sufficient to corroborate the accomplice's testimony. *King* v. *State*, 254 Ark. 509, 511, 494 S.W.2d 476, 478 (1973); *Coston, supra.*

Because the appellant failed to renew his motion for a directed verdict at the close of all the evidence, the sufficiency of the evidence is to be determined on the entire record. *Drew* v. *State*, 8 Ark. App. 120, 123, 648 S.W.2d 836, 837 (1983); *Christian* v. *State*, 6 Ark. App. 138, 143, 639 S.W.2d 78, 81 (1982); *See Chandler* v. *State*, 264 Ark. 175, 177, 569 S.W.2d 660, 661 (1978).

In reviewing the evidence, we look at it in the light most favorable to the State. *Rhodes, supra*, 276 Ark. at 211; *Coston, supra*, 10 Ark. App. at 245; *Drew, supra*, 8 Ark. App. at 123. We will not overturn the jury's verdict if it is supported by substantial evidence. *Tackett* v. *State*, 12 Ark. App. 57, 60, 670 S.W.2d 824, 826 (1984). In looking at the corroborating evidence as a whole, including the testimony of the appellant, we find it sufficient.

While the mere possession of recently stolen property is insufficient evidence to corroborate the accomplice's testimony, it is a circumstance to be considered in determining whether there is a chain of circumstances which renders the corroborating evidence sufficient. *Olles* v. *State*, 260 Ark. 571, 575, 542 S.W.2d 755, 758-9 (1976). In the case at bar the appellant had possession of the stolen saws, and he testified that he was at the scene of the crime. There is no question that the theft did occur, and the possession of the objects of the theft, coupled with the appellant's admission that he was present at the scene of the theft, provides sufficient corroboration for the accomplice's testimony. The jury was not bound to believe the appellant's explanation of his possession of the saws, nor, for that matter, the accomplice's testimony, but the weight to be given the evidence and the credibility of the witnesses are matters for the jury. *King, supra; Tackett, supra*, 12 Ark. App. at 59. Based on the whole record, we affirm, though we do not mean to imply that we would reach the same result if we were only considering the evidence adduced during the State's case in chief.

Affirmed.

CORBIN and GLAZE, JJ., agree.

James L. JOHNSON *v.* RESEARCH-COTTRELL, et al.

CA 84-381 689 S.W.2d 8

Court of Appeals of Arkansas
En Banc
Opinion delivered May 15, 1985

Guy Jones, Jr., P.A., for appellant.

Wright, Lindsey & Jennings, for appellee.

LAWSON CLONINGER, Judge. This is an appeal from the Workers' Compensation Commission. Appellant, James L. Johnson, suffered a compensable injury to his back in October of 1980 while working for appellee, Research-Cottrell. One physician assessed his permanent partial disability at five percent (5%) to the body as a whole and another assessed it at ten percent (10%) to the body as a whole.

After a hearing, the Administrative Law Judge found that appellant sustained permanent partial disability in the amount of thirty percent (30%) to the body as a whole. Both sides appealed to the Commission, appellant asking that he be declared permanently and totally disabled, and appellee asking that the rating be reduced to twenty percent (20%) disability. The Commission affirmed the decision of the ALJ and appellant then brought this appeal arguing that the Commission erred in not finding him to be totally disabled. We think the Commission's decision is supported by substantial evidence and we affirm.

At the hearing, the evidence established that appellant is a forty (40) year old man with a high school education whose work experience has been mainly in the construction business. He has not worked since the 1980 injury to his back and he continues to experience a considerable amount of pain when standing, bending and sitting. There was also evidence that appellant was not ready for vocational rehabilitation at the time of the hearing.

Appellant contends that based on this evidence, the Commission should have applied the "odd-lot doctrine" to his case and found that he was totally disabled. The odd-lot doctrine was described by Professor Larson in his treatise *Workmen's Compensation Law* at § 57.51 (1983) as follows:

> 'Total disability' in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial. The task is to phrase a rule delimiting the amount and character of work a man can be able to do without forfeiting his totally disabled status. The rule followed by most modern courts has been well summarized by Justice Matson of the Minnesota Supreme Court in the following language:
>
>> 'An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled.' [*Lee* v. *Minneapolis St. Ry.*, 230 Minn. 315, 41 N.W.2d 433, 436 (1950).]

Later, in § 57.61, Professor Larson states:

> If the evidence of degree of obvious physical impairment, coupled with other facts such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant.

Arkansas courts have accepted and applied the odd-lot doctrine. *See, e.g., Arkansas Best Freight System, Inc.* v. *Brooks*, 244 Ark. 191, 424 S.W.2d 377 (1968); *M.M. Cohn Co.* v. *Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979); *Sunbeam Corporation* v. *Bates*, 271 Ark. 385, 609 S.W.2d 102 (Ark. App. 1980).

The appellant argues that he made out a *prima facie* case for his being totally disabled considering the evidence of his impairment coupled with his age, education and training. Therefore, he contends that the burden of proof was on the appellee to show that some kind of suitable work was available to him and that they did not meet that burden of proof because they presented no evidence at all.

We disagree. In reviewing the evidence on appeal, we must make all reasonable inferences in favor of the Commission's finding and we must affirm if there is any substantial evidence upon which the Commission made its finding. *Smelser* v. *S.H. & J. Drilling Corp.*, 267 Ark. 996, 593 S.W.2d 61 (Ark. App. 1980).

Appellant cites several cases in support of his argument that the Commission should have found him totally disabled. *See, M.M. Cohn, supra*, and *Sunbeam Corp., supra*. In each of these cases, the Court of Appeals affirmed the Commission's award of total disability benefits to the claimants because there was substantial evidence to support the awards. However, none of these cases *require* the Commission to apply the odd-lot doctrine to a certain class of claimants. Instead, they require the Commission merely to *consider* factors other than mere physical disability in making an award of permanent disability. *See also Rapley* v. *Lindsey Const. Co.*, 5 Ark. App. 31, 631 S.W.2d 844 (1982).

In the instant case, we think the Commission must have considered the appellant's age, education, and training in making its award because it found 30% disability when his physicians assessed his physical impairment at only 5-10% disability. It was within the Commission's discretion to weigh the medical testimony and the testimony of the claimant. Here, based on that testimony, the Commission made its determination that appellant did not lose his entire capacity to earn wages as a result of his injury. Therefore, the Commission did not find appellant totally "disabled" as that term is defined in the Workers'

Compensation Act, Ark. Stat. Ann. § 81-1302(e) (1976). We find substantial evidence to support the findings of the Commission.

Affirmed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent. The majority opinion correctly states that the appellant is a forty year old man with a high school education whose work experience has been primarily in the construction industry. The majority concedes that the appellant has considerable pain when "standing, bending and sitting", and recognizes that the appellant is not ready for any type vocational training. Further, the record shows that there are no jobs at the appellee's plant which are available for an individual with the appellant's limitations.

The full Commission adopted the administrative law judge's decision, without making its own findings of fact and law. The administrative law judge found that the appellant was *not* a candidate for vocational rehabilitation, and the Commission affirmed that finding. Thus, the appellant is, according to the evidence, not a candidate for vocational rehabilitation; he is unable to work, and is unable to perform any function, including sitting, bending, or standing, for more than twenty minutes at a time. Obviously the Commission has the responsibility to weigh the evidence, both lay and medical, and to make a determination of the degree of the appellant's disability, but the Commission cannot meet that responsibility by the mere recitation of the appellant's age and educational background. The hard evidence in this record shows that the appellant is permanently and totally disabled. That may not be true, but there is virtually no evidence in this record to contradict such a finding.

I do not agree that there is substantial evidence to support the Commission's decision, and the majority opinion does not mention any such evidence. The majority opinion states that "the Commission must have considered the appellant's age, education, and training in making its award" and seeks to support that statement by the fact that the Commission found the appellant to have permanent disability in excess of his anatomical rating. Surely it is obvious that any claimant who is totally and permanently disabled is also 30% disabled, and, equally obvi-

ously, there would exist abundant evidence to support a finding of 30% disability. This Court does not perform its function of appellate review by merely stating that the Commission must have done its job because it found the appellant to have more disability than reflected in an anatomical rating. This record does not support the Commission's finding of 30% disability, and I dissent because I do not believe that the Commission addressed the appellant's argument that he fit within the "odd-lot" doctrine, for, if it had, a finding of permanent and total disability would have been required, at least on this record.

Earnest L. BRAGG *v.* EVANS-ST. CLAIR, INC.

CA 84-399 688 S.W.2d 956

Court of Appeals of Arkansas
Division I
Opinion delivered May 15, 1985

Gary Eubanks & Associates, by: *James Gerard Schulze*, for appellant.

Shackleford, Shackleford & Phillips, P.A., for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the Workers' Compensation Commission. On January 28, 1983, the appellant, Earnest L. Bragg, suffered a compensable injury to his neck. At that time he was employed by the appellee, Evans-St. Clair, Incorporated, and was earning $5.65 per hour. Following surgery, appellant returned to work for appellee and was subsequently given the job of assistant supervisor. At a hearing before an administrative law judge, the appellant testified that he was currently earning $6.03 per hour, having received an across-the-board wage increase and an increase based on merit. Appellant

also testified that he was performing essentially the same duties as before his injury, and that the only duty which he could not now perform was sliding a 600-pound object. However, he stated that he had the authority to delegate that duty to other employees.

Appellant's treating physician expressed the opinion that appellant had a permanent, partial physical impairment of 5% to the body as a whole, and another physician fixed the impairment at 15%. The law judge held that appellant failed to prove by a preponderance of the evidence that he sustained a loss of wage-earning capacity as a result of his injury and assessed his permanent partial disability at 10% to the body as a whole. The Commission affirmed and adopted the opinion of the administrative law judge.

On appeal, appellant argues that the Commission erred in finding that he suffered no wage-loss disability. The administrative law judge stated in his opinion:

> Arkansas has also recognized the doctrine that there is a rebuttable presumption that the wages actually received by an injured employee are equal to his wage-earning capacity. Because of the claimant's own testimony that he is able to perform the duties of his employment, I am of the opinion that the presumption just referred to has not been rebutted.

Appellant disagrees with the law judge and contends that the presumption referred to is *not* recognized in Arkansas law. He argues that by adopting that opinion the Commission erred "in adding the burden of overcoming this presumption to [his] burden of proof by the preponderance of the evidence." Appellant also contends that he suffered a loss of capacity to earn and points to evidence that he no longer can move a 600-pound object, that other employees now do his heavy work, and that he no longer fishes, hunts, or gardens because he has to save his strength so he can work.

It is settled law that the burden rests on the claimant to establish his claim for compensation. *Voss* v. *Ward's Pulpwood Yard*, 248 Ark. 465, 469, 452 S.W.2d 629 (1970). The standard of proof before the Commission is the preponderance of the evidence. *Potlatch Forests, Inc.* v. *Smith*, 237 Ark. 468, 475, 374 S.W.2d 166 (1964). We have recognized that there is a rule of

liberal construction which requires the Commission to draw all reasonable inferences favorably to the claimant, *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984), but that case also holds that this rule is not a substitute for the claimant's burden of establishing his claim by a preponderance of the evidence. 10 Ark. App. at 260-61.

Ark. Stat. Ann. § 81-1302(e) (Repl. 1976) defines "disability" as "*incapacity* because of injury *to earn*, in the same or any other employment, *the wages which the employee was receiving at the time of the injury*." (Emphasis added.) In awarding disability benefits for an injury to the body as a whole, it is the Commission's duty to determine from the evidence, if the claimant's injury has impaired his *capacity* to earn the wages he earned prior to the injury. When the claimant returns to work and earns as much as or more than he did prior to his injury, then the necessary and logical inference, absent any contrary evidence, is that the claimant has not suffered a loss of earning capacity.

This principle is discussed by Professor Larson in connection with two presumptions which are generally mentioned in determining wage-loss disability. One is: "If the employee, as often happens, returns to his former work for the same employer after his injury, or is offered it, at a wage at least as high as before, there is a presumption against loss of earning capacity." 2 Larson, *Workmen's Compensation Law* § 57.22 (Rel. Nov. 1980). Larson states that this presumption may be overcome by other evidence showing that the actual earnings do not fairly reflect the claimant's capacity. *Id.* at § 57.31.

The second presumption is that "actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity." *Id.* at § 57.21.

Although the first presumption is quoted in the concurring opinion of *Abbott* v. *Leavell & Company*, 244 Ark. 544, 426 S.W.2d 166 (1968), the appellant is correct in his assertion that Arkansas courts have not *expressly* recognized the existence of the presumptions as Larson has stated them. But, we think the presumptions referred to by Larson are simply used to mean "burden of proof" in the sense of placing both the burden of

introducing evidence and the burden of persuasion on the claimant. In that sense the appellate courts of Arkansas have recognized the presumptions referred to by Larson.

Thus, in *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984), this court stated:

> It is well settled that a worker who sustains an injury to the body as a whole may be entitled to wage loss disability in addition to his anatomical loss. *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). In determining the additional wage loss disability the Commission may take into consideration the worker's age, education, work experience, medical evidence and other matters reasonably expected to affect the worker's future earning power. A worker may be entitled to additional wage loss disability even though his wages remain the same or increase after the injury. *Lion Oil Company* v. *Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952).

And in *Terrell* v. *Austin Bridge Co.*, 10 Ark. App. 1, 660 S.W.2d 941 (1983), we quoted from *Abbott* v. *Leavell & Company, supra*, where the majority opinion said "because appellant is making as much money now as he did before does not necessarily mean he has the 'capacity' to earn that much." We also quoted from the concurring opinion's quotation from Larson. We concluded in *Terrell* as follows:

> From the above, we think it clear that a person injured on the job may suffer disability because of a physical loss or because of an inability to earn as much as he was earning when he was hurt and that a person can be disabled who has lost either or both. . . . In the instant case, appellant was earning higher wages at the time of the hearing than he was at the time of the accident. Whether he had a compensable disability, however, was a question for the Commission to determine under the law we have discussed. We must affirm that decision unless we are convinced that fair-minded men could not have reached the same conclusion.

In the instant case the administrative law judge made

this finding: "The claimant has failed to prove by the preponderance of the evidence that he has sustained a loss of earning capacity over and above the impairment rating." We think the law judge used the proper standard of proof and did not simply apply a presumption to find that appellant had no wage-loss disability merely because he was earning more money after his injury. However, we review the Commission's decision, not the decision of the law judge, and we affirm the Commission if its decision is supported by substantial evidence. *Potlatch Forests, Inc.* v. *Smith, supra.* There is evidence that appellant is an excellent worker. There is no evidence that he is not doing his job well, that his wage increases were the result of sympathy, or that his earnings are not commensurate with his earning capacity.

We find that the Commission's decision is supported by substantial evidence and it is affirmed.

COOPER and CLONINGER, JJ., agree.

Clarence HARRIS *v.* STATE of Arkansas

CA CR 84-138 689 S.W.2d 353

Court of Appeals of Arkansas
En Banc
Opinion delivered May 15, 1985

Gannaway, Darrow & O'Bryan, by: *Joe O'Bryan*, for appellant.

Steve Clark, Att'y Gen., by: *Joyce Rayburn Greene*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. The appellant was convicted in a non-jury trial of the crime of rape. He was charged under Ark. Stat. Ann. § 41-1803(1)(c) (Repl. 1977) which provides that engaging in deviate sexual activity with a person less than eleven years old constitutes rape. At the time of trial on January 30, 1984, the appellant was 76 years old. He was sentenced to ten years in the Arkansas Department of Correction.

Appellant's first argument is that the evidence is not sufficient to support his conviction. One definition of deviate sexual activity is "any act of sexual gratification involving the penetration, however slight, of the anus or mouth of one person by the penis of another person." Ark. Stat. Ann. § 41-1801(1)(a) (Repl. 1977). There is evidence in this case that on the day the offense occurred, the appellant was at a house across the street from where a little boy and his sister and mother lived. The boy, who lacked a month being ten years old, had known the appellant for some time and had gone places with him on previous occasions. On the day involved, the boy asked appellant if he could go home with him. The appellant told the boy he would have

to get permission. The boy's mother was working, but he got permission from his 16-year-old sister to go home with appellant.

The boy testified that he fixed and ate some breakfast after they got to appellant's house, and the appellant then led him into a bedroom where appellant took the boy's shirt off and pulled his pants down. The boy also testified that appellant put his mouth on the boy's penis and then had the boy do the same to him. At this time the boy's sister and a lady friend of hers knocked on appellant's door. They testified that when the boy and appellant came to the door, the boy's shirt, shoes, and socks were off and he was wearing only his trousers. It was also their testimony that the appellant's pants were unzipped and his belt unbuckled. After some words with the appellant, the sister and her friend took the boy home.

Basically, appellant contends that the evidence is not sufficient to permit a finding that there was penetration as required by the statute. He admits that there was evidence of sexual contact, but not penetration. However, when asked if the appellant placed his mouth *over* the boy's penis, the boy said, "Yes, sir." In *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982), the court said evidence that the accused put the child's penis in the accused's mouth was sufficient to show the commission of rape by deviate sexual activity. On appeal in criminal cases, we view the evidence in the light most favorable to the appellee, *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980) and, whether tried by judge or jury, we will affirm if there is substantial evidence to support the finding of the trier of fact, *Holloway* v. *State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Surridge* v. *State*, 279 Ark. 183, 650 S.W.2d 561 (1983). We think there was substantial evidence to support the court's finding in the present case.

Appellant's second point is that the trial judge erred in holding that the appellant was not eligible for probation. Although both defense counsel and the prosecutor indicated their agreement that some form of probation would be proper, the judge sentenced appellant to ten years and said, under the acts of the Arkansas Legislature, he had no power to suspend the sentence or grant probation.

We think the court was correct. Ark. Stat. Ann. § 41-1803(2) (Supp. 1983) provides that rape is a class Y felony. Section 41-803(1) (Supp. 1983) states that sentencing must be in accordance with that article and subsection (3) requires that a defendant convicted of a class Y felony be sentenced "to a term of imprisonment in accordance with Chapter 9." That chapter contains sections 41-901 through 41-904, and section 41-901(1)(a) (Supp. 1983) provides that the sentence for a class Y felony shall be not less than ten years imprisonment nor more than 40 years or life.

The appellant argues that Ark. Stat. Ann. § 41-1201 (Repl. 1977) allows a suspended sentence or probation unless the defendant is convicted of capital murder, murder in the first or second degree, *first degree rape*, kidnapping or aggravated robbery. Appellant further contends that because of the adoption of the Arkansas Criminal Code the old crime of first degree rape, as provided by Act 362 of 1967, *see* Ark. Stat. Ann. § 41-3401 (Supp. 1967), was not in effect at the time of the occurrence of the offense for which he was convicted. Thus, appellant argues, he was not convicted of first degree rape and under Ark. Stat. Ann. § 41-1201, *supra*, he could be granted a suspended sentence or probation.

This argument overlooks Ark. Stat. Ann. § 41-803(3), *supra*, which provides that a defendant convicted of a class Y felony *must* be sentenced to imprisonment under Chapter 9. Therefore, he *cannot* be given a suspended sentence or probation under section 41-1201 which is a part of Chapter 12, and the trial court was correct in stating that he had no power to grant appellant a suspended sentence or probation.

Affirmed.

COOPER and GLAZE, JJ., concur.

TOM GLAZE, Judge, concurring. Appellant argues for the first time on appeal that the trial court should have considered alternative sentencing under § 41-1201 (Repl. 1977), even though "first degree" rape which is mentioned in § 41-1201 is an offense precluded from such sentencing considerations. He reasons that "first degree" rape is different from the crime of rape with which he was charged and convicted under Ark. Stat. Ann. § 41-1803 (Supp. 1983). By way of explanation, first-degree rape

was previously defined under Ark. Stat. Ann. § 41-3401 (Supp. 1973), which limited the offense to be by a male against a female. The new § 41-1803, as amended, omitted the words "first-degree," and broadened the definition of rape to eliminate the gender-based element to cover other deviate sexual acts which were previously classified as sodomy. *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982). The General Assembly, however, never amended § 41-1201, the alternative sentencing statute, to delete the words "first degree" in front of the word "rape." Thus, appellant argues the offense with which he was convicted—rape, not first-degree rape—is not excepted under § 41-1201, and as a consequence, the trial court could have given appellant a probated sentence or suspended imposition of his sentence. In other words, appellant urges on appeal that the trial court was not mandated to give him the minimum ten-year sentence required for first degree rape under Ark. Stat. Ann. § 41-901(1)(a).

The State argues that although § 41-1201 was never amended to correlate with the new rape law, § 41-1803, the General Assembly's *intent* in passing § 41-1803 was to make sure that offenders convicted of those serious crimes served their sentences. The State's argument is consistent with Ark. Stat. Ann. § 41-803(5) (Supp. 1983) which reflects that the court may suspend imposition of sentence or place the defendant on probation pursuant to §§ 41-1201 *et seq.* when the defendant is guilty of an offense *other than* capital murder, treason, *a Class Y felony* or murder in the second degree. Rape, under the new § 41-1803 is a Class Y felony.

To reach and decide the merits of the issue argued by the appellant and the State, this Court must interpret statutes §§ 41-803, -1201 and -1803. This statutory interpretation is necessary not only because § 41-1803 was amended in 1981 as reflected hereinabove, but also because § 41-803 was amended in 1981. To decide this case as it does, the majority court—although it fails to say so—has ruled § 41-803, as amended, modified or amended § 41-1201 by implication. While I might agree with such rationale, that is an issue which exclusively is within the Supreme Court's jurisdiction under Rule 29. Because this case clearly is one of first impression and involves statutory interpretation to decide it on its merits, I suggested unsuccessfully this case be certified to the Supreme Court. Aside from the jurisdiction question, it is doubtful in my mind, at least, exactly what precedential value the

majority decision has. I would say none.

In conclusion, I have little doubt that the statutory interpretation issue decided by the court did not have to be reached. Therefore, I would affirm this decision on a basis clearly within our power, *i.e.*, the theory now urged by the appellant on appeal is different from that presented below. As we have said so often, an appellant may not change the grounds for his objection on appeal, and if an objection is made on one ground at trial, all other grounds are waived on appeal. *Wilson* v. *State*, 9 Ark. App. 213, 657 S.W.2d 558 (1983). Appellant's argument concerning alternative sentencing under § 41-1201 was never presented below and we should affirm the cause for that reason.

JAMES R. COOPER, Judge, concurring. I disagree with Judge Glaze that the matter of alternative sentencing is being raised for the first time on appeal.

After the judge found the appellant guilty, he inquired as to whether either side had anything additional to present. The appellant's attorney advised the court that the appellant was now away from children, that the appellant's health was bad, and that the appellant was not opposed to counseling. Counsel observed that, in light of the appellant's age (he was 76) any incarceration would be ill-advised. Counsel then stated that "I would ask the Court to consider his age and what he has tried to do so that this likelihood would not or could not re-occur." The prosecutor then noted that the family of the victim did not wish to see the appellant spend the rest of his life in jail, but that they did want his activities to be supervised, that he seek counseling, and stay away from small children. The judge then noted that the court had no power to suspend the sentence because of the actions of the legislature.

Although the appellant's attorney did not use the magic words, "suspend imposition of sentence" or "suspended sentence", it is obvious to me that both attorneys and the trial judge knew that what was being discussed was some form of alternative sentencing, with conditions which would include supervision and counseling.

I think the issue of alternative sentencing was properly raised before the trial court, is properly before us, and involves the application, rather than interpretation, of the relevant statutory

provisions, although I concede that the concepts of "application" versus "interpretation" is elusive.

Ron EASLEY *v.* SKY, INC.

CA 84-354 689 S.W.2d 356

Court of Appeals of Arkansas
Division II
Opinion delivered May 15, 1985

Pryor, Robinson & Barry, for appellant.

Ronald W. Metcalf, P.A., for appellee.

TOM GLAZE, Judge. This is an appeal by Ron Easley from the decision of the Chancery Court of Sebastian County, Fort Smith District. On October 14, 1982, Sky, Inc., (hereinafter Sky) entered into an agreement whereby it purchased the Ozark Truck Plaza, an ongoing business, from Easley and his partner Brouwer. Paragraph 8 of the agreement set forth the following anticompetition clause:

> Sellers, for and in consideration hereinabove mentioned, each agree that for a period of five (5) years from the date hereof, none of them, either directly or indirectly, or as a proprietor, partner or stockholder of any firm, business or corporation, will, without the prior written approval of the Board of Directors of Buyer, own, operate, invest, or be interested in a truck stop, mini-truck stop, service station or any other business by whatever name it is called or known, wherein over seventy (70%) of the annual gross revenue of such business is from the sale of gasoline, diesel fuel and other petroleum products. This provision of this

> Agreement shall apply to a geographic radius one hundred (100) miles from the City of Alma, Arkansas, except U.S. Highway 71 south of the corporate limits of the City of Fort Smith, Arkansas.

On December 21, 1983, Easley began operating the Short Stop Mini-Mart, a convenience store where gasoline and diesel fuel were sold. The store is located on south 71, one mile inside the city limits of Fort Smith.

Sky sought a permanent injunction against Easley for violating paragraph 8 of the agreement of October 14, 1982. Easley denied violating paragraph 8 and counterclaimed that paragraph 8 was unreasonably broad in its provisions regarding duration, territorial extent, and the nature and scope of its restraint and was unnecessary for Sky's protection. The chancellor held the anticompetition clause valid and reasonable in all respects. He found that the agreement was necessary and validly protected the interest of Sky and granted a permanent injunction restraining Easley from future violations of the agreement. We believe the law and the evidence support the chancellor's decision.

The law pertaining to restrictive sale covenants is well settled. Contracts in partial restraint of trade, ancillary to a sale or a business transaction, are valid to the extent reasonably necessary for the purchaser's protection. *Wren* v. *Pearah*, 220 Ark. 888, 891-2, 249 S.W.2d 985, 987 (1952); *accord*, *Madison Bank & Trust* v. *First National Bank of Huntsville*, 276 Ark. 405, 408, 635 S.W.2d 268, 270 (1982). In order to determine what constitutes a reasonable restraint of trade, each contract must be judged according to the circumstances and facts in that case. *Robbins* v. *Plant*, 174 Ark. 639, 643, 297 S.W. 1027, 1029 (1927); *accord, Stubblefield* v. *Siloam Springs Newspapers, Inc.*, 590 F. Supp. 1032, 1035 (W.D. Ark. 1984). A restraint of trade agreement which is ancillary to the transfer of a business is more likely to be upheld than is one ancillary to an employment contract. *Madison Bank & Trust, supra*, 276 Ark. at 409. The party challenging the validity of the restraint has the burden to show its unreasonableness. *Id.* The trial court will not be reversed unless its findings are clearly erroneous. *Id.* If the restraint lasts longer than is necessary to protect the promisee's interest, covers a geographic area larger than is necessary to protect those interests, or prohibits the promisor from engaging in activities

which are unnecessary to protect the promisee, it is unreasonable. *See Stubblefield, supra*, 590 F. Supp. at 1035; 6A A. Corbin, *Corbin on Contracts*, § 1387 (1951); Restatement (Second) of Contracts, § 188 comment d (1981).

In this appeal Easley challenges (1) the duration of the restriction against competition, (2) the scope of the activities prohibited by it and (3) the geographic radius described in the restriction. We consider each of these contentions in order.

First, Easley contends the duration of the restrictive covenant is unreasonably long. The case law tends to be against his contention. The overwhelming majority of other jurisdictions which have dealt with the use of an anticompetition clause in the sale of a service station have upheld durations of five years or more. Annot., 45 A.L.R.2d 77, 168 (1956). Arkansas law is in accord. For example, our Supreme Court in *Hultsman* v. *Carroll*, 177 Ark. 432, 6 S.W.2d 551 (1928), held a restriction, preventing the seller of a gasoline station from selling gasoline on a specific lot, reasonable, even though it was for the lifetime of the seller. The most recent Arkansas case dealing with the effect of a restrictive covenant ancillary to the sale of a business held that a duration of ten years was reasonable. *Madison Bank & Trust, supra*. In sum, we conclude that as a matter of law there is nothing inherently unreasonable with a duration restriction lasting five years. We also find the facts in the instant case justify a five-year period. Sky purchased the Ozark Truck Plaza business for the sum of $1,125,000.00, but, in addition, it expended approximately $400,000.00 in repairs and improvements to the existing facility. Max Young, a co-owner of Sky, testified that the five-year restriction contained in the parties' agreement would allow Sky to amortize a large part of its initial debt and recapture a substantial part of its investment. Without the five-year period, Young asserted, Easley would have an unfair competitive advantage. The chancellor obviously agreed with Young's assessment, and in our *de novo* review of the record, we are unable to say the chancellor was clearly wrong.

Next, Easley argues the parties' covenant not to compete is oppressively broad because it not only prohibits Easley from owning a convenience store engaging in the retail sale of gasoline for automobiles, it also precludes him from becoming a wholesale distributor for, or employee of, an oil company. Easley

also points out that Sky co-owner, Gene Kuykendall, is a shareholder in the K & K Oil Company, Inc., (a wholesale petroleum distributor) and that that company directly benefits from the unreasonable restriction of activities imposed upon Easley by the anticompetition clause in question. As we have indicated earlier, the scope of the activities prohibited cannot cover more activities than is necessary to protect the interest of the purchaser. *See Little Rock Towel & Linen Supply Co.* v. *Independent Linen Services Co. of Arkansas*, 237 Ark. 877, 377 S.W.2d 34 (1964). Here, however, we believe the record clearly reflects that prohibiting Easley from the wholesale distribution of petroleum was necessary to protect Sky's interest in Ozark Truck Plaza. Gary Brouwer, Easley's former partner, stated that when he worked for a wholesale distributor, he would solicit business from various truck lines. Brouwer further testified that, as a wholesale distributor, he believed that by using his contacts with other truck stops he could affect the operation of Ozark Truck Plaza, and he conceded that Easley could do likewise. Accordingly, we are compelled to hold the restriction concerning Easley's activities is substantiated by the evidence and is valid.

Easley's final contention is that the geographic scope of the restrictive covenant, a 100-mile radius, was unnecessarily large. The general rule is that territory included in the covenant, in order to be reasonable, must be necessary for the protection of the promisee's interest. *Madison Bank & Trust, supra*, 276 Ark. at 411. While Arkansas has not expressly authorized a 100-mile radius as a reasonable restraint, the majority of other states have, if the business sold extends throughout that territory. Annot., 46 A.L.R.2d 119, 373 (1956). Young's, Kuykendall's, and Brouwer's testimony all indicated that trucks refuel every 100 to 200 miles and that it was on this basis the 100-mile radius was chosen. Brouwer further testified that it was a rule of thumb for distributors, when setting up truck-stop franchises, to space them about 150 miles apart so that the trucks could refuel at the same type of station. Easley testified that, prior to the sale of Ozark Truck Plaza, sales to truckers made up over 90% of the business at Ozark Truck Plaza. This evidence shows that the area included in the restriction was necessary for Sky's protection. Therefore, the chancellor's determination that the geographic scope of paragraph 8 is reasonable is not clearly erroneous.

Because the evidence supports the chancellor's findings that

the scope, geographic extent, and duration provisions of paragraph 8 were reasonable and valid, we affirm the decision of the chancellor.

Affirmed.

COOPER and CORBIN, JJ., agree.

Elmer A. VOGEL *v.* SIMMONS FIRST NATIONAL BANK OF PINE BLUFF

CA 84-344 689 S.W.2d 576

Court of Appeals of Arkansas
Division I
Opinion delivered May 22, 1985

Jones & Petty, for appellant.

Ramsey, Cox, Lile, Bridgeforth, Gilbert, Harrelson & Starling, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Elmer Vogel appeals from a $212,272 judgment entered against him as guarantor of a line of credit extended to River Valley Enterprises, Inc. by Simmons First National Bank of Pine Bluff. A recitation of the factual background is necessary to bring the narrow issues presented by this appeal into focus.

In 1981 the appellant and Troy McNeill organized a

corporation to be known as River Valley Enterprises, Inc. for the purpose of selling irrigation equipment. The appellant invested $20,000 in the business and loaned McNeill a similar amount for his investment. The appellant served as president, his wife as vice-president, McNeill as secretary and Bonita K. Agress as office manager. McNeill and Agress were the active officers even though the appellant owned a majority of the stock. Appellant and McNeill arranged with Simmons First National Bank to extend to $200,000 line of credit to the corporation on execution by the appellant and McNeill of a personal guaranty agreement in which they guaranteed payment of "any and all indebtedness contracted by borrower (River Valley Enterprises, Inc.) with Simmons First National Bank limited only to the total outstanding indebtedness, exclusive of interest and cost, of $200,000." On that same day they delivered to Simmons First National Bank a copy of a corporate resolution authorizing McNeill and Agress to negotiate and procure loans to the corporation from Simmons up to $200,000 and to secure the loans by pledge, assignment or lien on personal property of the corporation.

On a number of occasions between May 1981 and March 1982 McNeill or Agress would execute notes in favor of Simmons First National Bank and would assign equipment sale contracts as collateral. On each occasion the notes were paid as agreed. Under its agreement with Simmons First National Bank, River Valley collected on the notes assigned to the bank and paid their collections to the bank. On March 22, 1982 Agress executed a note for $190,000 to Simmons First National Bank and secured it by assignment of two sales contracts for irrigation systems sold to Thomas R. Stricklin in Mississippi totaling $260,000, as well as all accounts receivable and inventory of River Valley. Agress did not inform Simmons that Stricklin had already paid $139,000 on these contracts.

Simmons had no knowledge of the situation until the note secured by the Stricklin contract was in default in July 1982. At that time Simmons Bank notified Stricklin to pay the balance of his contract directly to the bank. Then the bank learned that additional payments had been made to River Valley and that the balance due on the notes in the amount of $39,000 had been paid directly to another creditor of River Valley on Agress's authorization.

Since River Valley's business venture was not successful McNeill and Vogel decided to end the business. When Simmons Bank called on them for additional collateral McNeill executed a third mortgage on his home as additional security for the indebtedness. McNeill's home was sold in foreclosure to the second mortgagee for an amount insufficient to pay Simmons Bank's third mortgage and the sale was confirmed by the chancery court. Simmons Bank then brought this action on the Stricklin note against River Valley and against Vogel and McNeill on their guaranty agreement. McNeill filed a general denial. Vogel filed an answer denying allegations of the complaint and additionally asserting he should not be held personally liable on the guaranty agreement because Simmons Bank has released the collateral without his consent.

On the morning of the trial Simmons Bank presented a motion in limine asserting it had learned through discovery that McNeill made some complaint about the foreclosure sale of his home. Simmons Bank asserted that this testimony was irrelevant to the issues in the case and should be excluded as it would be prejudicial if let in. At an in chambers hearing which was not recorded the court granted the motion in limine.

At the close of all of the testimony the appellee moved for a directed verdict. The trial court ruled that there was sufficient evidence to go to the jury on the issue of the commercial reasonableness of the sale of inventory and receivables but ruled that there was insufficient evidence to submit to the jury the question of release of the guaranty insofar as the Stricklin note was concerned. The court properly instructed the jury on the other issues in the case and instructed them that a guarantor who pleads release has the burden of proving that the collateral was impaired without his consent and the extent of the impairment. He additionally instructed them:

> The court instructs you that you may not reduce the bank's claim on the basis of its conduct relating to the Stricklin contract, and any reduction of the bank's claim is limited to matters related to the accounts receivable and inventory.

After the jury had retired to consider its verdict the court suggested that his ruling on the motion in limine be made a matter of record and that the motion be filed and marked by the clerk.

The appellant was permitted to make a proffer of proof concerning the foreclosure sale which we will discuss in other portions of this opinion.

Appellant first contends that the trial court erred in not submitting the issue of release from the guaranty agreement to the jury. It is well settled that a guarantor is not liable where his underlying agreement has been changed without his consent. Any material alteration in the obligation made without the consent of the guarantor discharges him of all liability. *Moore* v. *First National Bank of Hot Springs*, 3 Ark. App. 146, 623 S.W.2d 530 (1981). It is also settled that where there is a guaranty agreement the collateral is not held for the protection of the creditor alone. Where the creditor unjustifiedly impairs or releases the collateral the guarantor is completely absolved of all liability. A guarantor who pleads release has the burden of proving the release or impairment and the extent to which the collateral was impaired. *Van Balen* v. *Peoples Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981). The appellant contends that the actions of the bank with regard to the Stricklin note made these rules applicable and released him from liability under his guaranty. We do not agree for several reasons.

Simmons Bank did nothing to impair or release any collateral securing the Stricklin note. When the collateral was delivered to them it was already impaired and the impairment resulted solely from actions on the part of the managing agents of River Valley Enterprises. That is, if the payment of $139,000 on the original note be deemed an impairment, the collateral was already impaired when it was offered to Simmons Bank. If the payments of the balance due on that note thereafter be considered an impairment those payments were accepted by River Valley. Any release was as a direct result of the actions of River Valley and not of Simmons Bank. Appellant was the president of River Valley.

The appellant argues that Simmons Bank's failure to inquire of Stricklin as to the condition of his obligation under the note was an act of bad faith and constituted an impairment of collateral which absolved him of liability as guarantor. We find no basis for establishing a duty on the part of the bank to make such an inquiry under the circumstances of this case. Such an inquiry would only disclose what the management of River Valley

already knew. As appellant was the principal officer of River Valley the knowledge of its agents was imputed to him. Furthermore, the guaranty agreement executed by the appellant covered all obligations of whatever nature contracted by River Valley's authorized agents with Simmons Bank, whether secured or unsecured.

[redacted] The appellant also contends that the bank did not follow accepted banking procedures when they did not inquire of Stricklin as to the condition of the note at the time it was accepted as collateral. There was no evidence whatever of what constituted accepted banking practice in this regard. The only evidence on that point was that in some instances where the bank did not have complete faith in the person offering to discount consumer paper it would verify that the goods had in fact been sold. In this case it was the testimony of the bank that they did not make any inquiry because their experience with River Valley on prior transactions had been excellent and they were not concerned because they had a guaranty agreement signed by the appellant, whose net worth was impressive. Vogel merely testified that because the bank asked him some questions when his personal equipment notes were offered to Simmons Bank he *assumed* that they did so in every case. He was surprised to find they had not done so with regard to the Stricklin note. We agree with the trial court that the bank had no such obligation.

[redacted] The appellant further argues that the guaranty agreement was violated because the plain intent of the parties was that the guaranty be applicable only to loans secured by equipment sales contracts and loans were not to exceed 75% of the contract amounts. The clear wording of the written agreement excludes such an interpretation. The only evidence mentioning this practice was the banker's testimony that the bank had an in-house rule to that effect. There was no evidence that Vogel and McNeill were aware of such a rule. We find no merit to this contention.

After the jury had retired and the court had granted the motion in limine the appellant made a proffer of proof that when the third mortgage was executed on the McNeill residence it was intended as additional security for the guaranty agreement. He contends that at some time after the foreclosure proceedings were instituted he and appellant were informed by the bank that it would be present at the sale and would bid to protect the equity.

McNeill would have stated that equity in the house was in excess of $30,000. The banker testified the bank sent a representative to the sale but did not bid enough to prevent the property from being bought by the second mortgage holder. Appellant contends that this was a depletion of the security which effected a release at least to the extent of the equity of the property. We do not agree.

Simmons did not release, impair or extinguish the equity or impair the lien of the third mortgage. That security was extinguished in the court's foreclosure decree and the sale was subsequently confirmed as having brought an adequate price. The record does not contain a statement by the trial court of its reasons for granting the motion in limine. If it was correct in its ruling, even if for the wrong reason, we will affirm. An alteration of a guaranty agreement is not material unless the guarantor is placed in the position of being required to do more than his original undertaking. If the bank failed to do an act required to be done under the agreement it is a breach of contract rather than an alteration. *Carroll-Boone Water District* v. *M & P Equip. Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983). If the bank in fact agreed to bid a sum in excess of the first and second mortgages, its failure to do so was not a release of collateral. Such a failure would be a breach of contract giving rise to a suit for damages which could have been asserted as a set-off.

There is nothing in the pleadings asserting a set-off for breach of contract regarding the sale of McNeill's home. There are no allegations concerning that sale. ARCP Rule 8(c) requires that all affirmative defenses including a set-off must be contained in the response to a complaint. *Odaware* v. *Robertson Aerial-AG*, 13 Ark. App. 285, 683 S.W.2d 624 (1985). Evidence of a breach of contract was immaterial to any issue and completely outside the pleadings in this case.

Affirmed.

MAYFIELD and CLONINGER, JJ., agree.

Ira Joseph CORISTO *v.* STATE of Arkansas

CA CR 85-3 689 S.W.2d 580

Court of Appeals of Arkansas
Division II
Opinion delivered May 22, 1985

Greene Law Office, by: *Anthony J. Sherman*, for appellant.

Steve Clark, Att'y Gen., by: *Joel Huggins*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case the sole issue raised for reversal is the sufficiency of the evidence to sustain the appellant's conviction. The appellant was convicted of first degree murder and sentenced to twenty five years in the Arkansas Department of Correction. From that decision, comes this appeal.

The appellant's wife was fatally wounded by a shotgun blast while at the couple's apartment. The appellant gave several different versions of the incident to different witnesses. Herman Brimer, an ambulance attendant, testified that the appellant told him that Ms. Coristo had been in the kitchen where he was preparing a meal, that the couple had been arguing, that his wife ran to the bedroom and the gun went off. Robert Lusk, a Little Rock Police Department patrolman, testified that when he arrived at the scene the body was found in the doorway to the bedroom and that the appellant told him that he was cooking and he dropped a plate and heard the gun go off. Officer Lusk testified that the appellant was upset and nervous.

Sergeant Duane Chapman testified that when he arrived at the scene he saw the shotgun lying against the bed, and he checked it because it appeared to be in a somewhat dangerous position. When he checked the gun, he found the safety to be on. The appellant told him the same story he had told Patrolman Lusk, and advised the officer that he had not handled the gun that day. At that point, Sergeant Chapman became suspicious because he felt that safeties on guns do not spontaneously engage. Sergeant Chapman then advised the appellant of his Miranda rights and confronted him with what the officer viewed as inconsistencies in the appellant's statement, with emphasis on the fact that the gun was on safety. At that point, according to Sergeant Chapman, the appellant broke down and admitted that he had shot his wife.

Detective James Keathley arrested the appellant and transported him to the Little Rock Police Department where he was again advised of his rights to counsel and to remain silent. Detective Keathley testified that the appellant was upset and sometimes would cry. Detective Keathley and Detective Gray LeMaster obtained a statement from the appellant. The statement indicated that the appellant had been drinking on the day of the shooting. The appellant stated that he and his wife had a disagreement over the exchange of some baby bottles, and that his wife had slapped him. The statement indicated that the appellant and his wife had fought the previous night and she had locked him out of the apartment. The appellant stated to the officers that he was cooking tuna croquets and that, because he suffers from Tourettes Syndrome, he was shaking and he dropped a plate, which broke. He stated that his wife became angry and

threatened to shoot him. According to the appellant's statement, she then went into the bedroom and he followed her because he did not know what she was going to do. He stated that he got between his wife and the .16 gauge shotgun and his wife turned to leave the room. He then picked up the gun, claiming he intended to unload it, and the gun went off. In the statement the appellant acknowledged that he had told the officers a different story when they arrived because he was scared.

Dr. Donna Brown, a forensic pathologist, testified that the fatal wound suffered by the appellant's wife resulted from a shot which was almost on a horizontal or straight line, and that the victim was shot from a distance of four to eight feet from the muzzle of the gun. Robert Phillips, a firearm and tool mark examiner for the Arkansas State Crime Laboratory, testified that he examined the shotgun and found no evidence of any malfunctions, and he observed that the safety on the gun was stiff, or hard to engage, and that the trigger pull was normal.

Virginia Edgemond, a friend and neighbor of the appellant and his wife, testified that she had observed the appellant and his wife fighting about a week before the shooting. She stated that the appellant got mad, went into the bedroom and got the shotgun, put it up to his wife's face and said he was going to kill her. (This testimony was objected to at trial, and the trial court overruled the objection, but the correctness of that ruling is not argued on appeal.) Ms. Edgemond also testified that the deceased was afraid of guns, and that she had asked Ms. Edgemond to unload the shotgun before because she was scared of it, and that the deceased had hidden the shells before. Ms. Edgemond also testified that, within a two week period prior to the shooting, she had heard the appellant threaten his wife on other occasions besides the one mentioned earlier.

After hearing the foregoing testimony, the jury found that the appellant deliberately and premeditatedly shot his wife, causing her death. As we stated in *Jones* v. *State*, 11 Ark. App. 129, 135, 668 S.W.2d 30 (1984):

> We must affirm the jury's verdict if there is substantial evidence to support it. *Stanley* v. *State*, 248 Ark. 787, 454 S.W.2d 72 (1970). Substantial evidence is that evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a

> conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980). The jury may infer premeditation and deliberation from the circumstances of the case, such as the character of the weapon used, the manner in which it was used, the nature, extent and location of the wounds inflicted and the like. *See McLemore* v. *State*, 274 Ark. 527, 626 S.W.2d 364 (1982); *see also Shipman* v. *State*, 252 Ark. 285, 478 S.W.2d 421 (1972).

In the case at bar we have little trouble finding substantial evidence to support the jury's verdict. Appellant's counsel argues that the earlier threat was irrelevant, and that evidence should not serve to provide proof of premeditation and deliberation. However, as noted above, the correctness of the trial court's ruling as to the admissibility of that testimony is not raised on appeal. The earlier threat coupled with other threats against the deceased, the inconsistent statements given the ambulance attendant and the investigating officers, the fact that the safety was on when Sergeant Chapman checked the shotgun, the direction the shot blast followed, and the absence of any malfunction in the weapon all provide ample proof from which the jury could find that the appellant deliberately, and with premeditation, shot and killed his wife. We affirm.

Affirmed.

CORBIN and GLAZE, JJ., agree.

Eva Margaret GLOVER *v.* Clarence Marvin GLOVER

CA 84-334 689 S.W.2d 592

Court of Appeals of Arkansas
Division II
Opinion delivered May 22, 1985

Kay L. Matthews, for appellant.

House, Wallace & Jewell, P.A., by: *Gary B. Rogers*; and *Glover & Glover*, by: *Mark Roberts*, for appellee.

JAMES R. COOPER, Judge. This is the second appeal of this case. In *Glover* v. *Glover*, 4 Ark. App. 27, 627 S.W.2d 30 (1982), we reversed the chancellor's decision regarding the division of certain marital property, and remanded with instructions to reinvest the appellant (wife) with an interest in a farming partnership. The chancellor, on remand, determined that the appellant's interest in the farming partnership should be valued as of the date of the divorce. From that decision, comes this appeal.

The sole issue presented on appeal is whether the appellant's interest in the partnership is a marital interest which should be fixed as of the date of the divorce, or whether, as the appellant contends, her interest is actually a partnership interest which survived the divorce and exists today. The chancellor found that her interest was a marital one. We affirm.

First, we deal with the appellant's contention that in the first *Glover* appeal we determined that her interest was that of a partner, and, that issue having been decided, the doctrine of law of the case requires that her interest be considered one of a partner rather than a spouse. We disagree. The appellant quotes from our earlier opinion which stated that "we find the appellant's one-fourth interest in the Glover partnership should be reinstated to her." *Glover, supra* at 29. From that sentence, the appellant contends that we decided that she had an interest in the farming partnership independent of her interest which arose because of the marital relationship. Although it is possible to read

the quoted sentence in that light, it would be incorrect to do so because the appellant never, at least until the hearings on remand, contended that she had anything other than a marital interest in the partnership. It is true that "matters decided upon one appeal become the law of the case and govern even this court upon a second appeal", *Wilson* v. *Rodgers*, 256 Ark. 276, 507 S.W.2d 508 (1974), but the question is open as to what matters were "decided upon appeal".

On appeal in the first *Glover* case, the appellant (wife) claimed that the trial court erred in computing the net worth of the partnership and in ordering the proceeds from the sale of the marital home to be used to liquidate a partnership debt. We agreed with the appellant on both points. Those were the only issues presented to us and the only issues decided. We did state that the farm partnership was comprised of the husband, the wife, and the husband's parents, but that statement was in error since the partnership was only comprised of the husband and his father. We would be bound by a determination that the wife had a partnership interest in the farming operation had we actually decided that she did in the earlier case, whether such a determination was accurate or not, but we made no such determination. Although we could have been more precise in our characterization of the nature of her interest, it is clear that this Court, the chancellor, and all the parties viewed the appellant's interest as one which existed solely because of the marital relationship. The appellant did have a one-fourth interest in the Glover partnership because she was entitled, under Ark. Stat. Ann., Section 34-1214 (Repl. 1979), to one-half of the parties' marital property, and the husband had a one-half interest in the partnership. Had the wife actually been a partner her interest might have been 90%, 50%, 25%, or whatever other percentage was established by the partnership agreement. The appellant seeks to bootstrap herself into a one-fourth interest in the partnership by using her spousal rights to establish her percentage of ownership and then claim that her interest was not a marital one at all but an actual partner's share. Her position is inconsistent, both with our earlier opinion and with logic, though in light of our statements in *Warren* v. *Warren*, 12 Ark. App. 260, 675 S.W.2d 371 (1984) we understand why she makes the argument. While the legal distinction we made between the *Warren* and *Glover* cases was correct, our factual reference in *Warren* that the wife had a

partnership interest was incorrect.

We hold that the chancellor correctly interpreted our first *Glover* opinion, and that he did not exceed the scope of our directions on remand.

Affirmed, and remanded for further proceedings consistent with this opinion.

CORBIN and GLAZE, JJ., agree.

William Donald PERKINS *v.* Deborah Ann PERKINS (Novotny)

CA 84-324 690 S.W.2d 356

Court of Appeals of Arkansas
Division I
Opinion delivered May 22, 1985

Wallace and Hamner, for appellant.

Dodds, Kidd, Ryan & Moore, by: *Richard N. Moore, Jr.*, for appellee.

LAWSON CLONINGER, Judge. Appellant contends in this appeal that the order of the chancellor directing appellee to pay only $500 per year for the support of two minor children in appellant's custody constituted an abuse of discretion. Appellant argues that the figure is inadequate, as it represents less than one-fourth of the usual minimum amount required. We agree that the chancellor erred in setting the figure at such a relatively low level, and we reverse his decision and remand with instructions to the chancellor to establish an appropriate amount of support payments.

Appellants and appellee were divorced in June, 1975, and by agreement appellee was granted custody of the couple's two minor children. In November, 1978, following hearings, appellant was awarded custody of the children. Appellee, who in the meantime had remarried and moved to the state of Idaho, filed a motion in March, 1984, requesting that she be allowed visitation rights for five weeks during the summer at her home. In his response and cross motion, appellant prayed for an order directing appellee to pay a reasonable weekly sum for child support. In April, 1984, the court entered an order permitting a one-month summer visitation in Idaho with air transportation expenses to be paid by appellee. After entertaining another motion by appellant seeking child support, the court issued an order in May, 1984, requiring appellee to pay appellant $500 per year in equal installments of $250, due each January 10 and September 5. From that order appellant brings this appeal.

The amount of child support to be awarded, if any, rests in the discretion of the court granting the divorce and is to be determined from the circumstances and the situation of the parties. *Cantrell* v. *Cantrell*, 10 Ark. App. 357, 664 S.W.2d 493 (1984). Among the factors to be considered in fixing an amount to

be contributed for child support are the needs of the children and the assets, earning capacity, income, and indebtedness of each parent. *Guffin* v. *Guffin*, 5 Ark. App. 83, 632 S.W.2d 446 (1982); *see also Barnhard* v. *Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972). The chancellor's finding will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Mitchell* v. *Mitchell*, 2 Ark. App. 75, 616 S.W.2d 753 (1981).

In the present case, appellant employed the Family Support Chart in an attempt to establish a standard for determining the amount of child support owed by appellee. The mathematical formula set forth in the chart is, of course, only a guide for the trial court and is not intended to be binding. *Mitchell* v. *Mitchell, supra*. Still, it remains a valuable tool for the court's use as the various factors mentioned above are weighed. That the chancellor failed to consider the level of support recommended by the chart is clear when the following comparisons, based upon appellee's take-home salary, are made:

Yearly Amount Per Family Support Chart	Yearly Amount Per Chancellor's Order	Yearly Amount Including Cost of Visitation
$2,392.00	$500.00	$1,037.00
Percentage of Take-Home Salary Per Family Support Chart	**Percentage of Take-Home Salary Per Chancellors Order**	**Percentage of Take-Home Salary Including Cost of Visitation**
26.30%	5.49%	11.40%

While we by no means intend to suggest that the figures appearing in the Family Support Chart column are required under the circumstances of this case, we believe that the substantial disparity between the chart's and the chancellor's calculations* indicates a failure on the court's part to give proper consideration to all factors in reaching a conclusion. This constitutes a reversible abuse of discretion.

This cause is reversed and remanded to the trial court for the purpose of establishing a reasonable amount of support to be paid by appellee, giving due consideration to the factors enumerated in *Guffin* v. *Guffin, supra*.

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* The third category, including the expense to appellee for the children's travel to Idaho, also reflects a disproportionately low level of support when compared to the chart's recommendation.

COOPER, J., agrees.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I concur. I agree the chancellor's decision should be reversed but not because of the substantial disparity between the Family Support Chart amount and that awarded by the chancellor. From the record, I believe it is clear that the chancellor failed to consider the childrens' needs, circumstances and ages, the parents' ability to pay or the parties' standard of living.

Jack M. PITTS *v.* WESTERN ELECTRIC, Employer, Self-Insured Employer

CA 84-443 689 S.W.2d 582

Court of Appeals of Arkansas
Division II
Opinion delivered May 22, 1985

Williams, Kendall, Schrantz & Wood, P.A., by: *Donald B. Kendall*, for appellant.

Friday, Eldredge & Clark, by: *Donald H. Bacon*, for appellee.

DONALD L. CORBIN, Judge. Appellant, Jack M. Pitts, was found to be "currently totally disabled" at the time of his hearing before the Administrative Law Judge and was awarded total disability benefits for the duration of his disability. Appellant's attorney was allowed "a controverted attorney's fee on all permanent disability benefits in excess of 43.75 weeks." Appellant's attorney was subsequently allowed a lump sum attorney's fee upon his motion by the ALJ. The employer, Western Electric, appealed to the Full Commission which reversed the lump sum attorney's fee award on the basic premise that "the present value of all future payments under a current total disability award is undeterminable as these benefits, by definition, have no finite ending points. Therefore, a lump-sum attorney's fee cannot be awarded on a current total disability award." We affirm.

Ark. Stat. Ann. § 81-1332.1 (Supp. 1983), which contains the statutory authorization for the award of lump sum attorneys' fees, provides as follows:

> The Workers' Compensation Commission is hereby authorized to approve lump sum attorneys fees for legal services rendered in respect of a claim before the Commission. Such lump sum attorneys fees are allowable notwithstanding that the award of compensation to the injured employee is to be paid on an installment basis. Lump sum attorneys fees, if approved by the Commission, shall be discounted at the rate provided in Ark. Stat. Ann. § 81-1319(k) as that provision may be amended from time to time.

Ark. Stat. Ann. § 81-1319(k) (Supp. 1983) provides as follows:

> Whenever the Commission determines that it is for the best interest of the parties entitled to compensation, and after due notice to all parties in interest of a hearing, the

> liability of the employer for compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at seven (7) percentum discount, compounded annually. The probability of the death of the injured employee or other persons entitled to compensation before the expiration of the period during which they are entitled to compensation shall, in the absence of special circumstances making such course improper, be determined in accordance with the American Experience Table of Mortality. The probability of the happening of any other contingency affecting the amount or duration of compensation shall be disregarded, except the possibility of the remarriage of the widow which shall be determined in accordance with the Danish Annuity and Dutch Remarriage Table.

In *Bemberg Iron Works* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984), we noted that *McNeely* v. *Clem Mill & Gin*, 241 Ark. 498, 409 S.W.2d 502 (1966), gave expression to a concept of applied law that remained without a label until this Court decided *City of Humphrey* v. *Woodward*, 4 Ark. App. 64, 628 S.W.2d 574 (1982), almost 16 years later. In *Bemberg Iron Works, supra*, we reiterated an observation in *City of Humphrey, supra*, that:

> now when we speak of total disability, such benefits may be denominated further in terms of 'current' total, 'limited' total or total disability benefits 'until such time as total disability ceases' . . . Obviously, in making such an award, the Commission remains hopeful that the claimant's disability is not permanent and that he will eventually return to work.

In *Aluminum Company of Amer.* v. *Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982), we restated the rule enumerated in *U.S.F. & G. Co.* v. *Potter*, 263 Ark. 689, 567 S.W.2d 104 (1978), that attorneys' fees can only be awarded when the statutes specifically authorize them. In the case at bar, the Commission properly concluded that a lump sum attorney's fee could not be awarded on appellant's current total disability award. We might have reached a different result had Ark. Stat. Ann. § 81-1332.1 not been amended by Act 631 of 1981 wherein

the last sentence was added. This requirement in effect restricts an award of a lump sum attorney's fee to an ascertainable award to a claimant. In the instant case, the award is not ascertainable because it is not permanent. Therefore, it is impossible to calculate the award pursuant to the statutes.

In *Littlejohn* v. *Earle Industries*, 239 Ark. 439, 389 S.W.2d 898 (1965), the Supreme Court held that:

> Thus, our legislature has entrusted to the Commission the right to determine the necessity of a claimant to secure the services of an attorney in order to preserve his benefits. We have indicated that on appeal this court will not interfere with the Commission's determination on the issue of attorneys' fees unless there is an abuse of discretion.

We hold that the Commission did not abuse its discretion in denying the award of a lump sum attorney's fee to appellant.

Affirmed.

COOPER and GLAZE, JJ., agree.

Ronnie Hubert BUCKNER *v.* Donna Gale BUCKNER

CA 84-323 689 S.W.2d 584

Court of Appeals of Arkansas
En Banc
Opinion delivered May 22, 1985

Guy H. "Mutt" Jones, Sr., Phil Stratton and *Casey Jones*, by: *Phil Stratton*, for appellant.

Helen Rice Grinder, for appellee.

TOM GLAZE, Judge. Appellant appeals the trial court's decision finding him in arrears in his child support payments in the sum of $13,869.00. He contends the chancellor erred in refusing him credit for certain cash payments made directly to appellee and for failing to remit child support payments that accumulated during a six-month period that he had physical custody of the parties' two children. We affirm.

Appellant claims that he had made cash contributions to appellee, totalling $12,401.82, and that amount should be deducted from his child support arrearage, which undisputedly is $13,869.00. The parties were divorced in 1977, and appellant was ordered to pay $100.50 per week child support through the court's registry. Since 1977, appellant has been found in contempt of court and in arrears for nonpayment of child support on three occasions, including this present action from which he appeals. The court's registry reflects that appellant was last current in his child support payments on November 24, 1981, and that he has made no payments since that date.[1] Appellant claims that after November 24, 1981, he and appellee discussed remarriage, and

[1] The testimony and other evidence conflict on when appellant actually paid the balance found due as of November 24, 1981.

while appellee denies it, appellant says they lived together until June, 1982, when they had a fight. Appellant testified that during the period they lived together, he gave appellee several cashier checks amounting to $3,076.00 and a bank money order in the sum of $3,886.02. In addition, he claims that he paid $2,000.00 towards the purchase of a house and that he made a number of mortgage payments on it. He said that he deeded the house to appellee upon her agreement he would pay no more child support. He also asserted he paid $645.00 on some newly-purchased furniture. Appellant testified to making other cash gifts to appellee and, in fact, indicated he gave her approximately $20,000.00 to $30,000.00 from December, 1981 to June, 1982.

Appellee denied receiving most of the cash gifts to which appellant testified, but she conceded he paid $2,000.00 on the house they purchased and $645.00 on the furniture. However, she testified that these purchases placed her in a worse financial situation because he did not assist with the monthly payments on either the house or furniture. Appellee said that much of the furniture was repossessed for nonpayment, and she had to rent the house because she could not maintain its mortgage payments. She denied that she agreed appellant would not have to make further child support payments when he deeded his interest in the house to her. Appellee further asserted that the $3,076.00 cashier check received from appellant was for the arrearage due in November, 1981, and that amount clearly should not be applied towards the reduction of his present arrears. Finally, she also stated that the $3,886.02 money order the appellant paid her in January, 1982, was not child support, and although the record is unclear on the point, she now argues those monies constituted the balance of the arrearages due on November 24, 1981.[2]

As can be gleaned from the foregoing, the evidence in this cause was conflicting. However, the law applicable to this matter is quite clear. Ordinarily, the chancery court has no power to remit accumulated court-ordered support payments. *Holley* v. *Holley*, 264 Ark. 35, 568 S.W.2d 487 (1978). In this State, entitlement to payment vests in the person entitled to it as the payments accrue as the equivalent of a debt due, and subject to

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[2] Appellant never testified concerning the purpose for which the money order was made.

any disallowance for periods of time when the conduct of the custodial parent entitled to payment has defeated the rights of the other parent or otherwise justified disallowance, judgments should be rendered for the full amount of the arrearages, limited only by the five-year statute of limitations. *Id.* Here, the chancellor found no legal justification for the remittance of appellant's court-ordered support payments.

While appellant claims he was relieved from further child support payments because of an agreement with appellee, she denies such an agreement. She also denied that she lived with appellant as he alleged, and a friend of appellee's substantiated appellee's testimony on this point. Appellant obviously gave some monies to appellee that were not made in discharge of child-support arrearages. Concerning these monies, the chancellor said:

> I think he spent some of the money that you all have proven this afternoon. I think he spent it in an effort to get (appellee) to live with him again, which was his prerogative. God knows, I would have been happy if they'd gone back together. He spent that money on a house and those things that he did for her, but that's not child support, and that's not what he was ordered to do.

In sum, the trial court found what monies appellant did give appellee were voluntary expenditures, not child support, and we cannot say the court was clearly wrong in so finding. As was held in *Glover* v. *Glover*, 268 Ark. 506, 598 S.W.2d 736 (1980), we do not, as a matter of law, give credit for voluntary expenditures. Thus, in this respect, we find the chancellor's decision was correct. We also believe the chancellor correctly denied appellant's request for the remission of child support payments during the period he had the children while appellee was recuperating from surgery. In *Riegler* v. *Riegler*, 246 Ark. 434, 438 S.W.2d 468 (1969), the noncustodial parent made a similar request because his daughter lived with him for one year. The Supreme Court found such a circumstance did not give the chancery court power to remit accumulated payments which became vested in the custodial parent. It held further that a modifying decree can relate to the future only.

We believe the trial court's findings are not against the

preponderance of the evidence and its decision is consistent within well-settled law. Therefore, we affirm.

Affirmed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority opinion. The real problem in this case is that the appellant has consistently refused to pay any monies through the registry of the court. He has been wrong to refuse to obey the court's orders in that regard. However, it appears to me that he is being punished for refusing to make the payments in the proper manner, not because he has not made some of the payments required by the divorce decree. The chancellor's entire statement at the close of the contempt hearing sheds light on the matter. He stated:

> I think it's apparent to everybody here that the reason that Judge Mobley put in the decree, back in 1977, that the payments would be made into the registry of the Court is just to prevent our having to spend an entire afternoon hearing a contempt citation. We've been here since 1:00 o'clock, hearing all this stuff that Mr. Buckner has done for his family. Mr. Buckner was not ordered to make a down payment on a house or to buy the beauty salon or to do any of those other things. He was ordered to pay $100.50 per week for child support, and this he's failed to do and he's been in this Court before Judge Mobley, before Judge Stephens, and now before me, because of his failure to do so. I find he made up his mind, way back there, that he wasn't going to do it. He didn't ever intend to do it. He may not do it after today, but he's going to jail because he didn't do it. I find that he owes $13,869 in delinquent child support payments, but he has, for some reason known best to himself, elected not to obey the orders of this Court. Not my order; Judge Mobley's order, back in 1977. I think he spent some of the money that you all have proven this afternoon. I think he spent it in an effort to get Donna Gail Buckner to live with him again, which was his prerogative. God knows, I would have been happy if they'd gone back together. He spent that money on a house and those other things that he did for her, but that's not child support, and that's not what he was ordered to do. I find that he's in

> contempt of court in the amount of $13,869 and I'm ordering him to jail until he has purged himself of his contempt. T.224

Also, at page 225 of the transcript, the chancellor stated:

> I'm denying any credits at all. I wouldn't have had to listen to this if Mr. Buckner had done what he was ordered to do. I wouldn't have had to spend an entire afternoon listening to all this stuff and viewing all these exhibits, about buying a house, about furniture that he made a down payment on and then eighty-five percent of it had to be repossessed by Kordsmeier Furniture Company. That was a big gift. That sure did help the children a lot.

Those statements indicate to me that the chancellor did not intend to give the appellant credit for any monies contributed to his wife and children, even if he proved he had paid the monies, because he had consistently refused to pay through the registry of the court. In *Bice* v. *Bice*, 6 Ark. App. 208, 639 S.W.2d 534 (1982), the wife filed a petition seeking to hold her ex-husband in contempt for failure to pay child support as ordered by the court. The chancellor refused to hear her petition because she had accepted payments directly from her ex-husband. We reversed, stating that:

> The trial court is directed to allow appellant [wife] to prove the amount of unpaid installments not barred by the statute of limitations by any relevant and competent evidence, and to allow appellee to prove any payments made outside the registry of the court by relevant and competent evidence.

In the case at bar the appellant has been cited for contempt on several occasions. He has flagrantly disobeyed the court's order to pay child support through the registry of the court. Such conduct likely constitutes contempt of court, but has little to do with whether he is entitled to credit for payments made outside the registry of the court. It is worth noting that the chancery clerk executed a statement which shows that the appellee signed the child support registry on November 11, 1981, showing that some $4,800 had been paid to her at home, and the clerk's statement indicates that such payment brought the child support current. This tends to support, at least in my view, the appellant's claim

that some of the monies paid after 1981 were accepted by the appellee as child support.

I have no quarrel with the majority's premise that the chancellor could find, on conflicting evidence, that payments made outside the registry of the court were not child support. What I think happened in this case is that the chancellor, understandably irritated with the appellant, refused to weigh the evidence properly. Instead, I think that the court decided that the appellant was not entitled to credit, regardless of the proof, because his payments were not made through the registry of the court. I would remand for a new hearing, and would instruct the chancellor to proceed in this case as the chancellor was instructed to do in *Bice, supra.*

PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* Pamela WILLIAMS

CA 84-437 689 S.W.2d 590

Court of Appeals of Arkansas
Division II
Opinion delivered May 22, 1985
[Rehearing denied June 26, 1985.*]

* Mayfield, J., would grant rehearing.

Rose Law Firm, A Professional Association, by: *Richard T. Donovan*, for appellant.

Pickens, McLarty & Watson, by: *James A. McLarty*, for appellee.

TOM GLAZE, Judge. The appellant insurance company appeals from a jury verdict awarding appellee benefits under a group accidental death and dismemberment policy for the loss of sight in her right eye. Under the policy, an employee must show the following three conditions before he or she may obtain benefits: (1) the employee sustained an accidental bodily injury while a covered individual; (2) the injury, directly and independently of all other causes, resulted in the loss; and (3) the loss occurred within ninety days after the injury was sustained. The group policy also contained several exclusions, one of which provided that the policy would not cover any loss which results directly or indirectly from bodily or mental infirmity or disease or medical or surgical treatment thereof.

Appellee underwent surgery on 14 September 1982 to remove a cataract on her right eye. During surgery, a hemorrhage occurred, and appellee lost complete sight in her right eye. The hemorrhage was an unexpected and unanticipated complication of the surgery. Appellant denied coverage on the basis of the above quoted conditions for benefit and the policy exclusion. On appeal, appellant raises three issues: (1) the trial court erred in failing to direct a verdict; (2) there was no substantial evidence to support the verdict of the jury; and (3) the trial court erred in not admitting the opinion testimony of the expert witness.

In 1964, appellee sustained a black eye when she was struck by her boyfriend. This injury to her right eye healed and caused her no further problem. Appellee began wearing glasses in 1975 to correct vision in both her eyes and she had no particular problem with her right eye until a traumatic cataract was diagnosed in 1981.

At trial appellant argued that the injury which appellee sustained in 1964 was the accidental bodily injury that eventually resulted in a traumatic cataract, and that during surgery to remove the cataract, appellee lost sight in her right eye. The loss which resulted from the 1964 injury would not be covered, appellant argued, because (1) the appellee was not covered at that time, (2) there were intervening causes between the time of the blow in 1964 and the loss of sight in her eye, *i.e.*, a cataract, surgery, and a hemorrhage, and (3) the loss occurred some eighteen years after the blow or injury. Appellant argued in the alternative that the accidental bodily injury was the cataract which was diagnosed in 1981. Under this 1981 injury theory, appellant contended the appellee would not meet the conditions because (1) the surgery and the hemorrhage that occurred were intervening causes between the time her cataract was diagnosed and when she lost her sight, and (2) her loss of sight occurred at least one year after her cataract was diagnosed. In addition, appellant urged that under the policy exclusion, appellee could not recover because the loss of sight in her eye resulted directly from the surgical treatment of a bodily infirmity, the cataract.

Appellee was successful in disposing of these arguments by proving that the hemorrhage was the accidental bodily injury which made her eligible for benefits. We proceed on appeal on this prevailing theory.

It is undisputed that appellee was covered under the policy when the injury (hemorrhage) occurred, and because her loss of sight was immediate, such loss was sustained within the required ninety-day period. Thus, appellee's loss clearly meets two of the three conditions required under the group policy. However, the focus of this case is on the condition not clearly met by the evidence, *viz.*, whether there was substantial evidence to support the finding that the hemorrhage which resulted in the loss of sight occurred independently of the surgery.

[redacted] Procedurally, a directed verdict is proper only when

the evidence is so insubstantial as to require that a jury verdict for the non-moving party be set aside. On appeal, we determine whether there is substantial evidence by giving the evidence, and all reasonable inferences deducible from that evidence, the highest probative value in favor of the non-moving party. *Kelly* v. *Cessna*, 282 Ark. 408, 668 S.W.2d 944 (1984). Substantial evidence has been defined as:

> 'evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture.' Ford on Evidence, Vol. 4 § 549, page 2760. Substantial evidence has also been defined as 'evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences.'

Findley, Adm'x. v. *Time Ins. Co.*, 269 Ark. 257, 259, 599 S.W.2d 736, 738 (1980) (quoting *Pickens-Bond Construction Co. et al.* v. *Case*, 266 Ark. 323, 584 S.W.2d 21 (1979)).

Appellee concedes that her case is based upon the following exchange during re-cross examination of the expert witness, Dr. Ben Lowery:

> Q. Now you say you don't think that the hemorrhage would have occurred if there had not been surgery, but really you have no way of knowing one way or the other, do you?
>
> A. No.

This is the only evidence presented by the appellee in support of the proposition that the hemorrhage, directly and independently of all other causes, resulted in the loss, and this testimony was elicited after Dr. Lowery on re-direct examination had opined that he did not believe the hemorrhage would have occurred if appellee had not been undergoing surgical treatment.

When we view this evidence in the light most favorable to the appellee and draw all reasonable inferences therefrom, we must agree with appellant that the trial court erred in denying the

motion for a directed verdict at the conclusion of the evidence. While Dr. Lowery's testimony on re-cross examination raised a question concerning whether appellee's hemorrhage might (or might not) have occurred independently of surgery, such testimony merely gave rise to two equally inconsistent inferences. Dr. Lowery simply had no way of knowing whether or not the hemorrhage would have occurred if there had not been surgery. Rather than offer anything of material certainty and precision which might compel a conclusion one way or the other, we must conclude Lowery's testimony could have raised nothing more than suspicion in the minds of the jurors.

We do not reach appellant's second and third points for reversal because we reverse and dismiss this cause upon the trial judge's failure to grant appellant's motion for a directed verdict.

Reversed and dismissed.

COOPER and CORBIN, JJ., agree.

Shirley ROSS *v.* Raymond E. WHITE

CA 84-346 689 S.W.2d 588

Court of Appeals of Arkansas
Division II
Opinion delivered May 22, 1985

Witt Law Firm, for appellant.

No brief filed for appellee.

TOM GLAZE, Judge. This appeal ensues from an order whereby the Logan County Circuit Court held the appellee's homestead was exempt from any levy or sale under an earlier judgment rendered against appellee in favor of appellant. Appellant urges the trial court erred because appellee failed procedurally and substantively to establish his homestead exemption. Appellant also argues the trial court erred in assessing costs against her in the sum of $100.00. We affirm.

Appellant first contends appellee failed to follow the required procedure set out in Ark. Stat. Ann. § 30-209 (Supp. 1983) for claiming an exemption of his properties from a levy of execution. She argues appellee did not exercise good faith and diligence in filing a schedule of property, he failed to list all his

property and give proper notice of filing his schedule, and in obtaining a stay of execution, he did not comply with the requirements of Ark. Stat. Ann. § 30-311 (Repl. 1979).

While we may agree with appellant that appellee did not satisfy all of the procedural aspects of §§ 30-209 and -311, we cannot agree that she has demonstrated any prejudice as a result of such procedural infirmities. For example, appellee clearly failed to list all his property until he amended his schedule on March 29, 1984 — three days after the court heard evidence on whether to quash appellant's execution. Appellant refers us to *Brown* v. *Peters*, 53 Ark. 182, 13 S.W. 729 (1890) wherein the Supreme Court held the debtor's schedule must set out all of his property or no supersedeas should have issued. We note that, although the Supreme Court in *Brown* reversed and directed the trial court to quash the supersedeas issued in the debtor's favor, the Supreme Court concluded that its action or direction did not prejudice the debtor's right to file a schedule according to law. Here, the trial court permitted and accepted appellee's belated filing of his amended schedule which listed all his property. We believe the court's decision to do so is consistent with the *Brown* decision and the settled rule that a liberal construction should be given the requirements contained in § 30-209, *supra. See Williams* v. *Swann*, 220 Ark. 906, 251 S.W.2d 111 (1952).

Our review of the record and the appellee's amended schedule also reflects that the properties listed were well within the exemptions to which he is entitled by law. Thus, regardless of appellee's technical noncompliance with the procedural matters named by appellant, we are unaware of how appellant was prejudiced. For the same reason, we find no reversible error (if indeed an error exists) in the trial court's issuance of a stay in this proceeding. Other reasons dictate appellant was not harmed by the untimely notice and late filing of appellee's schedule. Appellant had deposed appellee one month prior to the March, 1984, hearing, and she thoroughly cross-examined appellee at the hearing. Appellant was fully aware of the properties to which appellee claimed ownership even though appellee belatedly filed his list of properties.

Appellant next argues that appellee failed to establish his real property as a homestead, but if it were a homestead, appellee had abandoned it. Appellee and his former wife moved onto the

subject property in 1974 and occupied the house on the premises until they divorced in 1977. Appellee testified that he considered this property his home even though he divorced and his work subsequently required him to be in California. He stated that he and his mother have continued the mortgage payments on the property, and during the times he returns to Arkansas, he occupies and works on the house. He allowed his sister to move into his house in August, 1983, but he testified she pays no rent. Appellee's sister corroborated she pays no rent, and stated further that appellee was living in his house when she moved in. Sometime during his stay in California, appellee remarried, but his new wife attends school in California and has never lived in appellee's Arkansas home. Appellee maintains that he pays taxes and is registered to vote in Arkansas, and that he has never abandoned his Arkansas homestead.

Under article 9, section 3, of the Arkansas Constitution, the homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment or to a sale under execution. In the instant case, appellee clearly established his homestead when he married and moved onto the subject property in 1974. It is also settled that once appellee acquired and occupied the homestead while he was the head of a family, the fact that he and his wife divorced does not deprive him of the right to claim his homestead as exempt if he still resides on it. *See Butt* v. *Walker*, 177 Ark. 371, 6 S.W.2d 301 (1928). Thus, the critical issue is whether appellee abandoned his homestead after his divorce in 1977. Appellee offered the only evidence on this issue, and based upon that proof, we cannot say the trial judge clearly erred in deciding the appellee had impressed a homestead on his property and never abandoned it.

In conclusion, we address appellant's argument that she was assessed erroneously $100.00 in costs. Appellant complains that the appellee should not have been awarded costs because there was no proof that appellee had expended or was otherwise entitled to reimbursement for such costs. From our review of the record, we find no objection to the trial court's award of costs, nor can we find where the assessment-of-cost issue was raised. For that reason, we affirm the court's award. *See Albritton* v. *Prudential Ins. Co.*, 1 Ark. App. 346, 615 S.W.2d 412 (1981).

Affirmed.

COOPER and CORBIN, JJ., agree.

Jonathan D. JOHNSTON, Gary D. PLUMMER, John GUNDY, Robert Dale ALLEN, Robert M. RUSSELL, Kevin NIELSEN, Burt H. McGHEE, Jr., Dwight Roy KETCHER, Bobby D. CLARK, Travola Marvin GARLIN, Rollins G. HOGE, Alan Lee SLATE, Thomas L. LEEK *v.* CITY OF FORT SMITH, ARKANSAS

CA CR 84-176 690 S.W.2d 358

Court of Appeals of Arkansas
Division I
Opinion delivered May 29, 1985

Rex W. Chronister, Willard C. Smith, Jr., J.F. Atkinson, Jr., and *Robert R. Cloar*, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. The thirteen appellants in this

consolidated case attack their convictions under Act 549 of 1983, the Omnibus DWI Act, codified at Ark. Stat. Ann. § 75-2501 et seq. (Supp. 1983). They argue six points for reversal. Although the issues raised are constitutional in character, we are empowered to consider them, notwithstanding the limitation imposed by Rule 29(1)(c) of the Rules of the Supreme Court and Court of Appeals, because our decision involves merely the application of principles established in earlier opinions of the Arkansas Supreme Court. On the basis of the substantial case law dealing with the Omnibus DWI Act already on record, we affirm the judgments of the lower court.

In their first argument for reversal, appellants contend that the citations issued to them by the police are void for lack of specificity in that they did not indicate under which subsection of § 3 of the Omnibus DWI Act they were charged. The statute in question, Ark. Stat. Ann. § 75-2503 (Supp. 1983), reads as follows:

> (a) It is unlawful and punishable as provided in this Act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.
>
> (b) It is unlawful and punishable as provided in this Act for any person to operate or be in actual physical control of a motor vehicle if at that time there was 0.10% or more by weight of alcohol in the person's blood as determined [by a] chemical test of the person's blood, urine, breath, or other bodily substance.

Appellants were charged with "Driving Under the Influence of Intoxicants." According to appellants, the charge was couched in language so imprecise that they were denied their right to be informed of the nature of the accusation. They contend that the two subsections of Ark. Stat. Ann. § 75-2503 state two separate offenses that require different elements of proof.

Two recent Arkansas Supreme Court cases, *Wilson* v. *State*, 285 Ark. 257, 685 S.W.2d 811 (1985), and *Yacono* v. *State*, 285 Ark. 130, 685 S.W.2d 500 (1985), dispose of the matter. The court said in *Yacono*, *supra*, that the penalty is the same whether the act is violated by conduct proscribed by either subsection, and thus the "two conditions are simply two different

ways of proving a single violation." The accused in *Wilson, supra*, had been charged with the offense of "DWI one." This charge, the court held, "is sufficient for a conviction under either subsection (a) or (b), even though the evidentiary requirements of the subsections are different."

Appellants next assert that Ark. Stat. Ann. § 75-2503 is void for vagueness. They claim that the statutory language is so indefinite that one cannot determine exactly what acts are prohibited. The Supreme Court, in *Long* v. *State*, 284 Ark. 21, 660 S.W.2d 668 (1984), ruled that neither subsection (a) nor (b) was unconstitutionally vague. Discussing the question at length, the court said:

> Both the Fourteenth Amendment to the United States Constitution and article 2, section 8 of the Arkansas Constitution declare that no person shall be deprived of life, liberty or property without due process of law. It has been recognized for over 80 years that due process requires some level of definiteness in criminal statutes. Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv.L.Rev. 77, fn. 2 (1948). Due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. *State* v. *Bryant*, 219 Ark. 313, 241 S.W.2d 473 (1951); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67, 68-69 (1960), Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv.L.Rev. 77-78 (1948).
>
> Subsection (a) of § 75-2503 meets both requirements. First, it gives a fair warning of the prohibited conduct. Due process requires only fair warning, not actual notice. *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). The standard is the same in Arkansas. *Trice* v. *City of Pine Bluff*, 279 Ark. 125, 129, 649 S.W.2d 179 (1983).
>
> The word 'intoxicated' is described in another subsection, § 75-2502(a) as:
>
> > (a) 'Intoxicated' means influenced or affected by the ingestion of alcohol, a controlled substance, or a

> combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

The definition of 'intoxicated' fairly warns a person of ordinary intelligence that he is in jeopardy of violating the law if he drives a motor vehicle after consuming a sufficient quantity of alcohol to alter his reactions, motor skills and judgment to the extent that his driving constitutes a substantial danger to himself or others. The warning is sufficient to pass constitutional muster. The Constitution does not require impossible standards of specificity and a statute is sufficiently clear if its language conveys sufficient warning when measured by common understanding and practice. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *Davis* v. *Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979).

Second, a law is held to be vague when it leaves the police or the factfinder free to decide, without a fixed standard, what is prohibited. *Trice* v. *City of Pine Bluff*, 279 Ark. 125, 649 S.W.2d 179 (1983). The definition of intoxicated, set out in § 75-2502(a), is a sufficient standard for police enforcement and for ascertainment of guilt. We hold that § 75-2503(a) of the act is not unconstitutionally vague.

Under the second subsection, § 75-2503(b), intoxication is not an element of the offense. Driving with a blood alcohol content of .10% or more is the prohibited act. Stated differently, it is a violation per se to drive with a blood alcohol content of .10% or more. We have also held this subsection is not unconstitutionally vague. *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984).

On both counts, then, the Supreme Court has declared that § 75-2503 passes constitutional muster with respect to the issue of vagueness.

For their third point, appellants argue that subsection (b) of § 75-2503 deprives them of the presumption of innocence by shifting the burden of proof to the defendant and creating an

"irrebuttable presumption" of guilt. In *Lovell* v. *State, supra*, the Supreme Court stated explicitly that subsection (b) "does not lessen the state's burden of proof. Each defendant is presumed innocent until the state proves beyond a reasonable doubt that he is guilty of committing the prohibited act of driving with .10% or more alcoholic content in the blood." This argument is therefore without merit.

Appellants, in their fourth point, contend that their constitutional right to confront witnesses against them was violated by the failure of the police to preserve the breath samples taken from them. The Arkansas Supreme Court considered this argument in *Southern* v. *State*, 284 Ark. 572, 683 S.W.2d 933 (1985), and rejected it. The court noted:

> In *Redman* v. *State*, 265 Ark. 774, 580 S.W.2d 945 (1979), we held that neither the Sixth Amendment to the U.S. Constitution nor Article 2, § 10, of the Arkansas Constitution guaranteed the right to confront physical evidence as opposed to witnesses. If the appellant's citation to the Fifth Amendment to the U.S. Constitution was intentional and their argument is that the state's inability to present the breath samples was a deprivation of due process of law, (more properly argued by citing the Fourteenth Amendment) that argument was clearly answered in *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984), citing *California* v. *Trombetta*, ___ U.S. ___, 104 S.Ct. 2528 (1984).

Appellants argue in their fifth point that §§ 8, 9, and 13 of the Act, codified at Ark. Stat. Ann. §§ 75-2508, 75-2509, and 75-2511 (Supp. 1983), violate the doctrines of prosecutorial discretion and separation of powers. These sections, they say, remove from prosecutors and courts the power to reduce charges, to place a first offender on probation prior to an adjudication of guilt, and to deal with the suspension or revocation of the operator's license. The central part of the argument is that, under the Omnibus DWI Act, decisions made in the past by prosecuting attorneys and judges are now made by the arresting officer.

In two recent opinions, *Southern* v. *State*, *supra*, and *Sparrow* v. *State*, 284 Ark. 396, 683 S.W.2d 218 (1985), the Supreme Court responded to the separation of powers issue by

restating the fundamental principle that "it is for the legislative branch of a state or [the] federal government to determine the kind of conduct that constitutes a crime and the nature and extent of the punishment which may be imposed." Hence, the legislature was not placing prosecutorial or judicial power in the hands of the police by enacting the challenged law, but was instead assuming its constitutional responsibility.

Finally, appellants urge that the presentence screening and assessment report on the defendant required by Ark. Stat. Ann. § 75-2506 (Supp. 1983) violates their right against compulsory self-incrimination. The Arkansas Supreme Court succinctly disposed of this argument in *Janes* v. *State*, 285 Ark. 279, 686 S.W.2d 783 (1985): "The act does not require a defendant to take any action whatever in response to the State's proof or to the presentence report; so obviously there is no compulsory self-incrimination."

None of the arguments raised by appellants has merit. The judgments against them are therefore affirmed.

CRACRAFT, C.J., and MAYFIELD, J., agree.

A.O. SMITH-INLAND, Inc. *v.* Clark A. DODD, and SECOND INJURY FUND

CA 84-424 690 S.W.2d 367

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1985

Shackleford, Shackleford & Phillips, P.A., for appellant.

Phillip K. Kinsey and *Orville C. Clift*, for appellee Dodd.

Steve Clark, Att'y Gen., by: *David S. Mitchell*, for appellee Second Injury Fund.

DONALD L. CORBIN, Judge. Appellant, A.O. Smith-Inland, Inc., appeals from a decision of the Workers' Compensation Commission wherein the Commission determined that the Second Injury Fund had no liability for the payment of compensation benefits. We affirm.

Two questions are raised by this appeal. Appellant contends that Ark. Stat. Ann. § 81-1313(i) as amended by Act 253 of 1979 should be construed to apply to permanent disabilities occurring after January 1, 1981, and that the Commission erred in holding that this statute applied only to injuries occurring after January 1, 1981. Secondly, appellant argues that Ark. Stat. Ann. § 81-1313(i) impliedly amended Ark. Stat. Ann. § 81-1313(f)(1).

The record reflects that appellee Clark A. Dodd commenced his employment with appellant in April 1968. He worked in various capacities without incident until August 26, 1971, at which time he was carrying one end of a bundle of pipes weighing approximately 500 pounds and two men on the other end dropped their end, putting severe stress on appellee and causing an injury to his low back. Appellee was treated conservatively for his injury by Dr. Harold Chakales, who diagnosed a bulging at the L4, 5 and 6 levels. Dr. Chakales rated appellee as having a 15% disability to the body as a whole. At a hearing before an Administrative Law Judge, appellee was awarded an additional 5% wage loss disability by opinion filed May 17, 1974. Appellee returned to work with a 50-pound weight restriction which restriction was later removed by Dr. Chakales.

In September 1979 appellee sustained an injury to his cervical spine in the C6-7 level while in the process of having several eye teeth removed by his dentist. After a period of conservative treatment by Dr. David Reding, a posterior cervical laminectomy at the C6-7 level was performed. No permanent partial disability was assessed and appellee eventually returned to work for appellant in its return merchandise area. On October 10, 1980, appellee felt a tearing muscle sensation in his cervical area or neck while in the process of unloading a 16-inch flange pipe

from a crate. He was referred by the company physician at his request to Dr. David Reding. A myelogram was performed and a defect was discovered at the C5-6 level. Surgery was performed in January 1981, and appellee was released by Dr. Reding on July 27, 1981, with restrictions which included a 20-pound weight restriction and standing and walking for no more than 4 to 6 hours per day. A 10% permanent partial disability rating to the body as a whole was assigned on December 15, 1981, as a result of the injury. No apportionment was made between the dental injury which necessitated surgery and the on-the-job injury of October 10, 1980, which also required surgery.

Appellee returned to work for appellant on July 27, 1981, as a tool crib attendant. He testified he did pickup and delivery work and worked in the office. Appellee stated that his condition worsened in December 1981 and he could no longer stand the pain. He returned to Dr. Reding who prescribed pain medication and outpatient physical therapy. Appellee was subsequently admitted to the hospital in July 1982 and a myelogram was performed. Intensive outpatient physical therapy was again recommended along with a 10-pound weight restriction.

Upon appellee's return to his employment on July 19, 1982, he was informed that no work was available to him with the 10-pound weight restriction and was placed on sick leave. Appellee returned to his place of employment on a monthly basis thereafter requesting a sick leave form to continue his sick leave benefits.

By opinion dated September 27, 1983, the Administrative Law Judge determined among other things that appellee was currently totally disabled since July 28, 1982, as a result of his October 10, 1980, injury. Appellee was found to be entitled to a vocational rehabilitation evaluation and an independent medical examination and evaluation for a second opinion as to the extent of permanent physical impairment. Furthermore, the ALJ determined that the issues of vocational rehabilitation, permanent disability and Second Injury Fund liability would be reserved for future determination.

Appellant appealed the decision of the ALJ to the Full Commission which reversed and vacated the ALJ's finding and award of current total disability benefits and the corresponding award of attorney's fees. The Commission ruled that Ark. Stat. Ann. § 81-1313(i) did not apply retroactively to the claim and,

accordingly, since appellee's claim occurred on October 10, 1980, Ark. Stat. Ann. § 81-1313(i) did not apply. Appellant also argued on appeal to the Commission that there was a conflict between Sections 13(f)(1) and 13(i) and, accordingly, it was apparent that section 13(i) as amended impliedly repealed section 13(f)(1). The Commission rejected this argument. Appellant appeals from that portion of the opinion and order of the Commission finding that the Second Injury Fund was not responsible for payment of benefits to appellee.

In its first assignment of error, appellant argues that Ark. Stat. Ann. § 81-1313(i) as amended by Act 253 of 1979 applies to injuries occurring before January 1, 1981. Appellant admits this statute was not in effect at the time of appellee's second on-the-job injury of October 10, 1980, and makes no argument that the statute should be applied retroactively. Rather, appellant contends that § 81-1313(i) applies to disabilities sustained after January 1, 1981, and bases this contention upon the language in the first sentence of § 81-1313(i) which provides:

> (1) Commencing January 1, 1981, all cases of permanent disability where there has been previous disability or impairment shall be compensated as herein provided.

Appellant alleges that the Commission's finding that in order to come within the provisions of the Second Injury Fund as amended it was necessary that the injury occur after January 1, 1981, is contrary to the plain wording of the amendment. This argument is without merit and overlooks a fundamental problem associated with effective dates of the applicable Second Injury Fund legislation. The only provision or subsection of Ark. Stat. Ann. § 81-1313(f) giving rise to Second Injury Fund liability before January 1, 1981, is § 81-1313(f)(2)(iii), which applies to narrow and limited situations involving consecutively sustained and specifically enumerated scheduled injuries, i.e., the loss of "one hand, one arm, one foot, and one leg, or one eye." This statute was later amended as § 81-1313(i) by Act 253 of 1979 effective January 1, 1981, and by Act 290 of 1981 effective March 3, 1981. Act 253 of 1979 expanded the scope of the fund to include all previously disabled employees sustaining a second injury on the job. This amendment was in effect for only two months as Act 290 of 1981 amended the statute effective immediately.

We hold that the Commission properly found that §

81-1313(i) did not apply as appellee's injury occurred on October 10, 1980, and the amended version of § 81-1313(f)(2)(iii) was not effective until January 1, 1981. Section 81-1313(f)(2)(iii) was applicable to this claim which limited Second Injury Fund liability to specifically enumerated scheduled injuries. All of appellee's injuries were unscheduled whole body injuries.

Appellant alleges in his second assignment of error that Ark. Stat. Ann. § 81-1313(i) as amended impliedly repealed § 81-1313(f)(1) as there is a conflict between these statutes and that the Second Injury Fund is responsible for increased disability benefits. We do not find it necessary to address this argument, which the Commission rejected, as we have previously held that § 81-1313(i) is not applicable to this case.

Affirmed.

COOPER, J., agrees.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I concur. The primary issue is whether Ark. Stat. Ann. § 81-1313(i), as amended by Act 253 of 1979 (the Second Injury Fund), applies to "injuries" sustained after January 1, 1981, or whether it applies to "disabilities" sustained after January 1, 1981. The Commission held the injury had to occur after January 1, 1981, and I agree. Here, appellee sustained his compensable injury on October 1, 1980, and therefore the Second Injury Fund law does not apply. In *Harrison Furniture* v. *Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981), our Court determined that the Second Injury Fund law did not apply to an injury that occurred prior to its effective date, January 1, 1981. I agreed with that determination then and still do. Because I believe the provisions in § 81-1313(i) center upon when the claimant sustains his or her injury, not when the amount of impairment is established, I agree to affirm the Commission's decision.

Samuel Bruce BAGGETT, Jr. *v.* STATE of Arkansas

CA CR 84-217 690 S.W.2d 362

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1985

Robert E. Garner, for appellant.

Steve Clark, Att'y Gen., by: *Clint E. Miller*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant Samuel Bruce Baggett, Jr., was tried before a Jefferson County jury on August 8 and 9, 1984, and found guilty of interference with custody in violation of Ark. Stat. Ann. § 41-2411 (Repl. 1977), and sentenced to the Arkansas Department of Correction to a term of 3½ years and fined $5,000. We affirm.

Appellant failed to deliver his minor son to the Warren City Police Station in Bradley County on July 25, 1982, pursuant to the requirements of the terms of a custody decree issued by the Jefferson County Chancery Court. The mother (custodial parent) was to pick up and return the child to the custodial residence in Jefferson County.

On July 28, 1982, a felony information was filed in Jefferson County Circuit Court charging appellant with interference with custody, a violation of Ark. Stat. Ann. § 41-2411.

On August 6, 1982, the Chancery Court of Jefferson County entered the following ex parte order:

> The Court finds that the defendant, Bruce Baggett, is guilty of contempt of court as of July 25, 1982, for not

> returning the child of the parties to the plaintiff at the Warren Police Station as previously ordered. He is hereby sentenced by this court to the Jefferson County Jail for a period of ninety (90) days and a fine of $1,000.00 is hereby levied against him. The Court will consider remitting part of the monetary fine and jail sentence upon proper application by the defendant if made within five (5) days after this order is brought to the defendant's attention as proven by the greater weight of the evidence. The Court further finds that in the event the defendant does not return the child to the plaintiff within five (5) days after notice of this court's finding, an additional fine of $100.00 per day is hereby levied for every day until the child is returned to the petitioner. The Court will consider additional incarceration as well.

The child, with his father, was found by the F.B.I. in Nashville, Tennessee, on August 3, 1983.

I.

APPELLANT ALLEGES IN HIS FIRST CONTENTION FOR REVERSAL THAT HIS EARLIER CONTEMPT FINDING BY THE JEFFERSON COUNTY CHANCERY COURT PROHIBITED THE SUBSEQUENT FELONY PROSECUTION BY THE JEFFERSON COUNTY CIRCUIT COURT FOR INTERFERENCE WITH CUSTODY BECAUSE IT PLACED HIM IN DOUBLE JEOPARDY.

Both the Arkansas and United States Constitutions prohibit placing a person twice in jeopardy for the same offense. Ark. Const. art. 2, § 8; U.S. Const. amend. 5. In *Decker* v. *State*, 251 Ark. 28, 471 S.W.2d 343 (1971), the Arkansas Supreme Court stated that the test of double jeopardy is not whether a defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense, and where two statutes are intended to suppress different evils, conviction under one will not preclude prosecution of the other.

Both appellant and the State agree that if the Jefferson County Chancery Court's contempt proceeding of August 6, 1982, was civil in nature, there would be no former jeopardy

defense to appellant's prosecution for interference with custody in the Jefferson County Circuit Court. The State argues that the chancery contempt proceeding was civil in nature. Appellant argues just as vigorously that it was civil and criminal in nature and if it was criminal, then double jeopardy would have been a defense.

Shillintani v. *U.S.*, 384 U.S. 364 (1966), provides the following test to determine if contempt findings are civil or criminal in nature - "What does the court primarily seek to accomplish by imposing sentence?" The Arkansas Supreme Court in *Dennison* v. *Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974), stated that: "If the main purpose is to punish in order to maintain the dignity, integrity and authority of, and respect towards the court, then the contempt is criminal in nature." A later case, *Ward* v. *Ward*, 273 Ark. 198, 617 S.W.2d 364 (1981), stands for the same principle. *Ward, supra*, also noted that civil contempt proceedings are intended to protect and enforce the rights of private parties by compelling obedience to court orders and decrees. We agree with the parties' conclusion that criminal contempt *punishes* whereas civil contempt *coerces*.

When faced with the question of whether a contempt proceeding was civil or criminal in nature, some jurisdictions have utilized the approach of determining whether the act giving rise to the contempt proceeding was committed in the presence of the court (direct) or committed outside the presence of or away from the court (indirect). Indirect criminal contempt proceedings have been held in a majority of jurisdictions to bar, on double jeopardy grounds, subsequent criminal prosecutions which are based on the same facts. *State* v. *Thompson*, 294 Or. 528, 659 P.2d 383 (1983), (contempt charge imposed on defendant for entering neighbor's land after having been enjoined from doing so in property dispute); *People* v. *Holmes*, 11 Ill. App. 3d 498, 368 N.E.2d 1106 (1977), (defendant violated protective order entered pursuant to divorce complaint enjoining him from accosting or molesting his wife and although he was not punished in contempt proceeding, this did not preclude finding of double jeopardy in subsequent criminal prosecution for armed violence based upon same acts which were previously subject of contempt hearing); *Maples* v. *State*, 565 S.W.2d 202 (Tenn. 1978), (summary criminal contempt finding against defendant as a result of an admittedly fraudulent divorce proceeding which

defendant instituted in chancery court and in which he gave false testimony did not prevent subsequent criminal prosecution for perjury based on same conduct under principle of double jeopardy).

Other courts have permitted a subsequent criminal prosecution based upon the same facts as the criminal contempt when the criminal contempt was direct. *U.S.* v. *Mirra*, 220 F.Supp. 361 (S.D.N.Y. 1963), (constitutional prohibition against double jeopardy did not prevent prosecution of defendant, who hurled witness' chair at assistant U.S. attorney and who was summarily held in contempt, for assault).

Appellant relies principally upon *State* v. *Hope*, 449 So.2d 633 (La. Ct. App. 1984). There, the Court of Appeals of Louisiana did not address the question of whether the acts constituting contempt were direct or indirect. The defendant picked up his minor child from the residence of the mother (custodial parent) for weekend visitation. He left the state with the child and did not return the child to the mother until approximately five months later. The defendant was found guilty of criminal contempt on the citation by the mother and was sentenced to ten days in jail. After serving that sentence, defendant was charged with simple kidnapping. In holding that the subsequent kidnapping prosecution would place the defendant in double jeopardy, the Louisiana Court of Appeals first determined that the contempt proceeding was criminal in nature, utilizing the test enunciated in *Shillitani, supra*. In making this determination, the court noted that the defendant was not given a choice between complying with the court's orders or going to jail. The court stated that the primary purpose of the order was to punish the defendant for his non-compliance with previous orders of the court although the ten-day jail sentence may have had the effect of compelling him into complying with future court orders. The court next addressed the question of whether the trial on the kidnapping charge would expose the defendant to double jeopardy, utilizing the "Blockburger" test, i.e., whether each statute required proof of an additional element which the other did not. *Blockburger* v. *U.S.*, 284 U.S. 299 (1932). The "same evidence" test was also used by the Louisiana Court of Appeals. That test provides that if the evidence required to support a finding of guilt of one crime would also have supported conviction of the other, the two are the same offense under a plea of double jeopardy, and

a defendant can only be placed in jeopardy for one. *State* v. *Steele*, 387 So. 2d 1175 (La. 1980). It was noted by the court that the "same evidence" test was somewhat broader in concept than the "Blockburger" test.

The Louisiana Court of Appeals applied the above tests holding that:

> In the instant case, the evidence necessary to convict defendant of the first offense (contempt of court) would not have been sufficient to convict defendant of the second offense (simple kidnapping). The contempt charge only required proof that defendant willfully disobeyed a lawful order of the court. The simple kidnapping charge required proof that defendant took the child out of the state, from the custody and without the consent of the legal custodian, with the intent to defeat the jurisdiction of the court. However, the proof necessary to convict defendant of the simple kidnapping charge would have been sufficient to convict defendant of the contempt charge. We therefore conclude that the two offenses are the same under the 'same evidence' test and that trial of defendant on the simple kidnapping charge would have the effect of placing defendant twice in jeopardy for the same course of conduct.

We agree with appellee that *State* v. *Hope, supra*, is not controlling and is distinguishable. There, the child had been returned to the custodial parent before the defendant was found in contempt. The defendant was personally before the court after the missing child had been returned to the custodial parent. There was no need to coerce the defendant as the child had already been returned to the custodial parent. The defendant had served the ten days of jail time pursuant to the contempt order prior to being charged with simple kidnapping. Finally, the court in *State* v. *Hope, supra*, made the initial determination that the former contempt proceeding was criminal in nature.

In the case at bar, the child had not been returned to the custodial parent at the time the Jefferson County Chancery Court issued its contempt order as was the case in *State* v. *Hope*, *supra*. The abstract of the record does not indicate when or if appellant was given notice of the chancery contempt order. Our

review of the transcript, however, reveals one occasion at which time appellant may have received notice of the contempt order. This may have occurred when he was served with the felony information upon his return to Arkansas. The record does not establish that appellant has ever paid any part of the fine or served a day in jail pursuant to the provisions of the ex parte contempt order nor that he has to this day appeared before the chancellor to determine whether the ex parte contempt order should be made permanent.

In *Dennison* v. *Mobley, supra*, appellants sought review of a Faulkner Chancery Court order holding them in contempt for violation of a previous order of that court relating to the custody of their three-year-old granddaughter. The chancery court found that appellants had failed to return the child after a three-hour visitation and that appellants had aided and abetted their son from returning the child. The Arkansas Supreme Court sustained that part of the chancery court's order holding appellants in criminal contempt and quashed the part holding them in civil contempt.

The Court in *Dennison, supra*, stated:

> The chancellor's findings and the punishment mated [sic] out, particularly when considered along with his opening and closing admonitions, clearly indicate that he considered the proceeding as one for both civil and criminal contempt in the light of such cases as *Songer*. The $100 fine and three days' jail sentence, characteristic of punishment for criminal contempt, were in addition to the civil contempt penalty obviously calculated to bring about compliance with the custody order, i.e., the fine of $100 per day and a commitment to jail until the child was returned to her mother.

The material language of the contempt order was as follows:

> 4. That the Court finds and hereby levies a fine of $100 to be placed upon Charles and Modelle Dennison jointly. Also, a $100 a day fine, per day, until said child, Jessica Lynn Dennison is returned to the jurisdiction of this Court and to the above named plaintiff, Pearlie Mae Dennison. That said Charles and Modelle Dennison are to remain in jail until said child is returned to this Court and that in

addition to the time they are in jail an additional three (3) days is to be served by Charles and Modelle Dennison.

In the instant case appellant contends the Jefferson County Chancery Court contempt order is of civil and criminal connotation. He further argues that the civil portion involved the fine of $100 per day and additional incarceration for each day the child was not returned and that the criminal portion concerned the 90-day sentence in jail and fine of $1,000. Appellee contends on the other hand that the Jefferson County Chancery Court exercised its contempt power civilly on August 6, 1982, to coerce appellant to return the child to his mother.

It is apparent that there is an additional element in the contempt order in the case at bar which was not present in the *Dennison* order. Here, the chancery judge used the additional language following the 90-day jail sentence and the $1,000 fine, to wit: "The Court will consider remitting part of the monetary fine and jail sentence upon proper application by the defendant if made within 5 days after this order is brought to the defendant's attention as proved by the greater weight of evidence." We believe this additional language clearly established the intent of the order as being coercive. Accordingly, we hold that the Jefferson County Chancery Court contempt order was civil in nature and that there was no former jeopardy defense by appellant as to his subsequent prosecution for interference with custody by the Jefferson County Circuit Court.

The chancellor obviously utilized every weapon in his arsenal in an effort to enforce the rights of a party, i.e., the right of the mother to the custody of the child. Had appellant ever appeared before the chancellor subsequent to the return of the child and been incarcerated and fined, or should the chancellor seek to punish appellant following this conviction for interference with custody, we might reach a different result. See, *Ex Parte Englutt*, 619 S.W.2d 279 (Tex.Civ.App. 1981). We view the contempt action in the chancery court here as being entirely different in purpose than that of the criminal action for interference with custody and that to determine otherwise would greatly hamper the day-to-day enforcement of the rights of individuals by the chancery courts in this State. Furthermore, to permit a defendant to escape the consequences of his contumacy via the double jeopardy route would be to countenance a state of affairs

where chancery judges could become ineffectual in enforcing their contempt powers for fear that a contempt conviction used as a means of enforcing the rights of individuals would raise a constitutional bar to a subsequent prosecution of the same act. We find no merit to this assignment of error.

II.

APPELLANT ALLEGES IN HIS SECOND CONTENTION FOR REVERSAL THAT THE TRIAL COURT ERRED IN NOT GRANTING HIS MOTION FOR TRANSFER SINCE JEFFERSON COUNTY DID NOT HAVE VENUE.

Appellant's final point for reversal concerns the trial court's denial of appellant's motion to transfer the case on the basis of lack of venue from Jefferson County to Bradley County.

The record reflects that appellant drove to Jefferson County on July 11, 1982, to pick up the parties' minor child. Appellant emphasizes in his brief that this was done with lawful authority and that he did not consider committing the crime until three days later when served with his ex-wife's petition to terminate visitation at which time appellant and the minor child were in Bradley County. Appellant argues that the crime was committed in Bradley County when he proceeded to leave his home in Warren with the child.

Appellee argues that to prove Jefferson County did not have venue, appellant had to establish that evidence was introduced at trial affirmatively showing Jefferson County lacked venue. Appellee cites Ark. Stat. Ann. § 43-1426 (Repl. 1977), and § 41-110(2) (Repl. 1977), as authority for this proposition. The State submits that no evidence was admitted to this effect and that appellant committed the criminal offense in Jefferson County because appellant's ex-wife's custodial relationship was exercised in Jefferson County. Appellee contends that appellant's argument overlooks the fundamental interest protected by Ark. Stat. Ann. § 41-2411 — appellant's ex-wife's custodial relationship with their son.

The record reflects that at the close of the prosecution's case-in-chief, appellant orally moved that the charges against him be transferred to Bradley County pursuant to Ark. Stat. Ann. § 43-

2123 (Repl. 1977). Appellant argued unsuccessfully to the trial judge that no testimony or evidence had been presented by the State that any offense took place within the jurisdiction of the Jefferson County Circuit Court.

Ark. Const. art. 2, § 10 provides that an accused is entitled to trial by an impartial jury of the county in which the crime was committed. It is presumed that an offense charged was committed within the jurisdiction of the court in which the charge is filed, unless the evidence affirmatively shows otherwise. Ark. Stat. Ann. § 43-1426; *Hill* v. *State*, 253 Ark. 512, 487 S.W.2d 624 (1972). As stated in *Johnson* v. *State*, 254 Ark. 703, 495 S.W.2d 845 (1973), the State does not have to prove the crime was committed in the forum county.

In the case at bar appellant presented his motion to transfer prematurely at the close of the State's evidence. Pursuant to the above authority, the State was not required to put on proof that the interference with custody charge was committed in Jefferson County as the information stated that the crime was committed therein and venue was presumed proper unless there was affirmative evidence to the contrary. The record reflects that there was no such evidence at this stage in the proceedings and, accordingly, the trial court did not abuse its discretion in denying appellant's motion to transfer. While admittedly appellant may have put on some proof following his motion to transfer to the effect that he did not consider committing the crime until he returned to Bradley County and that he fled from that county with the child, our independent review of the record reveals that appellant did not at any subsequent time during the course of the trial renew his motion to transfer. We find no merit to this assignment of error.

Affirmed.

CRACRAFT, C.J., and MAYFIELD, J., agree.

ARKANSAS KRAFT VENDORS and GEORGIA CASUALTY COMPANY *v.* Donald HORTON

CA 85-18 690 S.W.2d 370

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1985
[Rehearing denied June 26, 1985.]

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellant.

The Haskins and Hendricks Law Firm, by: *Robert R. Cortinez*, for appellee.

TOM GLAZE, Judge. This is an appeal by Georgia Casualty Insurance Company (Georgia Casualty) and Arkansas Kraft Vendors (Kraft) from the November 8, 1984, decision of the Workers' Compensation Commission. The Commission held that Georgia Casualty's insurance policy No. WC 968251 (Policy) was in effect at the time of the injury, was issued to Randy Olson as a member of a class of individuals, and provided coverage for injuries received by Donald Horton, Olson's employee.

The Policy listed the named insured as "vendors while cutting wood for Arkansas Kraft and Pinecrest Lumber Company, Morrilton, Arkansas." Olson, a vendor for Kraft, applied for workers' compensation coverage under this Policy, and following acceptance, Kraft withheld the premium from his proceeds. The premium was $35.00 a month plus $.94 per cord of wood delivered to Kraft. Olson was never provided a copy of this Policy.

On March 23, 1983, Donald Horton, appellee, was injured while working for Olson. At the time of the injury, Olson was hauling a load of wood for Southern Wood Products Company (Southern Wood), which is not connected with Kraft. The injury occurred on Southern Wood's premises. Horton was denied workers' compensation benefits on the grounds that he was not working for Kraft at the time of the accident. It is not disputed that the Policy was in effect at the time of the injury or that

Horton incurred an injury arising out of and in the scope of his employment.

The Administrative Law Judge found that the Policy, when construed in its entirety, was ambiguous and open to two reasonable interpretations. He determined that the phrase "while cutting wood for Arkansas Kraft," in light of the exclusionary clause, could mean either the time period during which the vendor was under contract to cut wood for Kraft or that the particular load of wood must be for Kraft. The exclusion provides that workers' compensation coverage does not apply to any operations conducted at or from any work place not described under Items 1 (vendors while cutting wood for Arkansas Kraft) or 4 (covering logging or lumbering and drivers in Arkansas or Oklahoma) of the declarations if the insured is a qualified self-insurer or has other workers' compensation insurance. Construing the Policy against the insurer, the Administrative Law Judge found the named insured clause, "while cutting wood for Arkansas Kraft," meant during the time period a vendor was under contract to Kraft, held Horton was covered under the Policy, and ordered Georgia Casualty to pay him. Upon appeal to the Workers' Compensation Commission, the Commission affirmed and adopted the opinion of the Administrative Law Judge.

The Workers' Compensation Commission has jurisdiction to determine questions concerning an employer's insurance policy, including the extent of coverage, when they are ancillary to a determination of the claimant's rights. *Great Central Insurance Co.* v. *Mel's Texaco*, 8 Ark. App. 236, 240, 651 S.W.2d 101, 103 (1983). We must affirm the decision of the Commission if we find any substantial evidence to support it. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 263, 663 S.W.2d 196, 200 (1984). We are required to review the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the Commission's findings. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981).

In this appeal, appellants challenge the Commission's findings that the phrase, "vendors while cutting wood for Arkansas Kraft", was ambiguous and that Horton was a named insured under the Policy, engaging in covered activity. We must agree.

Olson, appellee's employer, testified that it was customary to carry a separate workers' compensation policy with each com-

pany he hauled logs for, and if he was hauling wood for two different companies on the same day, he would ask the company he was hauling for at the time of an accident to pay workers' compensation. He further testified that he understood the Policy covered his men anytime they were working for Kraft, but acknowledged that the premium he paid varied with the amount of wood sold to Kraft. The more wood he sold Kraft, the higher the premium.

An insurance policy must be construed to provide coverage, unless it is patently unreasonable to do so. *Insured Lloyds Insurance Co.* v. *Arkansas Truck Parts, Inc.*, 13 Ark. App. 165, 169, 681 S.W.2d 403, 406 (1984). In considering the circumstances of this case, we believe it is patently unreasonable to construe the Policy to extend to any logging operation carried on by the vendor for another company while under a contract to haul wood for Kraft. Such a construction leads to illogical and unreasonable results. For example, let us assume a vendor covered under this Policy had a contract to haul one load of pulpwood a month for Kraft and fifty loads a month for B Company through which he had not obtained workers' compensation insurance. Under these facts, Kraft's insurer, Georgia Casualty, would be liable for any accident incurred while the vendor was hauling wood for B Company, even though the vendor only paid Georgia Casualty the bare minimum in premiums. In construing the Policy in this manner, the Commission effectively reads out the clause providing for the escalating premium, and ignores the intentions of the parties in providing and obtaining separate policies with each company for which the vendor hauled.

The exclusionary clause, upon which the Commission places great reliance, must be construed in light of the whole Policy, including the phrase "while cutting wood for Arkansas Kraft." *See Continental Casualty Co.* v. *Davidson*, 250 Ark. 35, 41, 463 S.W.2d 652, 655 (1971). This clause can be reasonably construed as providing workers' compensation coverage if a vendor were logging or hauling wood for Kraft in a location other than Arkansas or Oklahoma, and if he had no other applicable insurance. Construing it in this manner gives effect to the exclusionary clause, the named insured clause ("while cutting wood for Arkansas Kraft"), and the provision for a premium which varies, depending on the amount of wood sold to Kraft. The Commission's construction effectively precludes the named in-

sured clause and the premium clause from having any correlatable meaning. When one construction of a policy excludes certain provisions and another gives effect to all provisions, the construction giving effect to all provisions is the one to be adopted. *Davidson*, 250 Ark. at 41. The policy must be construed in a "common sense" manner so as to give effect to the intentions of the parties. *State Farm Mutual Automobile Insurance Co.* v. *Pennington*, 215 F. Supp. 784, 789 (E.D. Ark. 1963). Furthermore, an insurance policy will not be construed and extended to provide coverage for a risk the policy plainly excludes, and for which the insurer has not been paid. *Baskette* v. *Union Life Insurance Co.*, 9 Ark. App. 34, 652 S.W.2d 635 (1983); *accord, Snow* v. *Travelers Insurance Co.*, 12 Ark. App. 240, 674 S.W.2d 943 (1984). The Commission, by extending coverage to a risk not covered by the Policy and for which Georgia Casualty was not paid, did not construe the Policy in a common sense manner. Therefore, we must reverse.

The Commission's holding that the Policy provision, "while cutting wood for Arkansas Kraft," violates the spirit and intent of Ark. Stat. Ann. § 81-1338(c) (Repl. 1976) is also clearly erroneous. While § 81-1338(c) is deliberately broad in scope and is intended to require coverage of the employer's "entire liability" to his employees, *Southern Farm Bureau Casualty Insurance Co.* v. *Tuggle*, 270 Ark. 106, 110, 603 S.W.2d 452, (Ark. App. 1980), it is our opinion that the Policy in the case at bar fulfills the statute's requirements. We find that it provides coverage for the employer's "entire liability" while hauling wood for Kraft.

There being no substantial evidence to support the holdings of the Commission, we reverse and remand.

Reversed and remanded.

COOPER and CORBIN, JJ., agree.

SYNERGY GAS CORP. *v.* H.M. ORSBURN & SON, INC.

CA 85-110 689 S.W.2d 594

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1985
[Rehearing denied June 19, 1985.]

Hoover, Jacobs & Storey, by: *Victor A. Fleming*, for appellant.

Bullock & McCormick, by: *William R. Bullock*, for appellee.

TOM GLAZE, Judge. This appeal involves a lease agreement between Synergy Gas Corporation (Synergy) and H. M. Orsburn & Son, Inc., (Orsburn). Synergy contends the chancellor erred in finding that Synergy failed to exercise its option to extend its lease and that it could have exercised the option to purchase contained in the lease only during a validly effected extension of the lease. The chancellor further held the option to purchase was void under the rule against perpetuities. We affirm.

On September 11, 1972, Orsburn and Sun Oil Company entered into a lease for real property for a primary term beginning January 1, 1973, and ending January 1, 1983. This lease provided for rent of $150.00 per month. On December 14, 1981, the lease was assigned to Synergy. The lease contains the following pertinent clauses:

Paragraph 3:

> Lessor hereby grants unto Lessee the continuing option of extending the primary term of this lease for four (4) additional separate periods of five (5) years each, at the same rental and upon the same terms and conditions as the primary term, said options to be exercised as to each such

> extension period only by written notice to Lessor *at least thirty (30) days prior to the expiration of the primary term* hereof or the current extension period . . . (Emphasis added.)
>
> *Paragraph 4*:
>
> Lessor hereby grants to Lessee the exclusive right, at Lessee's option, to purchase the demised premises . . . *at any time after the primary term* of this lease *or at any time during the extension* or renewal periods thereof, (a) for the sum of Eighteen Thousand Dollars ($18,000.00); . . . (Emphasis added.)

Paragraph 15 of the lease is also relevant and provides that all notices given under the lease shall be effective if sent by registered mail. It further provides that the date of service shall be the date the notice is deposited in the post office.

Synergy gave notice, by a registered letter postmarked December 3, 1982, that it was exercising its option to extend the lease from January 1, 1983, to January 1, 1988. On December 6, 1982, H. M. Orsburn wrote Synergy, stating that, as he had not heard from Synergy, he assumed that Synergy did not want to extend the lease and the lease would be cancelled. On December 15, 1982, Mr. Orsburn wrote Synergy informing it of the receipt of Synergy's letter postmarked December 3, 1982, and stating that, because the letter provided less than the thirty-days notice required by the lease, all options to re-lease or purchase were cancelled. Mr. Orsburn further informed Synergy that he would consider negotiating a new lease.

From January through March, 1983, Synergy remitted and Orsburn accepted $150.00 a month as rent. From April through December, 1983, Synergy remitted and Orsburn accepted $400.00 a month as rent. Negotiations for a new lease took place during this time, but none was ever signed.

On December 13, 1983, Synergy sent by registered mail a letter purporting to exercise the option to purchase the property for $18,000, the figure specified in the lease. Mr. Orsburn refused to honor this purported exercise of the option and, on December 22, 1983, wrote Synergy that its "month-to-month tenancy is terminated and cancelled." In January 1984, Synergy submitted

$150.00 to Orsburn as final lease payment under its purported exercise of the option, which Orsburn refused to accept. Synergy then brought a suit for specific performance of the option to purchase, which the chancellor denied.

Synergy first contends that the chancellor erred in holding that the extension of the lease was invalid because Synergy failed to give thirty-days notice. We must affirm the chancellor's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. *Integon Life Insurance Corp.* v. *Vandegrift*, 11 Ark. App. 270, 669 S.W.2d 492 (1984). Daniel M. Schientag, Vice-President of Synergy, testified that the notice was mailed on December 3, 1982, which, counting both the third of December and the first of January, constituted exactly thirty days. Synergy argues the chancellor erred when he relied on Ark. Stat. Ann. § 27-130 (Repl. 1979) and refused to count both December 3rd and January 1st. Synergy's contentions cannot be sustained under either the law or the plain language of the contract. In *Gregory* v. *Walker*, 239 Ark. 415, 389 S.W.2d 892 (1965), our Supreme Court held that, while nationwide there is no absolute rule as to the computation of time in situations involving landlords and tenants, in Arkansas the rule is "that, in the computation of time, the first day is to be excluded, and the last day, included." 239 Ark. at 417-18. The court further stated that this rule is in keeping with § 27-130 (requiring that, when computing the time between two acts, only one of the days, either the date of the first *or* the last act, may be counted). 239 Ark. at 418. Furthermore, the plain language of Paragraph 3 of the lease in this case provides that notice must be given "at least thirty (30) days *prior* to the expiration of the primary term." (Emphasis added.) While Synergy argues this means prior to January 2, 1983, both W. E. Morris, the representative of the original lessee and primary drafter of the lease, and H. M. Orsburn, the original lessor's representative, testified that they construed Paragraph 3 to mean prior to January 1, 1983. In *Schnitt* v. *McKellar*, 244 Ark. 377, 385-6, 427 S.W.2d 202, 207 (1968), the Supreme Court stated the construction that the parties have placed on a contract is entitled to great weight in interpreting it. Under applicable law and the facts of this cause, we believe the chancellor correctly determined that Synergy would need to have given notice on the first of December in order to have met the thirty-days notice require-

ment of the lease.

Synergy argues that, because the lease is a long-term lease, it should not be held to a strict count of days, citing *Riverside Land Co.* v. *Big Rock Stone & Material Co.*, 183 Ark. 1061, 40 S.W.2d 423 (1931). However, in *Riverside Land Co.*, the court, acknowledging that the giving of notice was a condition precedent to the extension of the lease, found the *lessor had waived* the lessee's failure to give notice of the extension by accepting rent, without any objection, for over a year, before the lessee gave notice of its desire to extend the lease. 183 Ark. at 1064-7. A new rent was negotiated, the lease continued, and was then assigned to appellee, who had no notice that the extension notice had not been properly given until it tried to exercise a second extension period under the lease. *Id.* Unlike the situation in *Riverside Land Co.*, here we have no hint of a waiver by the lessor, Orsburn. Here, Orsburn promptly gave notice of its intent to hold Synergy to the required notice. Under these facts, the chancellor's holding that the lease was not validly extended is clearly not against the preponderance of the evidence.

Synergy's next contention is that, even if the lease was not extended properly, the chancellor erred in holding that Synergy's attempted exercise of the option to purchase was invalid and that the option could only be exercised during a proper extension of the lease. We note that the chancellor failed to specify his reason for making this particular finding. Nonetheless, because we review equity appeals *de novo*, we will affirm a correct decision of the chancellor if we find the record shows an appropriate reason for affirmance. *Sossamon* v. *Davis*, 271 Ark. 156, 161, 607 S.W.2d 405, 409 (Ark. App. 1980). Under the terms of the lease, it is undisputed that the option could only be exercised after the primary term had expired. Synergy's vice-president, Schientag, testified that he thought Synergy could exercise the option any time thereafter, whether or not the lease was renewed. He believed that the option to purchase was a separate agreement, with a separate consideration.

It is settled Arkansas law that an option to purchase contained in a lease expires when the lease is terminated or rescinded, unless separate consideration is given for the option. *See Cockrum* v. *McCallie*, 253 Ark. 745, 488 S.W.2d 717 (1973); *Hicks* v. *Woodruff*, 238 Ark. 481, 382 S.W.2d 586

(1964); *Smith* v. *Carter*, 213 Ark. 937, 214 S.W.2d 64 (1948). In an option to purchase contained in a lease, time is of the essence, whether the lease explicitly so provides or not. *Carter*, 213 Ark. at 941. The court is without discretion to grant additional time, and the lessee cannot extend the prescribed period merely by holding over and paying rent. *Id.* Synergy contends a separate consideration was given, *viz.* the payment of rent for ten years under the primary term. As we stated before, the court is to give great weight to the construction of the contract given to it by the parties. *See Schnitt, supra.* While Schientag stated he believed separate consideration was given, there was no evidence any was given. Nor can we, as Synergy suggests, read the lease terms to indicate the parties provided or intended a consideration for the option to purchase. The only consideration mentioned in the lease pertains to the $150.00 monthly rental due during the primary lease term of ten years. Consistent with the fact no additional consideration was intended, both Morris and H. M. Orsburn, original parties to the agreement, testified that the option to purchase would expire if the lease was not validly extended. In sum, because the lease fails to provide any independent consideration for the option to purchase, and because the evidence supports a finding that no separate consideration was given, we cannot say the chancellor clearly erred in holding that the option to purchase could only be exercised during a valid extension of the lease.

Because we have upheld the chancellor's finding that the option expired upon Synergy's failure to effectively extend the lease, we need not decide whether the option to purchase violated the rule against perpetuities.

Affirmed.

COOPER and CORBIN, JJ., agree.

Jerry D. AVERY *v.* STATE of Arkansas

CA CR 84-196 690 S.W.2d 732

Court of Appeals of Arkansas
En Banc
Opinion delivered June 5, 1985
[Rehearing denied July 3, 1985.*]

* Cooper and Mayfield, JJ., would grant rehearing.

John F. Gibson, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant was sentenced to a term of five years imprisonment on the charge of theft of property, seven years on burglary, to run concurrently, and eighteen years for attempted rape. Appellant raises three points for reversal. We find none of his arguments persuasive, and we affirm the judgment of the trial court.

Testimony at trial revealed that on the night of July 18, 1983, Verita Hairston, on returning to her mobile home, noticed a blue Ford automobile parked directly opposite the end of her trailer. When she went outside shortly afterward to retrieve some articles from her car, she observed that the unfamiliar automobile was still parked near her house. She saw no one and went back inside the mobile home.

As she was putting some towels away in the bathroom Hairston heard a voice at the window. Looking up, she saw someone standing against the bathroom window. She slapped a towel against the window and said, "Get away!" The person at the window responded in a deep male voice with an obscenity. Hairston then turned off the light, shut the bathroom door, and looked out the window to see where he had gone. After about a minute of silence she heard her dog sniffing in the bedroom. She

looked through the crack at the base of the bathroom door and saw through the space a man's feet in a pair of socks. One sock had a hole in the toe.

Hairston held the door shut and asked, "What do you want?" The intruder replied, "I just want to make love to you. I just want to make love to you. Just come out here and let me make love to you, and I will not hurt you." Fearing that she would be raped, Hairston quickly opened the bathroom window, escaped, and ran screaming for help to a neighbor's trailer. Once safely inside, she phoned the police, who arrived shortly afterward.

The blue Ford was still parked outside Hairston's trailer when she and the police entered the mobile home to look for the suspect. By the time they walked outside after inspecting the house, the car was gone. As Hairston and the officers stood in front of the trailer discussing the incident, the automobile drove by. The policemen noted the license number and, after reporting it, received information that the vehicle was registered in appellant's name. While the officers were still present, the car drove by a second time. A neighbor appeared and told police that she had seen someone get out of a ditch and get into the automobile. The officers gave chase and arrested appellant, who had in his possession a gun which had been stolen from the Hairston trailer.

In his first argument, appellant contends that the trial court erred in overruling his motion for a mistrial following testimony by a police officer that appellant stated he had come into Hairston's neighborhood for the purpose of buying "dope." At trial, appellant's attorney objected to the statement on the grounds that the implication of his client in unrelated criminal activity was prejudicial. The court instructed the jury to disregard any testimony concerning any alleged attempt by appellant to obtain drugs. Simultaneously, the court overruled a motion for a mistrial.

The granting of a mistrial is a drastic remedy and should be resorted to only when justice cannot be served by continuing with the trial and when no other method exists by which the prejudice may be removed. *King* v. *State*, 9 Ark. App. 295, 658 S.W.2d 434 (1983). The trial judge is vested with considerable discretion in acting on motions for mistrial because of his superior position to determine the possibility of prejudice.

Drew v. *State*, 8 Ark. App. 120, 648 S.W.2d 836 (1983). The judge's exercise of that discretion will not be reversed in the absence of manifest abuse. *Id.* When an objection is made by counsel and is sustained and followed by an admonition from the presiding judge to the jury, the prejudicial statement is cured. *Id.* In the present case, where the objection by appellant's attorney to the testimony of the police officer was promptly followed by a judicial admonition, we do not think the prejudice was so great as to call for a mistrial. *Brewer* v. *State*, 269 Ark. 185, 599 S.W.2d 141 (1980).

Appellant argues in his second point for reversal that the trial court erred in overruling his motion for a directed verdict. He claims that no substantial evidence was introduced at trial to prove that he attempted to rape Hairston. Only when no fact issue exists is a directed verdict proper. On appeal, we view the evidence in the light most favorable to the appellee, and we affirm the judgment if there is substantial evidence to support the jury's verdict. *Wilson* v. *State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983). Substantial evidence is that evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

We believe that appellee presented substantial evidence at trial to justify the jury's finding of guilt on the charge of attempted rape. Rape is defined at Ark. Stat. Ann. § 41-1803(1)(a) (Repl. 1977) as sexual intercourse or deviate sexual activity with another person by forcible compulsion. Under Ark. Stat. Ann. § 41-701(2) (Repl.1977), in order to prove attempted rape, the State is required to prove that a person "purposely engages in conduct that constitutes a substantial step in a course of conduct intended or known to cause such a result" [*i.e.*, rape]. Appellant's actions and words clearly constituted a substantial step toward accomplishing the rape of Verita Hairston. A man who has stood at a woman's bathroom window uttering obscenities and has entered her house uninvited, saying, "Just come out here and let me make love to you, and I will not hurt you," certainly has engaged in conduct that could lead a jury to determine, with reasonable and material certainty and precision, that he was

intent upon sexual intercourse with her by forcible compulsion. The trial court properly denied appellant's motion for a directed verdict.

Appellant urges in his third point for reversal that the trial court erred in refusing to permit him to cross-examine a police officer with respect to any prior statements that Hairston may have made. The record, however, shows that, while he sustained the prosecutor's objection to appellant's attorney's questioning the officer about the victim's earlier statements, the judge added that the lawyer could ask such questions later in the trial for the purpose of impeachment. Appellant's attorney evidently chose not to pursue the subject later, despite his opportunity to do so when the policeman was called on rebuttal and when Hairston herself took the witness stand. Moreover, appellant's counsel neglected to make known to the trial court the substance of the anticipated evidence by proffer under the requirements of Rule 103(a)(2), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979). Under these circumstances, we find no error on the judge's part.

Affirmed.

MAYFIELD and COOPER, JJ., dissent.

CRACRAFT, C.J., concurs.

GEORGE K. CRACRAFT, Chief Judge, concurring. I concur with the opinion of the majority.

It was argued in conference that sentencing the appellant on both the attempted rape and burglary convictions was reversible error under Ark. Stat. Ann. § 41-105 (Repl. 1977). The majority opinion does not address that issue because our examination of the abstract and record discloses that the issue was never raised in the trial court and it was not argued in the briefs. The first suggestion of that issue was made by counsel in his rebuttal statements during oral argument. The majority follows the well established rule that a timely and appropriate objection must be made to preserve an issue on appeal. The court has also made it clear that this rule applies even to constitutional issues and has specifically applied it where a timely objection was not made to the sentences on multiple charges in *Robinson* v. *State*, 278 Ark. 516, 648 S.W.2d 444 (1983) and *Rowe* v. *State*, 271 Ark. 20, 607

S.W.2d 657 (1980). I would also adhere to the well established rule that we do not consider arguments which are not briefed.

The majority did not address that issue for those reasons. However, as it is discussed in a dissenting opinion I would state my view that the provisions of Ark. Stat. Ann. § 41-105 (Repl. 1977) have no application to this case. In certain circumstances that section prohibits multiple sentences where the same conduct results in more than one offense. An accused may be convicted and sentenced for only one offense arising out of the same conduct when one of the offenses is necessarily included in the other. It provides that one offense is included in the other if it must be established by proof of the same or less than all of the same elements required to establish the commission of the offense charged. The purpose of the statute is to allow a conviction of a lesser included offense when the accused is not convicted of the greater charge and to prohibit sentencing for both. *Akins* v. *State* 278 Ark. 180, 667 S.W.2d 654 (1984).

In the felony murder cases the court has not permitted a sentence for both the capital murder and the underlying felony for the reason that it is necessary to prove each and every element of the underlying felony in order to obtain the capital felony murder conviction. The underlying felonies are therefore lesser included offenses in these cases. *Wilson* v. *State* 277 Ark. 219, 640 S.W.2d 440 (1982).

The charges here are attempted rape and burglary. Neither crime necessarily requires proof of any of the elements of the other. In *Hickerson* v. *State* 282 Ark. 217, 667 S. W. 2d 654 (1984) the appellant was convicted of kidnapping, burglary and rape. Relying on §41-105 (Repl. 1977) he contended on appeal that he could not be sentenced on all three charges. Although the court found the evidence insufficient to support the conviction of burglary it rejected his primary argument in the following language:

> Furthermore, it would have been possible in this case for circumstances to support a conviction for burglary if the facts had been present to support that separate crime. *Conley* v. *State*, supra. None of these crimes, rape, burglary or kidnapping is necessarily a lesser included offense of the other. All involve separate elements, and it is

not necessary to prove one offense in order to prove another, which is one of the tests in applying that statute.

Burglary is defined as unlawful entry into an occupiable structure with intent to commit an offense punishable by imprisonment. Rape is generally defined as engaging in sexual intercourse or deviate sexual activity with another person by forcible compulsion. Attempted rape is defined as purposely engaging in conduct which constitutes a substantial step toward accomplishing the rape. It is not necessary to prove an unlawful entry into an occupiable structure to establish rape or attempted rape. Once the intent to rape has been formed and substantial steps to accomplish it have been taken the offense of rape or attempted rape can be committed anywhere. Since each offense requires proof of elements not required by the other a defendant can be convicted and sentenced on both offenses.

Nor can I agree that appellant's unlawful entry was the only substantial step taken to accomplish the rape. The Commentary to Ark. Stat. Ann. § 41-701 (Repl. 1977) lists seven examples of types of conduct which, if corroborative of criminal purpose, might be held to be substantial steps. Included in this list are enticing or seeking to entice the contemplated victim of the offense to go to the place contemplated for the commission of the crime, reconnoitering the place contemplated for the offense and unlawful entry to the place in which it is contemplated the offense will be committed.

Prior to his unlawful entry the appellant had reconnoitered the place by appearing at the bathroom window and first ascertaining the intended victim's whereabouts. After his entry he sought to entice her to leave the bathroom and come into the living room where he intended the rape to occur.

I concur.

MELVIN MAYFIELD, Judge, dissenting. As the majority opinion correctly states, in order for the appellant to be guilty of the crime of attempted rape he had to engage in conduct that constituted *a substantial step* in a course of conduct intended to result in sexual intercourse or deviate sexual activity with another person by forcible compulsion. In my view, except for entering the mobile home without permission, the appellant did not engage in

any conduct that constituted *a substantial step* in a course of conduct to commit rape. Certainly his voiced obscenity while standing by the bathroom window outside the home did not constitute such a substantial step, and after he got inside the home, he did not try to open the bathroom door or take any other substantial step to commit rape. Thus, the only possible conduct shown by the evidence as sufficient to constitute a substantial step to commit rape is the unlawful entry into the mobile home.

The appellant was also convicted of burglary. To be guilty of burglary one must *enter or remain unlawfully* in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment. Ark. Stat. Ann. § 41-2002 (Repl. 1977).

My first problem is whether the same act of unlawful entry into the home can support a conviction for both attempted rape and burglary. Ark. Stat. Ann. § 41-105 (Repl. 1977) provides:

> (1) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other, as defined in subsection (2):
>
> (2) . . . An offense is so included if:
>
> (a) it is established by proof of the same or less than all the elements required to establish the commission of the offense charged;

In *Sanders* v. *State*, 279 Ark. 32, 648 S.W.2d 451 (1983), it was held that being sentenced for both aggravated robbery and first degree battery was a violation of the constitutional prohibition against double jeopardy and a violation of Ark. Stat. Ann. § 41-105(1)(a) and (2)(a) (Repl. 1977). The court said this was true for two reasons. "First, both convictions grew out of a single act; and secondly, under the felony information in this case the proof required to prove one of the offenses necessarily included proof of the other." The court explained as follows:

> In *Akins* v. *State*, 278 Ark. 180, 644 S.W.2d 273

> (1983), wherein the appellant was also charged with aggravated robbery and first degree battery, we held that Ark. Stat. Ann. § 41-105 (Repl. 1977) prohibits multiple sentences when the same act results in more than one offense. We also noted that when a criminal offense cannot be committed without the commission of an underlying offense, a conviction cannot be had for both offenses under § 41-105. *Akins, supra*, citing *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982); *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982); *Swaite* v. *State*, 272 Ark. 128, 612 S.W.2d 307 (1981). In *Akins*, a case similar to petitioner's in which the victim of an armed robbery attempted to use his own pistol to prevent the robbery and was shot by the robber, we set aside the conviction and sentence for battery. We must afford petitioner the same relief. Count I of the felony information on which he was tried charged that he committed aggravated robbery by force. Count II charged that "in the course of and in furtherance of the felony [i.e. the aggravated robbery by force], he . . . caused serious physical injury. . . ." As in *Akins*, the proof required to prove one offense necessarily included proof of the other. Therefore, in accordance with A.R.Cr.P. Rule 37.1(a) the conviction and sentence for the lesser offense, battery in the first degree, must be set aside since it was imposed in violation of Ark. Stat. Ann. § 41-105 (Repl. 1977). The conviction and sentence for aggravated robbery are not disturbed. See also *Wilson* v. *State*, 277 Ark. 219, 640 S.W.2d 440 (1982).

My research has not found a case in Arkansas involving burglary and attempted rape where the proof of one crime included proof of the other as does the case at bar. However, *Mitchell* v. *State*, 281 Ark. 112, 661 S.W.2d 390 (1983), held that Ark. Stat. Ann. § 41-105 prevented the conviction for two counts of aggravated robbery where property was taken from a man that it belonged to, and at the same time property that belonged to his employer was taken from the man. The court said the same proof was required for each of the counts, and set aside one of the convictions. It, therefore, seems clear that the appellant in the present case cannot be convicted of burglary with intent to commit theft and, by using the same act of unlawful entry as a

substantial step in the attempt to commit rape, be convicted of attempted rape. If he had taken a substantial step to commit rape *after* he entered the home, we would have a different situation. In this case, however, it just so happens that we have to use proof of the same act to establish both the burglary and the attempted rape. I do not think the conviction for both crimes can stand under these circumstances.

My limited research in other jurisdictions has not found a case exactly in point either, but I think *State* v. *Lora*, 213 Kan. 184, 515 P.2d 1086 (1973), supports the position I take. In that case the court affirmed a conviction for burglary of the Abderholden home and the attempted rape of Mrs. Abderholden. But there was evidence that the defendant broke into the home with the intent to commit a rape and grabbed the lady after he got into the house and attempted to rape her. His attempt failed because she broke away from him. In that case the court said:

> The overt act toward perpetration of the rape which was necessary to constitute the crime of attempted rape in this case consisted of seizing Mrs. Abderholden and attempting to restrain her within the residence. The necessary elements of proof of the crime of aggravated burglary in this case are not included in those necessary to prove the crime of attempted rape or vice versa. Therefore the charges are not duplicitous.

I realize that the appellant in this case did not raise this point in the same way I have discussed it. However, in his appeal to this court he admits the evidence was sufficient to support the burglary conviction, but contends the attempted rape conviction should be reversed. If my view is correct, Ark. Stat. Ann. § 41-105 prohibits a sentence for both burglary and attempted rape in this case. In *Walton* v. *State*, 279 Ark. 193, 203, 650 S.W.2d 231 (1983), the court held two sentences were not authorized under this section even though the issue was raised for the first time on appeal. *See also Robinson* v. *State*, 279 Ark. 61, 648 S.W.2d 446 (1983), and *Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982), where petitions for relief under A.R.Cr.P., Rule 37, were involved. But under those cases the attempted rape conviction in this case should not be reversed. The appellant could properly be prosecuted on both charges but could be sentenced on only one.

Therefore, the attempted rape conviction should be affirmed and the burglary conviction should be reversed and dismissed. *See Wilson* v. *State*, 277 Ark. 219, 640 S.W.2d 440 (1982); *Robinson* v. *State*, *supra*.

COOPER, J., joins in this dissent.

WORTHEN BANK & TRUST CO. *v.* Beverly F. ADAIR

CA 84-117 690 S.W.2d 727

Court of Appeals of Arkansas
En Banc
Opinion delivered June 5, 1985
[Rehearing denied June 26, 1985.*]

* Glaze, J., would grant rehearing.

Fred E. Bosshart, for appellant.

Bill Isaacs, for appellee.

MELVIN MAYFIELD, Judge. In this case the appellant, Worthen Bank, filed a complaint against John and Beverly Adair to collect $3,070.87, alleged to be the unpaid balance due on charges made on a Visa card issued by the bank. John was never served with summons, but service was obtained on Beverly and she filed a motion to dismiss. The motion contained allegations that she had never received a credit card from the bank, that the complaint was apparently based on an open account but no verified accounting was supplied, and that the only exhibit attached to the complaint clearly indicated that she had no contractual liability for the account sued upon.

A response to the motion to dismiss denied most of the allegations of the motion and stated that the proper way to obtain a verified and itemized statement of the account was by motion for a more definite statement. However, an amendment to the complaint was filed the same day and attached to it were picture copies of the appellant's records showing itemized charges made to the Visa card account and a running total of the amount due.

Eventually the case came on for trial before the judge without a jury and without any hearing on the motion to dismiss. The appellant's only witness was the supervisor of the bank's recovery department who was also the keeper of its records. The witness testified he was familiar with the Visa charge accounts and he identified the application for the Visa card to which the amounts sued for were charged. This application is a form signed by John Adair as the applicant. It contains information about his employment, income, and credit references. About two-thirds of the way down from the top of the form are two boxes. One is to be checked if another person will be liable upon or permitted to use the bank card account. The box is *not* checked. The other box is to be checked if the applicant is relying on another person's income in paying the bank card account. That box *is* checked. However, at the bottom of the form, under the signature of the applicant, on a line designated "other signature," there is the apparent signature of Beverly Adair. Underneath that signature line the form states, "Only if also to be contractually liable." There was no evidence introduced to show the relationship between John and Beverly.

Counsel for appellee, Beverly Adair, objected to the introduction of this application into evidence and the judge stated he would sustain the objection unless there was some evidence that her apparent signature was actually made by her. No such evidence was offered and the appellant rested. The judge then stated that the appellant had failed to prove its cause of action and that the complaint was dismissed. An order signed by the judge concludes with the following paragraph:

> The plaintiff proceeded to present its case against Beverly F. Adair and at the conclusion of the plaintiff's case, the defendant moved to dismiss for failure to present a prima facie case. After an examination of the pleadings filed herein and after listening to the testimony provided by the plaintiff, the court finds that the defendant's motion to dismiss should be and hereby is granted, and the plaintiff's cause of action as against Beverly F. Adair is dismissed in all respects with prejudice.

On appeal, the bank makes three arguments. It first says the court erred in dismissing its complaint because of Ark. Stat. Ann. § 28-202 (Repl. 1979) which provides that in suits on accounts "the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath, deny the correctness of the account. . . ." *See also Walden* v. *Metzler*, 227 Ark. 782, 301 S.W.2d 439 (1957); *Rice* v. *Kroeck*, 2 Ark. App. 223, 619 S.W.2d 691 (1981). The appellant contends that its amendment to the complaint with the attached copies of the itemized charges made to the Visa card account, plus the original complaint which contained a verification subscribed and sworn to before a notary public, made a prima facie case, under the authority of the statute and cases cited above, since the appellee did not deny the correctness of the account under oath.

The problem is that the copies of the itemized charges all show they were made to John Adair. This may have made a prima facie case against him but no such case was made against Beverly. We have some doubts as to the case against John because the verification of the original complaint would not seem to be sufficient to verify a subsequent amendment to the complaint, and because the itemized charges did not list the various items

purchased but listed only the name of the business that supplied the item or service purchased. *See Griffin* v. *Young*, 225 Ark. 813, 286 S.W.2d 486 (1956), and *Everett* v. *Parts, Inc.*, 4 Ark. App. 213, 628 S.W.2d 875 (1982). But in any event, it seems clear that the itemized charges against John did not make a prima facie case against Beverly. In *Starlight Supply Company* v. *Feris*, 462 S.W.2d 608 (Tex. Civ. App. 1970), the court said:

> The rule which makes a verified account prima facie evidence unless a written denial under oath in conformity with Rule 185 is filed does not apply to or cover transactions between third parties who were strangers to the transaction. (Citations omitted.)
>
> It matters not that Appellant has pleaded that Appellee owes the account. As stated in *Copeland*, above, where an obligation alleged in the pleading does not conform to the writing exhibited as a basis thereof, the document rather than the pleading controls.

And in *Lee* v. *McCormick*, 647 S.W.2d 735, 740, (Tex. Civ. App. 1983), the court said it is well established that "a verified account is not prima facie evidence, even in the absence of a written denial under oath, as to transactions between the plaintiff and third parties, or plaintiff and parties who were strangers to the original transaction."

Another argument made by the appellant is related to the one just discussed. This contention is that the trial judge erred in refusing to allow appellant to introduce into evidence monthly statements issued on the Visa account. These proffered statements are addressed to John Adair and do not show or make reference to the name of Beverly Adair at any place. Just as the itemized account charged only to John Adair did not make a prima facie case as to Beverly Adair, the monthly statements addressed only to John were not admissible into evidence in the trial of the case against Beverly.

Appellant's third argument on appeal is that the application was admissible into evidence even though there was no testimony that the apparent signature of Beverly was actually made by her. The appellant relies upon Ark. Stat. Ann. § 28-927 (Repl. 1979) which reads as follows:

> Where a writing, purporting to have been executed by one of the parties, is referred to in, and filed with, a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun.

In *J. R. Watkins Med. Co.* v. *Montgomery*, 140 Ark. 487, 215 S.W. 638 (1919), the court held the above statute allowed a written instrument to be introduced into evidence where it met the conditions of the statute but held that the genuineness of the signature could be questioned by evidence and this would make a fact question for the jury; however, the burden would still be on the plaintiff to establish its case by a preponderance of the evidence. *Accord Callaway* v. *Ashby*, 192 Ark. 929, 95 S.W.2d 907 (1936).

[redacted] In the instant case we believe the application containing the apparent signature of the appellee, which was attached as an exhibit to the complaint, was admissible as the appellee did not deny the genuineness of the signature by an affidavit before trial. However, this does not mean that the trial court erred in dismissing the appellant's complaint. According to the order signed by the judge, the action he took in dismissing the complaint was, in effect, the granting of a motion by appellee for a directed verdict. In *Pritchard* v. *Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 464, 642 S.W.2d 877 (1982), the Arkansas Supreme Court said:

> In determining on appeal the correctness of the trial court's action concerning a motion for a directed verdict by either party, the test is to take that view of the evidence that is most favorable to the party against whom the verdict is sought and to give it its highest probative value, taking into account all reasonable inferences deducible from it, *and to grant the motion only if the evidence viewed in that light would be so insubstantial as to require that a jury verdict for the party be set aside. Dan Cowling and Associates* v. *Clinton Board of Education*, 273 Ark. 214, 618 S.W.2d 158 (1981) (Emphasis added.)

We think the trial judge was correct in granting the appellee's motion for directed verdict because he would have had to set aside a verdict for appellant, if one had been returned in its favor, because that verdict would not have been supported by substan-

tial evidence. We think this is true because the application is ambiguous, because it was prepared by the appellant, and because of the construction placed upon the application by the appellant.

The application is a form, obviously printed by the appellant, which contains on one side a number of blanks calling for certain information and with conditions set forth on the opposite side as to the use of the credit card and to the terms of payment for charges made to the account. This constitutes the contract sued upon. The form is so drafted that it is not clear as to how the blanks are to be completed. It contains a line that is designated "Applicant's Signature." However, as we have already indicated, the form asks for information concerning a person other than the applicant.

First are the two boxes. One is to be checked if "another person" will be liable upon or permitted to use the bank card account. The other box is to be checked if the applicant is relying upon "another person's" income in paying the account. Underneath these two boxes are lines designated for the name of the "other person," and for the name of the "employer of the other person." Detailed information about the employment and income of the "other person" is also requested. Then on the last line, underneath the line for the application's signature, is a line for the "other signature," and underneath this last line appears the words "only if also to be contractually liable." Beverly Adair's signature on this line certainly conflicts with checking the box which indicates the applicant is relying on "another person's" income to pay the credit card charges and with failing to check the box which indicates "another person" will be liable on or permitted to use the card. In *Schulte* v. *Benton Savings & Loan Ass'n*, 279 Ark. 275, 281, 651 S.W.2d 71 (1983), the court said:

> It is a familiar rule of construction that the terms of a contract will be construed against the party drafting it, and when there is a doubt as to the meaning of some provision, the doubt is resolved against the party who prepared the contract. (Citations omitted.)

And in *Hall* v. *Weeks*, 214 Ark. 703, 707, 217 S.W.2d 828 (1949), the court said:

> Appellee correctly says that when, as here, words are selected by the proponent of a contract, and the phraseology does not convey a clear meaning, uncertainties will be resolved against the one whose form was used if the language is reasonably susceptible of the particular construction.

Finally, in *Craig* v. *Golden Rule Life Ins. Co.*, 184 Ark. 48, 50, 41 S.W.2d 769 (1931), the court quoted from an earlier case as follows:

> "It is a well-established principle of law that, in the interpretation or construction of the contract, the construction the parties themselves have placed on the contract is entitled to great weight, and will generally be adopted by the courts in giving effect to its provisions. This is especially true in cases of ambiguity in the written contract."

When we consider that the evidence shows that the appellant prepared the form used to make the application for the credit card involved in this case, that the blanks on the form allow for ambiguity, and that the appellee's liability under the contract sued upon is uncertain, it seems to us that the law requires that the doubt be resolved against the appellant. And when we consider that the itemized charges attached to the appellant's amendment to the complaint do not show any indication that Beverly Adair was considered as contractually liable for the charges made to the credit card account, it seems to us that appellant's own construction of the contract must be given great weight. When viewed in the light of these considerations, we find that even if the trial court had admitted the application into evidence, there would be no substantial evidence—only inconsistent inferences—to support a finding for appellant. *See Aluminum Co. of America* v. *McClendon*, 259 Ark. 675, 687, 535 S.W.2d 832 (1976) (defining substantial evidence). Since the evidence was so insubstantial that a verdict for the appellant would have to be set aside, there was no error in granting appellee's motion for a directed verdict and in dismissing appellant's complaint.

Of course, the trial judge's decision actually turned upon the ruling that the application was not admissible as evidence because the appellee's signature had not been estab-

lished. But we do not reverse the trial judge if he reached the right result, even though he gave an erroneous reason. *Southern Farm Bureau Cas. Ins. Co.* v. *Reed*, 231 Ark. 759, 332 S.W.2d 615 (1960); *Tittle* v. *City of Conway*, 268 Ark. 1126, 599 S.W.2d 412 (1980); *White* v. *Gladden*, 6 Ark. App. 299, 641 S.W.2d 738 (1982).

Affirmed.

CRACRAFT, C.J., and GLAZE, J., dissent.

TOM GLAZE, Judge, dissenting. I respectfully dissent. I would suggest that the majority has made this case more complicated than it really is. The trial court erred in excluding appellant's credit card application which bore both parties' signatures. The trial court found the application inadmissible because there was no proof that the signature on the application was actually that of the appellee. Even the majority admits the trial judge erred, and that under Ark. Stat. Ann. § 28-927 (Repl. 1979), he should have admitted the application into evidence.

Once this Court decided the application was admissible, the only conclusion or result to reach was that the appellant, by introducing the application, made a prima facie case that the appellee was obligated contractually on her husband's account. However, instead of reversing and remanding this cause for further proceedings, the majority tried this case *de novo*. This Court went on to find the credit card application contained an ambiguity, *viz.*, that while appellee presumably signed the application, agreeing she would be contractually liable for her husband's obligations, the same application contained an *uncompleted* section requesting the name of any other person who would be liable upon or permitted to use the applicant's account. After finding that an ambiguity existed, the majority construed the ambiguity against the appellant because the appellant prepared the application. The Court also found, somehow, that the appellant's own construction of the application should be used to resolve the uncertainty or ambiguity against the appellant. I say "somehow" because no evidence was given concerning the parties' intent when the appellant prepared and appellee signed the application form.

Our Court is deciding this case by erroneously administering

a *de novo* review. This is a law case, not one in equity. The trial court admittedly erred and the cause should be reversed and remanded for further proceedings. The trial judge found no ambiguity nor do I believe one exists. At the very least, the appellant is entitled to argue that point below, and because that issue involves a question of fact, appellant and appellee should be permitted to offer evidence and to have the trial judge or jury decide the issue.

Finally, the majority tries to support its decision by mentioning the rule that we do not reverse the trial judge if he reached the right result even though he gave an erroneous reason. That rule simply is not applicable. Here the trial judge clearly erred in failing to admit into evidence the application proffered by the appellant. This Court cannot justify the trial court's erroneous evidentiary ruling by suggesting the appellee would ultimately win anyway because the application was ambiguous, and because it should be construed against the appellant, making the appellee not liable on her husband's account. As I noted earlier, the trial judge mentioned nothing about an ambiguity, and the appellant should be given the opportunity to address that issue. To hold otherwise denies appellant due process. The majority has attempted to weigh and determine the sufficiency of the evidence on the ambiguity issue before the parties have developed evidence on the question. Accordingly, our Court is merely compounding the trial court's error.

I would reverse and remand this cause for further proceedings.

CRACRAFT, C.J., joins in this dissent.

John BARNES *v.* STATE of Arkansas

CA CR 85-9 691 S.W.2d 178

Court of Appeals of Arkansas
Division I
Opinion delivered June 12, 1985

Young, Patton & Folsom, by: *Damon Young*, for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. John Barnes appeals

from his conviction of the crime of the sale of a controlled substance for which he was sentenced to a term of seven years in the Department of Correction. We find no merit in any of the six assignments of error advanced on appeal and affirm the conviction.

At the trial the State called two witnesses. Jerry DeWayne Howard testified that he was an undercover agent for the Arkansas State Police Narcotics Division. In January of 1983 he was on assignment in Miller County for approximately six months as a part of an investigation which resulted in the arrest of fifty-four individuals. During this period he worked with confidential informants who furnished him with names of persons suspected of dealing in drugs and assisted him in arranging meetings with them. One informant told him that the appellant was dealing in marijuana and went with him to the appellant's home. When they arrived the informant knocked on the door and the two were invited in the house. According to the police officer the informant was known to the appellant and they discussed controlled substances for a period of time before he asked appellant to sell them marijuana. Appellant agreed to do so and as appellant was handicapped and in bed he directed the agent to look for the marijuana in a coffee can near the stereo. The agent found two bags of marijuana in the coffee can, took one bag out, and paid $75 to the appellant for the marijuana. After discussing the possibility of returning and purchasing more from him in the future the officer and the informant left. As the police officer was working in an extended investigation the arrest was made later to keep his identity from being known. The State's second witness, an expert chemist, testified that the substance purchased from the appellant and delivered to him was in fact marijuana.

The appellant testified in his own behalf. He denied that he had sold the marijuana to the officer and offered proof tending to show that he could not have sold it at his house on the day the officer testified. He argues that the verdict was not supported by sufficient evidence of guilt. We do not agree.

Throughout these proceedings the appellant elected to proceed pro se and without the benefit of counsel, appointed or retained. On the date of trial he consulted with his son and authorized his son to sign for him a waiver which stated he

understood that under both state and federal law he was entitled to counsel and would be provided counsel free of charge if unable to obtain one. He acknowledged further that he was aware that if he requested counsel one would be provided and that he had been informed by the court that his waiver of counsel would not preclude him from claiming that right in future proceedings if he requested it. At the bottom of the written waiver over the signature of the circuit judge appeared the following: "I have questioned the defendant and find that he intelligently waived counsel and was competent to do so." The appellant himself questioned the jurors on voir dire, made an opening statement, cross-examined the State's witnesses, and testified in his own behalf. At no time during the course of the trial did he request the assistance of counsel.

On appeal for the first time he contends that the trial court erred in allowing him to proceed without the assistance of counsel. Ark. Const. art. 2, § 10 provides that an accused in a criminal prosecution shall enjoy the right to be heard by himself and his counsel. We have clearly recognized the right of a defendant to conduct his own defense in a criminal trial whether for felony or misdemeanor if he elects to do so. *Barnes* v. *State*, 258 Ark. 565, 528 S.W.2d 370 (1975). The United States Supreme Court has declared that this right exists under the Sixth Amendment to the Constitution and it is applicable to the states by the Fourteenth Amendment independently of our own constitution and case law. *Faretta* v. *California*, 422 U.S. 806 (1975). Both *Barnes* and *Faretta* make it clear that the State may not force a defendant to accept counsel against his will or deny his request to conduct his own defense. Where the accused knowingly and intelligently declines the assistance of counsel and asserts his constitutional right to represent himself the court should not interfere with the free exercise of that constitutional right. It is only necessary that the election be made "with eyes open" and technical and legal knowledge is totally irrelevant in the assessment of a knowing and intelligent exercise of the right.

Appellant argues that the record does not show that he was given a warning of the advantages and disadvantages of proceeding pro se before the election was made. While it might be better for the record to contain and express warning by the court of the disadvantages of self representation in order to establish

that the accused knows what he is doing and his choice is made with his eyes open, neither *Faretta* nor *Barnes* requires it. The only qualification on the waiver of right to representation is that it be voluntarily and intelligently made. It requires only that the accused have "full knowledge or adequate warning concerning his rights," and this determination must be made in each case on the particular facts and circumstances surrounding it. *Barnes* v. *State*, *supra*. The cases relied upon in *Faretta* make this clear. *Adams* v. *United States*, 317 U.S. 269, 605 (1942).

This record is devoid of anything indicative of involuntariness in appellant's election. The record reflects that a bench warrant was issued on March 30, 1983. On April 15, 1983 appellant appeared, waived counsel, entered a plea of not guilty and his trial was set for May 9, 1983. The case was continued on appellant's motion six times during the ensuing thirteen months before his trial on June 18, 1984. On the day of the trial he executed a written waiver of his right to counsel on which the trial judge recorded that he had questioned him and found that the appellant was competent and had intelligently waived his right to counsel. At the time the waiver was signed appellant was assisted by his son because of his physical handicap. Throughout the entire period appellant persisted in his election to conduct his own defense. We are not concerned with the wisdom of his choice but only with whether it was voluntarily and intelligently made. We cannot conclude from these facts and circumstances that the trial court erred in finding that it was.

The appellant argues that the trial court should have offered him the benefit of standby counsel to act in an advisory capacity. The court is not required to do this but may do so if it determines it to be necessary. However, *Faretta* and *Barnes* make it clear that the court cannot force an attorney upon an unwilling defendant and, although it may in some instances appoint standby counsel, that counsel cannot be permitted to interfere with the accused's own presentation of his defense.

The appellant contends that the court did not inquire into appellant's mental condition or determine whether he was under the influence of medication which might prevent an intelligent waiver. He relies on his testimony during cross-examination that he was taking Valium and Codeine to relieve the pain of the

gunshot wound which had crippled him. He made that statement in an apology to the jury for his mouth's being dry and in no way intended to indicate to anyone that he was not mentally alert as a result of it. The court stated that he had determined appellant to be competent and to have knowingly and intelligently executed a waiver. Appellant's own son had consulted with the appellant immediately before the written waiver was executed. The son, who was in a better position than anyone else present to determine whether the appellant was affected by any medication, made no such assertion. Our examination of the record and his conduct of his defense does not convince us that appellant was under the influence of any drugs.

Appellant next contends that there was not substantial evidence to support the jury's verdict. He argues that the confidential informant did not testify, thereby leaving the testimony of the undercover officer to stand uncorroborated and sharply contradicted by the appellant, and therefore rendering it insufficient to overcome the presumption of innocence beyond a reasonable doubt. While it is well settled that under Ark. Stat. Ann. § 43-2116 (Repl. 1977) a criminal conviction cannot be sustained upon the uncorroborated testimony of an accomplice, it is as well established that a police officer who buys a controlled substance from the accused is not an accomplice of that person from whom he purchased it and his testimony is not required to be corroborated. *Brizendine* v. *State*, 4 Ark. App. 19, 627 S.W.2d 26 (1982). On appeal from a jury's verdict this court views the evidence in the light most favorable to the appellee and will affirm if there is any substantial evidence to support the verdict. *Boone* v. *State*, 282 Ark. 274, 668 S.W.2d 17 (1984). The credibility of witnesses and the weight to be given their testimony is within the province of the jury. We cannot conclude that the jury's verdict was not supported by substantial evidence.

Appellant contends that the court erred in admitting testimony of specific instances of prior misconduct which is prohibited by Unif. R. Evid. 608(b) unless the evidence is probative as to the truthfulness or untruthfulness of the witness. He argues that the questions were not asked to test the appellant's veracity but merely to prejudice the jury and show a propensity on the part of the appellant to commit the offense charged. This issue was not raised in the trial court and cannot be raised for the first

time on appeal.

Furthermore the appellant took the witness stand in his own behalf asserting that he had nothing to hide and would answer any questions put to him. After the State rested its case the appellant called his first witness to testify to his character. As his character had not been put into issue by the State the trial court ruled that he could not do this until it became an issue. The court then advised the appellant that while he was not required to testify in his own behalf, if he wished to do so he would be permitted to do so. The appellant then indicated that he did not desire to make a narrative statement or ask himself questions. He indicated that if the State had any questions to ask him he would take the witness stand, saying: "I am agreeable to anything you want to ask me, Mr. Johnson. I hide nothing from no one. You just put me on the stand." The court permitted this procedure at appellant's request.

Appellant was asked if he had sold marijuana to the agent and he denied this. He was then asked if he did in fact sell marijuana and he admitted that he had sold it on prior occasions but said he he did not sell it on the date charged. He stated he had not sold any marijuana "recently." He was then asked if he in fact had over a half pound of marijuana in his home on the day he was arrested and he admitted that he did. The only objection that he made when asked to disclose the name of the person from whom he had purchased the half pound was that he had given his word he would not divulge that name. When asked how he came into possession of the half pound, appellant protested that this was a "double jeopardy deal." When the court ordered him to answer the question, he then stated that he had not purchased it but had grown it on his own property for his own use. The appellant opened up the question of possession of marijuana on other occasions and should not now be heard to complain of that for which he was responsible. He had already answered several questions concerning his possession of marijuana without objection. We find no error.

During the appellant's cross-examination of the undercover agent he asked the agent the name of the person who accompanied him to the appellant's home on the date of the sale. The following then occurred:

MR. JOHNSON: I will object to that. A confidential informant's identity is not discoverable by this defendant at this stage of the proceedings.

MR. BARNES: There is nothing else that I know of that I could ask this man at this particular time.

THE COURT: You may step down.

Appellant contends the court erred in refusing to sustain his request for disclosure of the confidential informant's identity. We find no merit to this contention because the court never ruled on the State's objection and appellant pursued this question no further.

Nor do we find merit to the appellant's contention that the failure to disclose the identity of the confidential informant was prejudicial to his case. When an informant is also a witness to or a participant in the crime his identity should be disclosed. However, this rule depends on the circumstances of each case. Limitations are placed on the disclosure of the identity of informants because of the public interest in fostering and protecting the free flow of information on criminal activity. *James* v. *State*, 280 Ark. 359, 658 S.W.2d 382 (1983). We conclude that the prosecutor's objection was well taken. There had been no prior effort to obtain the identity of the confidential informant, to obtain information from him to prepare a defense, or to have him present as a defense witness. Unless disclosing the identity of the informant was necessary for preparing and presenting a defense and public interest rule would govern. Furthermore, there was evidence from the police officer that the confidential informant was known to the appellant at the time the purchase was made and that this was one of the reasons that the appellant discussed the contraband with him so freely and made the sale to him so readily.

On direct examination the undercover officer testified that after the initial purchase from the appellant they discussed the future sale of larger quantities and that appellant had agreed to sell more. On cross-examination the appellant asked the officer why he had not come back to "bust" him for possessing a larger amount. The officer answered: "Mr. Barnes, I believe when they arrested you they found several ounces of marijuana in your

house." Appellant objected stating that this did not have anything to do with the case. The court overruled the objection. The appellant now argues that the court erred in failing to sustain appellant's objection to a nonresponsive answer. Although we are inclined to agree with the trial court's ruling that the answer was responsive, we would find no error otherwise. The court was not called upon to make any ruling on the voluntary answer given by the witness, to give any admonition to the jury, or in fact to do anything at all. Appellant cannot now complain that the trial court erred in not striking the answer or in admonishing the jury to disregard it. *Midwest Bus Lines, Inc.* v. *Williams*, 243 Ark. 854, 422 S.W.2d 869 (1968).

The appellant finally contends that the trial court erred in sentencing him for a felony rather than a misdemeanor because the applicable provision of Ark. Stat. Ann. § 82-2617(a)(1)(iv) (Supp. 1983) does not specifically declare the violation to be a felony but merely provides for imprisonment for not less than four nor more than ten years. We do not find in the abstract or record that this argument was presented to the trial court and it cannot be raised for the first time on appeal. *Tolland* v. *State*, 285 Ark. 415, 688 S.W.2d 718 (1985).

Affirmed.

COOPER, J., agrees, CORBIN, J., concurs.

DONALD L. CORBIN, Judge, concurring. I concur in the affirmance of this conviction, but for different reasons. Clearly, the actions of appellant in getting his trial date reset six times indicate that he had more than a passing acquaintance with our system of criminal jurisprudence. He was able to successfully delay his trial from May 9, 1983, until June 18, 1984, some 13 months, by obtaining six continuances, a feat which many competent attorneys are not readily capable of doing. It is difficult for one to imagine that from the time appellant was served with the warrant for his arrest on March 30, 1983, until the day of his trial on June 18, 1984, he was not made aware of the potential pitfalls if he proceeded in a pro se defense. Certainly, an intelligent and voluntary waiver was made by this appellant to proceed pro se.

I differ with the majority as I believe *Faretta* v. *California*,

422 U.S. 806 (1975), and *Barnes* v. *State*, 258 Ark. 565, 528 S.W.2d 370 (1975), require an express warning by the trial court of the dangers and disadvantages of self representation so the record will establish that the defendant knows what he is doing and his choice is made "with eyes open." The defendant's technical legal knowledge is totally irrelevant in assessing his knowing exercise of the right to defend himself, but he should be warned of the hazards in representing himself because of technical procedures and rules of evidence which a layman is not equipped to handle.

In the case at bar it is not clear whether appellant received such a warning from the trial court. The failure to make a record of the warning makes it difficult if not impossible for this Court to review and make a determination of this issue on appeal. However, in view of the circumstances and appellant's success in obtaining six continuances, I must agree with the majority that an intelligent and voluntary waiver was made by appellant to proceed pro se.

Chris Joshlyn HOLMES *v.* STATE of Arkansas

CA CR 85-19 690 S.W.2d 738

Court of Appeals of Arkansas
Division I
Opinion delivered June 12, 1985

William R. Simpson, Jr., Public Defender, by: *Arthur L. Allen*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Chris Joshlyn Holmes appeals from his conviction in a trial without a jury of the crime of third degree battery for which he was sentenced to a term of sixty days in the county jail and was fined $100 and costs. He argues that the evidence was insufficient to support the conviction. We do not agree.

Ark. Stat. Ann. § 41-1603(1)(a) (Repl. 1977) defines the offense as follows:

> A person commits battery in the third degree if, with the purpose of causing physical injury to another person, he causes physical injury to any person.

"Physical injury" is defined as the impairment of physical condition or the infliction of substantial pain. Ark. Stat. Ann. § 41-115(14) (Repl. 1977).

In our review of criminal convictions by a court sitting without a jury we view the evidence and all permissible inferences to be drawn from it in the light most favorable to the State and will affirm only if there is no substantial evidence to support the conviction. Viewed in that light, the evidence discloses that Randy Taylor, a ten year old child, went next door to borrow an iron. When he entered the house the appellant, a much older person, jumped out from where he had been hiding, grabbed Taylor and threw him to the floor threatening to tear out his tongue and calling him obscene names. He grabbed him in the mouth and around the neck and began choking him. According to Taylor this affray lasted from five to ten minutes. Taylor's mother testified that she observed the attack. She said the appellant grabbed the child by the throat, choked him, pulled at his tongue and threw him down. She heard him call him obscene names. Taylor testified that he did not bleed, had not been cut and, although it hurt while the man was attacking him, it did not hurt after it was over. The appellant argues that this evidence could not support a finding of substantial pain as required by the statute.

We agree that the code does not define substantial pain clearly and there is no body of law dealing with that definition clearly. It is clear from the cases and the statute itself that the penalty for battery is determined by the severity of the attack. Battery in the first degree comprehends life endangering conduct, second degree battery comprises conduct resulting in serious physical injury, and third degree battery requires the infliction of substantial pain or impairment of physical condition.

The fact that the victim in this case did not verbally relate the extent of his pain and anguish is not controlling. Pain is a subjective matter and difficult to measure from testimony. The pulling of one's arm with tremendous force might inflict no pain at all. The pulling of a person's tongue is quite likely to result in

substantial pain even though it subsides rapidly. In most cases questions and answers about pain caused by an injury are "unnecessary attempts at proof of facts known by everyone who understands the extent of the injuries." *Scott-Burr Stores Corp.* v. *Foster*, 197 Ark. 232, 122 S.W.2d 165 (1938). In determining whether an injury inflicts substantial pain the trier of fact must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted. The finder of fact is not required to set aside its common knowledge and may consider the evidence in the light of its observations and experiences in the affairs of life.

In this case where the attack was as described by the victim and his mother the trier of fact could determine from the sensitive nature of the nerves in the tongue, mouth and throat that the victim did suffer substantial pain as a result of it.

Affirmed.

COOPER and CORBIN, JJ., agree.

Robert Earl CLINKSCALE *v.* STATE of Arkansas

CA CR 85-11 690 S.W.2d 740

Court of Appeals of Arkansas
Division II
Opinion delivered June 12, 1985

[redacted]

Wilson, Hays, O'Hare & Myers, for appellant.

Steve Clark, Att'y Gen., by: *Connie C. Griffin*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant's sole argument for reversal in this criminal appeal is that the trial court erred in admitting evidence of his prior conviction for delivery of heroin in order to establish the elements of the offense of felon in possession of a firearm under Ark. Stat. Ann. § 41-3103 (Repl. 1977). We do not agree, and we accordingly affirm the judgment of the lower court.

Appellant was arrested on the charge of felon in possession of a firearm on October 15, 1983, after police found that he had used a weapon to apprehend one of two men who were attempting to steal a cassette tape player from his wife's car. Testimony revealed that appellant pointed a gun at the man and at one point struck him above the mouth with it. The State proffered appellant's Department of Correction file at trial and introduced a copy of the record of his 1973 conviction for delivery of heroin to prove his prior felony conviction. The trial court admitted the evidence over appellant's objection, and he was convicted. In the second phase of the bifurcated trial, appellant was sentenced to eight years in prison as an habitual offender.

Appellant contends that the probative value of the evidence of his conviction for delivery of heroin was substantially outweighed by the danger of unfair prejudice. Rule 403, Ark. Uniform Rules of Evidence. He insists that the danger of prejudice would have been considerably less had the court admitted as evidence one of the "numerous convictions" recorded in the file. As an example he points to a 1965 grand larceny conviction which, appellant argues, would not have inflamed the jury.

In *Combs* v. *State*, 270 Ark. 496, 606 S.W.2d 61 (1980), the Arkansas Supreme Court upheld a lower court's denial of an appellant's motion *in limine* to exclude evidence of the nature of his prior felony conviction. The appellant in that felon in possession case argued that the specific nature of the crime for

which he had been previously convicted, second degree murder, was irrelevant and its introduction obviously prejudicial. The court responded that the conviction of a prior felony is one of the elements of the offense charged and that the prosecuting attorney has not only the right but the duty to attempt to prove every element of the offense. Further, the court said that the nature of the prior felony and the facts in the *Combs* case, in which the appellant was disarmed by police after making a threatening motion, reflected on the seriousness of the crime and were relevant in the determination of the sentence.

Appellant in the instant case concedes the relevance of the conviction for delivery of heroin but urges reversal strictly on the basis of unfair prejudice. Naturally, evidence offered by the State is likely to be prejudicial to an accused; otherwise, it probably would not be offered. *See Beed* v. *State*, 271 Ark. 526, 609 S.W.2d 898 (1980). A trial court has a great deal of discretion in determining whether the probative value of a prior conviction outweighs its prejudicial effect, and the decision of the trial court will not be reversed in the absence of an abuse of discretion. *See Brewer* v. *State*, 271 Ark. 254, 608 S.W.2d 363 (1980); *Washington* v. *State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982). A prior felony conviction was relevant evidence in that it was an element of the crime, and the trial court's decision that the State could elect to introduce evidence of a 1973 conviction for delivery of heroin rather than a 1965 conviction for grand larceny was not an abuse of discretion. Appellant's contention that he should be permitted to select the prior conviction to be introduced by the State is not tenable.

Affirmed.

GLAZE, J., agrees.

MAYFIELD, J., concurs.

Damon H. CARTER *v.* ST. VINCENT INFIRMARY

CA 84-409 690 S.W.2d 741

Court of Appeals of Arkansas
Division II
Opinion delivered June 12, 1985

Gill, Johnson, Gill & Gill, by: *B. Kenneth Johnson*, for appellant.

Friday, Eldredge & Clark, by: *John Dewey Watson* and *Kevin A. Crass*, for appellee.

DONALD L. CORBIN, Judge. An action for damages resulting from alleged malpractice was initiated by appellant, Damon H. Carter, against appellee, St. Vincent Infirmary, in the Circuit Court of Lincoln County. A jury returned a verdict for appellee. We reverse and remand for a new trial.

In January of 1979, appellant entered St. Vincent Infirmary. He had surgery identified as a gastric resection on January 8, 1979. A second operation was performed on January 16, 1979, to correct an obstruction of the lower intestine. Following appellant's release from the hospital, he learned that he had an injury to his brachial plexus involving the long thoracic nerve resulting in a winged scapula with a loss of use to his right arm and shoulder. Both parties agree that appellant suffered an injury to his brachial plexus. Each party, however, alleges a different cause. Appellant contended at trial that the damage to his brachial plexus was caused by a stretch injury which he alleged occurred as a result of the negligence of two of appellee's orderlies. Appellant contended that he sustained the injury when the orderlies moved him from his hospital bed to a hospital gurney to take him to his second surgery. Appellee presented alternative evidence to illustrate that appellant's injury was not caused by an isolated stretch but was caused by a herpes simplex virus.

The issue on appeal is whether the trial court erred in

excluding the rebuttal testimony of Cathy Bradshaw, a registered nurse who had special training as an Infection Control Practitioner. We agree with appellant that this witness should have been allowed to testify in rebuttal, subject to exclusion on proper objection to those specific portions of her testimony which may have been inadmissible.

Whether a witness may give expert testimony rests largely within the sound discretion of the trial court and will not be reversed unless an abuse of discretion is found. *Dildine* v. *Clark Equipment Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984). As stated by the Court in *Dildine, supra*:

> Obviously no firm rule can be derived which would serve uniformly as a means of measuring qualifications of an expert, but the tone of our cases suggests that too rigid a standard should be avoided and if some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of persons of ordinary knowledge, his evidence is admissible. (cites omitted)

The record reflects in the instant case that counsel for appellant questioned Cathy Bradshaw as to her opinion of whether a herpes simplex virus could cause permanent nerve damage. Counsel for appellee objected and was permitted to voir dire the witness regarding her qualifications. The court subsequently ruled that the witness was not qualified to give an answer to the above question. Upon further examination by counsel for appellant, Cathy Bradshaw was questioned regarding the reliance she would place upon the articles and treatises referred to by physicians who had previously testified on behalf of appellee. Counsel for appellee objected to the question arguing that the witness was not qualified to say what she would rely on as she was not a medical doctor. The witness was subsequently questioned outside the presence of the jury which testimony was tendered into the record as a proffer. The trial court subsequently ruled that the witness was not qualified to testify as to whether she would rely on those articles and treatises.

Appellant argues that Cathy Bradshaw's testimony was not offered to render an opinion on the ultimate issue or to provide a diagnostic opinion of the cause of appellant's injury. Her testi-

mony was offered for the limited purpose of demonstrating that the medical journals read into evidence by appellee's physician witnesses were outdated and not considered to be authoritative in the 1980's. Her testimony was further offered for the purpose of establishing that current medical evidence distinguishes the effects of different strains of the herpes virus. Her testimony would have shown that while herpes zoster may cause nerve damage, there were no documented medical cases where the herpes simplex virus had ever caused the type injury suffered by appellant.

At trial, the qualifications of Nurse Bradshaw were established as follows:

> (1) she was currently the Infection Control Practitioner at Jefferson Regional Medical Center in Pine Bluff, and had held that position for three years;
>
> (2) her job as Infection Control Practitioner was to research and maintain a knowledge of the most recent developments in the area of infections and infectious diseases;
>
> (3) she was trained as an Infection Control Practitioner at the Center for Disease Control in Atlanta, Georgia, which is the national institution and authority on infections and infectious diseases. There she attended a 320 hour course on infection control including specific lectures and training in the field of herpetic viral infections. Since that course, she had attended fourteen seminars and conferences on updates in infection control.
>
> (4) she regularly provides information to the doctors of Jefferson Regional Medical Center concerning the possible effects of herpetic viral infections, and regarding new developments in the infectious disease area.
>
> (5) she also acts as a consultant to doctors and area hospitals in South Arkansas in the field of infection control.
>
> (6) she has access to the National Library of Medicine Computer Data Bank and has been trained to accurately retrieve information from this source.

(7) In addition to her special training in infectious diseases, she had been a registered nurse for eleven years.

Clearly, Cathy Bradshaw had knowledge of herpetic viral infections beyond that of persons of ordinary knowledge. Appellee's expert witnesses testified that they would rely on the Head of Infection Control at St. Vincent Infirmary for information concerning viral infections.

Nurse Bradshaw's testimony should have been admissible for the limited purpose of demonstrating that the authorities relied upon by appellee were considered obsolete; for the purpose of providing the jury with the most updated information available on the new effects of the herpes simplex viral strain; and for the purpose of providing an expert opinion on whether or not a herpes simplex virus could cause permanent nerve damage. If allowed to testify, Ms. Bradshaw would have established that her communications with the Center for Disease Control and her search of the National Library of Medicine Computer Bank did not reveal any documented cases where a herpes simplex viral strain had caused permanent nerve damage.

A Texas Court of Appeals case is similar to the case at bar. In *Johnson* v. *Hermann Hospital*, 659 S.W.2d 124 (Tex. Civ. App. 1983), a fifteen-year old girl, after undergoing successful surgery to correct buck teeth, was transferred to Hermann Hospital's SICU II where she was breathing through an endotracheal tube. The nurses in SICU II were responsible for suctioning the tube with the use of special catheters to keep the airway open. Approximately two and one half hours following her transfer to SICU, Cheryl Johnson had a respiratory and cardiac arrest. She suffered permanent brain damage as a result of her brain being deprived of oxygen.

Appellants brought suit contending that the nurse charged with caring for Cheryl in SICU was inexperienced in critical care nursing and was responsible for more patients than she could care for properly and adequately. Additionally, appellants contended Cheryl's airway was not adequately suctioned, allowing secretions to gradually accumulate and thicken, cutting off the air flow in the endotracheal tube and causing Cheryl's cardiac and respiratory arrest. Appellees contended the nurse in charge of

Cheryl's care in SICU was qualified, was not over-burdened, and that the proper nurse-to-patient ratio for step down SICU was maintained. Appellees further contended that Cheryl's injuries were the result of a sudden and acute episode wherein the endotracheal tube suddenly kinked or suddenly became obstructed by the rapid accumulation of secretions within the tube.

At the trial, medical experts were called by each side. At the close of appellees' evidence, appellants sought to introduce portions of the deposition of Nurse Wanda Karcher in rebuttal. Appellees objected and appellants read portions of the deposition into the record outside of the presence of the jury. The court sustained appellees' objection.

Appellees asserted Karcher's testimony was inadmissible because she testified to facts about which she had no personal knowledge, and she was not qualified as an expert witness.

The opinion recited that Nurse Karcher was called as a rebuttal witness to testify as to the proper standards of care for patients by nurses in SICU's. Karcher's testimony revealed that she had had extensive experience in the care of patients using endotracheal tubes and in the proper method of suctioning those tubes.

The Texas Appeals Court reversed and remanded stating:

> Although Karcher was not an RN at the time she gave her testimony, she was qualified to testify because of her experience. Nonphysicians may qualify as medical experts by virtue of special experience. *Warren* v. *Hartnett*, 561 S.W.2d 860 (Tex.Civ.App.—Dallas 1977, writ ref'd n.r.e.).

The Texas court quoted from a previous decision which stated: "It is a fundamental rule that either party is entitled to introduce testimony to rebutt [sic] evidence introduced by his adversary." *Lumbermen's Lloyds* v. *Jones*, 264 S.W.2d 759, 761 (Tex.Civ.App.—Texarkana 1954) rev'd on other grounds 153 Tex. 379, 268 S.W.2d 909 (1954); *Southern Pacific Transportation Co.* v. *Peralez*, 546 S.W.2d 88 (Tex.Civ.App.—Corpus Christi 1976, writ ref'd n.r.e.). It was further noted by the Texas Court of Appeals that the testimony of Nurse Karcher was

offered in rebuttal. "Although some of her testimony may have been inadmissible in appellants' case in chief, testimony which is inadmissible in the first instance may become relevant and admissible in rebuttal."

In the case at bar it is clear that Nurse Bradshaw's testimony would not have been admissible in appellant's case in chief; however, it became relevant and admissible evidence on rebuttal which the jury was entitled to consider and weigh. Of course, the witness was not qualified to make a diagnosis of appellant's injury and the causation thereof.

Appellees assert that part of Nurse Bradshaw's testimony concerning her making inquiries, by telephone and through a computer linkup regarding causation of permanent nerve damage, was clearly hearsay. However, it is well settled that an expert may base his opinion on facts learned from others despite their being hearsay. *Dixon* v. *Ledbetter*, 262 Ark. 758, 561 S.W.2d 294 (1978). In *Arkansas State Highway Commission* v. *Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985), we cited Ark. Unif. R. Evid. 703, which provides:

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

We noted that under this rule an expert must be allowed to disclose to the trier of fact the basis facts for his opinion, as otherwise the opinion is left unsupported in midair with little if any means for evaluating its correctness. The relative weakness or strength of the factual underpinning of the expert's opinion goes to the weight and credibility, rather than admissibility. *See, Polk* v. *Ford Motor Co.*, 529 F.2d 259 (8th Cir.), *cert. denied*, 426 U.S. 907 (1976).

In conclusion we hold that the trial court abused its discretion in refusing to qualify Nurse Bradshaw as an expert in her field. Her testimony reveals that she was sufficiently familiar by virtue of her training and experience in the area of infectious diseases. Furthermore, her testimony was offered in rebuttal and

not for the purpose of diagnosing appellant's injury or its cause.

Reversed and remanded.

COOPER and GLAZE, JJ., agree.

SOUTHERN PAPER BOX CO. *v.* Gaines N. HOUSTON

CA 84-256 690 S.W.2d 745

Court of Appeals of Arkansas
En Banc
Opinion delivered June 12, 1985
[Supplemental Opinion on Denial of Rehearing October 9, 1985.*]

* Glaze, J., dissents. Cooper, J., would grant rehearing for reasons stated in his dissent to original opinion.

Allen, Cabe & Lester, A Professional Association, for appellant.

Catlett & Stubblefield, by: *H. B. Stubblefield*, for appellee.

MELVIN MAYFIELD, Judge. Appellee, a Little Rock attorney, filed suit against appellant to recover an $85,979.85 fee alleged to be due him. Appellant did not file an answer to the complaint but its president, Raymond Cardwell, contacted appellee's attorney, made a payment of $21,544.89 on the account, and agreed that the company would pay $5,000.00 each week until the account was paid. Only one weekly payment was made and when several weeks passed without further payments, appellee's attorney notified appellant in writing of his intention to take a default judgment. Appellant then contacted its present attorney who filed a motion to quash the summons on the basis of improper service, alleging that the summons was not served on an officer, managing or general agent, or any other authorized agent of the corporation as required by the Arkansas Rules of Civil Procedure Rule 4(d)(5).

At an evidentiary hearing, there was testimony that a sheriff's deputy had left the summons with a receptionist at appellant's office although Mr. Cardwell admitted that an employee gave him the summons the same afternoon it was given to the receptionist. The trial court denied the motion to quash and granted the appellee's motion for default judgment for the balance due on the account.

Appellant's first argument on appeal is that the trial court erred in denying its motion to quash since there was a failure to obtain service as provided by ARCP Rule 4(d)(5). Appellant cites several cases to support its position, but we do not think any of them are applicable under the facts of this case.

In *Tucker* v. *Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), a default judgment was set aside because the summons did not give the defendant adequate notice. The court said the summons was defective because it was not directed to the defendant, did not direct him to file a pleading and defend, did not notify him that judgment would be entered against him if he did not defend, and did not inform him that the default judgment would be for the relief demanded in the complaint.

In *Edmonson* v. *Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978), the defendant was out of town when his wife picked up the summons at the sheriff's office. The Arkansas Supreme Court held that a default judgment obtained on that service should have been vacated since the summons was not served by leaving a copy at the defendant's usual place of abode in keeping with the statute in effect at that time. The Court said the judgment was void under Ark. Stat. Ann. § 29-107 (Repl. 1962) which "provides that '[a]ll judgments' rendered by any court against any person 'without notice, actual or constructive, and all proceedings' thereon 'shall be absolutely null and void.' " *See* Ark. Stat. Ann. § 29-107 (Repl. 1979).

In *Pounders* v. *Chicken Country, Inc.*, 3 Ark. App., 220, 624 S.W.2d 445 (1981), the president of a corporation testified that he had no knowledge of the writ of garnishment served on an employee until after a default judgment had been entered against the corporation. The trial court set that judgment aside and the appellate court affirmed on the basis that the judgment was void. *Pounders* cited *Nutrena Mills, Inc.* v. *Parsons Feed & Farm Supply, Inc.*, 234 Ark. 1058, 356 S.W.2d 421 (1962), where the trial court granted the corporate garnishee's motion to quash service because the writ was not served upon its president and it was not shown that he was unavailable. Thus, that case, unlike the instant case, did not involve a default judgment.

In *Terminal Truck Brokers* v. *Memphis Truck & Trailer, Inc.*, 279 Ark. 427, 652 S.W.2d 34 (1983), it was held that a default judgment should be set aside because the writ of garnishment fell short of the requirements of ARCP Rule 4(b) as to form "in substantially the same manner" as the summons held defective in *Tucker* v. *Johnson, supra.*

And in *A.O. Smith Harvestore* v. *Burnside*, 282 Ark. 27, 665

S.W.2d 288 (1984), default judgment was set aside where proper service was not obtained upon a nonresident corporation "because the attempt to use the Secretary of State resulted in the notice being returned," and appellant's agent, who was given a copy of the complaint, removed any question of waiver of proper service by a statement in a letter to appellee's attorney.

The above cases, relied upon by the appellant, fall into two categories. In *Tucker* and *Terminal Truck Brokers* default judgment was set aside because the summons was defective in *form*, that is, in the language used. In *Edmonson*, *Burnside*, and *Pounders*, the default judgment was set aside because the summons was *not served* in the proper manner and the defendant did not have actual notice of the suit until after judgment was entered. The case at bar, however, does not fall into either of these categories. Here, the proper officer of appellant, its president, admits he actually received the summons the same day it was served on the receptionist. Also, there is no contention that the form does not comply with the form prescribed by the Supreme Court in its per curiam issued February 1, 1981, as a result of the *Tucker* decision. *See* 275 Ark. at 497.

Considered under the factual circumstances of the instant case, the case of *White* v. *Ray's Bldg. Contractor*, 267 Ark. 83, 589 S.W.2d 28 (1979), relied upon by the appellee, reaches a conclusion contrary to those cited by the appellant. In *White*, notice to the nonresident defendants by registered mail was returned undelivered as "unclaimed." The appellee, however, obtained default judgment on the basis of an affidavit suggesting that the defendants had in fact refused to receive the letter. The appellate court affirmed the trial court's refusal to set aside the judgment since the proof indicated that the defendants had actual knowledge of the suit several months before the default judgment was entered. We believe that decision fits the situation in the instant case. Here, the president of the appellant corporation admits that he actually received the summons the same day it was left at his office. He also admits that he made a substantial payment on the account and agreed to make weekly payments until the account was paid in full. The appellant has not been prejudiced. It has not been denied either *notice* of the suit or *opportunity* to answer. *See Ford Life Ins. Co.* v. *Parker*, 277 Ark. 516, 644 S.W.2d 239 (1982).

Appellant also argues that the trial court erred in granting the default judgment since, before the time to answer had expired, the appellee had agreed to "drop the suit" in exchange for the appellant's promise to pay the amount sued for. It is argued that appellant had a valid defense to a portion of the account but did not file an answer in reliance upon the appellee's agreement to "drop the suit," and that this constituted "excusable neglect" within the meaning of ARCP Rule 55(c). *Perry* v. *Bale Chevrolet Co.*, 263 Ark. 552, 566 S.W.2d 150 (1978), and *Burns* v. *Shamrock Club*, 271 Ark. 572, 609 S.W.2d 55 (1980), are cited in support of this contention.

In *Perry* the appellant tendered a handwritten answer on the 19th or 20th day after service but the clerk would not file it because it was not typed in compliance with a local court rule. The appellant then filed a typewritten answer one day late. In response to a motion for default judgment the appellant responded by affidavit that he had been in communication with appellee's respresentatives who had agreed the case would be dismissed; however, on the 18th day after service he learned they had not advised their attorney of this agreement and he then tried to file the handwritten answer. The trial court found this did not constitute "excusable neglect" and granted the default judgment motion. The Supreme Court pointed out that appellant's affidavit had not been controverted and held that excusable neglect did exist.

In *Burns* the appellant was served with summons on a suit to recover damages for appellant's negligent operation of an automobile. Appellant called an attorney who had previously represented him. The attorney advised appellant he could not represent him, but when appellant said he had insurance coverage, the attorney explained the company's obligation to defend the suit and asked appellant to get him the name of the company. The next day the appellant called and left the name of the company with the attorney's secretary and that same day the attorney wrote the insurance company asking that it defend the suit. About a week later, before time to file an answer had expired, the company notified the attorney that appellant had no coverage on the automobile. The attorney neglected to pass that information on to appellant, no answer was filed, and default judgment was granted. The Supreme Court reversed, holding that there was "an

honest and unfortunate misunderstanding which constituted just cause for not filing a timely answer."

We do not believe the facts in the instant case demonstrate the extenuating circumstances shown in *Perry* and *Burns*. Here, the president of appellant corporation agreed to pay the amount sued for. Although he testified that there was some question *in his mind* as to whether he really would make all the payments necessary to pay the full amount, he very clearly did not reveal that to the appellee. Certainly the trial court was entitled to take that evidence into consideration in determining whether the appellant had a valid defense to the claim and whether there was excusable neglect or other just cause sufficient to excuse the appellant from a default judgment. In *Renault Central* v. *Int'l Imports*, 266 Ark. 155, 159, 583 S.W.2d 10 (1979), the Supreme Court said:

> A trial judge has wide discretion in determining whether a default judgment should be vacated and this court will not reverse the decision of the trial judge unless he has abused that discretion. *Jetton* v. *Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978); and *Davis* v. *McBride*, 247 Ark. 895, 448 S.W.2d 37 [1969]. In a case such as this, where no attempt was made to show either the existence of a meritorious defense or a lack of knowledge of the pendency of the proceeding, we cannot say that refusal to grant a motion to vacate was an abuse of discretion.

And in *Meisch* v. *Brady*, 270 Ark. 652, 658, 606 S.W.2d 112 (Ark. App. 1980), the Court of Appeals said:

> Rule 55 states in no uncertain terms that a default judgment may be set aside "upon a showing of excusable neglect, unavoidable casualty, or other just cause." And rule 60(d) is equally clear and in definite terms provides that *"[n]o judgment* against defendant, unless it was rendered before the action stood for trial, shall be set aside . . . unless defendant in his motion asserts a valid defense to the action and, upon hearing, makes a prima facie showing of such defense."

We also note that the agreement to "drop the suit" is

not free of ambiguity. In a sense the suit was dropped for as long as the agreed payments were made. What this term meant and the weight it should have been given in considering whether appellant had a valid defense or whether excusable neglect or other just cause existed was for the trial judge to decide. We find that his decision was not clearly against the preponderance of the evidence.

Affirmed.

COOPER and GLAZE, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority opinion. I have no particular quarrel with the majority's decision that the service was adequate because the appellant's president had actual knowledge of the suit and thus had the opportunity to defend. However, I disagree with the majority's, and the trial court's, decision that the failure to file a timely answer was not excusable. What has happened is that the appellee, an attorney, induced the appellant's president not to file an answer by agreeing to "drop the suit". The majority finds that phrase ambiguous, but it is unlikely that the appellee meant anything other than a dismissal because the parties had agreed on a payment plan. The appellant corporation obviously relied on the appellee's representations, for it did not file an answer or attempt to do so until it received notice that the appellee intended to present a motion for a default judgment.

In *Perry* v. *Bale Chevrolet Co.*, 263 Ark. 552, 566 S.W.2d 150 (1978), the Arkansas Supreme Court found that the trial court abused his discretion by granting a default judgment. The defendant was properly served with a summons, and he attempted to file an answer one day late. His excuse for being late was that he had been in communication with representatives of the appellee and that it was agreed that the suit would be dismissed prior to the last day for filing his answer. The trial court found that excuse insufficient to prevent the granting of a default judgment. In reversing, the Supreme Court said:

> Under the peculiar circumstances of this case, we disagree and reverse the judgment. Pertinent circumstances are the appellant's understanding that the suit would be dismissed without his being required to answer, his prompt action in

tendering a handwritten answer and the filing of a typewritten answer only one day late. *Perry, supra*, at 553.

As noted in *Perry, supra*, default judgments are not the favorites of the law, and in several instances substantial compliance by a defendant has been held sufficient to avoid a default judgment. See, *Winters* v. *Lewis*, 260 Ark. 563, 542 S.W.2d 746 (1976); *Barkis* v. *Bell*, 238 Ark. 683, 384 S.W.2d 269 (1964); *Easley* v. *Inglis*, 233 Ark. 589, 346 S.W.2d 206 (1961); *Cummings* v. *Lord's Art Galleries*, 227 Ark. 972, 302 S.W.2d 792 (1957).

On the peculiar circumstances of the case at bar, I would reverse the trial judge's decision, and hold that the appellant's failure to timely answer was the result of "excusable neglect" or "other just cause". *Fitzwater* v. *Harris*, 231 Ark. 173, 328 S.W.2d 501 (1959).

TOM GLAZE, Judge, dissenting. Because appellee failed to obtain service on appellant as provided under Rule 4(d)(5) of the Arkansas Rules of Civil Procedure, I believe this cause should be reversed. In my opinion, the Supreme Court's holding in *Edmonson* v. *Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978) clearly dictates such reversal.

Here the majority incorrectly attempts to distinguish *Edmonson*. This Court erroneously states that the defendant Edmonson did not have actual notice of the suit until after the default judgment was entered and that the judgment was void for lack of notice under Ark. Stat. Ann. § 29-107 (Repl. 1962). Nothing in the *Edmonson* decision reflects the defendant was unaware of the suit until *after* the default judgment was entered. Furthermore, such a factual distinction was not significant in the Supreme Court's holding, which was based upon appellee's (Farris') failure to obtain proper service under Ark. Stat. Ann. § 27-330 (Repl. 1962). In *Edmonson*, the defendant was out of town when his wife picked up his summons at the sheriff's office. The trial court observed that the service upon Edmonson's wife at the sheriff's office rather than "at the place of abode"—as required under § 27-330—was a technical distinction, and it held the service was valid. The Supreme Court reversed the trial court, holding statutory service requirements, being in derogation of

common law rights, must be strictly construed and exactly complied with. The Supreme Court further held the default judgment against Edmonson was void *ab initio* because the sheriff failed to comply with the mandatory provisions of § 27-330.

In the instant case, the sheriff failed to comply with the mandatory provisions of Rule 4(d)(5), which requires service upon a corporation by delivering a copy of the summons and complaint to an officer, partner (other than a limited partner), managing or general agent, or any agent authorized by appointment or law to receive service of the summons. Undisputedly, the sheriff served appellant's receptionist and thereby failed to comply with any of the terms set out in Rule 4(d)(5). If the Supreme Court required strict compliance with service procedures in *Edmonson*, I fail to see how we can do otherwise in this cause.

I dissent.

Supplemental Opinion on Denial of Rehearing
Delivered October 9, 1985

697 S.W.2d 124

MELVIN MAYFIELD, Judge. After our decision affirming the trial court, 15 Ark. App. 176, 690 S.W.2d 745 (1985), the appellant filed a petition for rehearing accompanied by a 16-page brief. The appellee has filed a response to the petition alleging that the appellant is attempting to reargue the entire case.

Arkansas Supreme Court and Court of Appeals Rule 20(g) provides that "Counsel are expected to argue the case fully in the original briefs, and the brief on rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the Court." Here, the appellant did not even reply to the appellee's brief, but after our opinion was handed down, the appellant filed a brief on rehearing containing 18 cases not cited in its original brief and containing twice as many pages as the argument portion of its original brief.

We agree with the appellee that appellant's brief on rehearing violates Rule 20(g) and that this is sufficient reason to deny the petition for rehearing. However, we think the petition should also be denied on its merits.

The thrust of appellant's original brief was that actual knowledge of a proceeding in court will not validate a default

judgment granted on defective service of process. As pointed out in our original opinion, all the cases cited by appellant fell into two categories: (1) where the summons was defective in form so that it did not notify the defendant that failure to answer would result in default judgment, or (2) where the summons was not served in the proper manner and the defendant did not have actual notice of the suit until after judgment was entered against him.

In its brief on rehearing the appellant renews its argument and cites a case not cited in its original brief, *Halliman* v. *Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971), as additional authority. That case, however, presents nothing new. It clearly holds that Ark. Stat. Ann. § 29-107 (Repl. 1962) makes a judgment null and void if rendered "without notice, actual or constructive."[1] This explanation of *Halliman* and a case cited in appellant's original brief, *Edmonson* v. *Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978), was given in the last paragraph of the case of *White* v. *Ray's Bldg. Contractor*, 267 Ark. 83, 589 S.W.2d 28 (1979), cited in our original opinion. But in *White* the appellant had actual knowledge of the suit before default judgment was entered against him and because of that the court refused to set the judgment aside. As we pointed out in our original opinion, that is the situation in the instant case.

However, the appellant's brief on rehearing also makes a new argument on this point. It is now argued that knowledge of the pendency of an action does not cure invalid service of process *where challenged by a motion to quash filed prior to the granting of a default judgment*. A number of cases not cited in its original brief are cited in appellant's rehearing brief in support of this contention. Most of them are patently not applicable and we do not find that the decision in any of them is based on the fact that a motion to quash was filed prior to the granting of a default judgment. On the other hand, one of the cases cited in *White* states: "After the entry of a default judgment

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[1] See footnote in *Tucker* v. *Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982), for statement that section 29-107 was not superseded with respect to default judgments by the Arkansas Rules of Civil Procedure.

the defendant's attack should be directed against the judgment rather than against the service of process." *See Employers Mutual Casualty Co.* v. *Buckner*, 233 Ark. 564, 345 S.W.2d 924 (1961). Moreover, under ARCP Rule 12(b) a defense based upon insufficiency of service of process may be raised by responsive pleading or motion, but under Rule 12(h)(1) that defense is waived by the failure to properly assert it. And in *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979), the court said:

> It is a well-settled general rule, however, that any objection to irregularities or defects in the service of process is waived unless made promptly and diligently and that defective service of process may be sufficient to constitute legal notice of a suit and support a judgment therein, so long as the service actually gives the party served notice of the proceedings. (Citations omitted.)

266 Ark. at 35.

In view of appellant's new argument about its motion to quash, it is important to note Rule 12 and *Pender* because the appellant failed to file a pleading or motion of any kind for more than 50 days after its president actually received a summons giving him notice of the filing of the suit and warning him that default judgment would be entered if no response was filed within 20 days. Rule 12 and *Pender* both recognize that the insufficiency of service of process may be waived and we think there is ample evidence to support the trial court's action in denying appellant's belated motion to quash and in granting the appellee's motion for default judgment.

Appellant's brief for rehearing states that this case "fits exactly in the mold" of *Nutrena Mills, Inc.* v. *Parsons Feed & Farm Supply, Inc.*, 234 Ark. 1058, 356 S.W.2d 421 (1962), but we do not agree. In that case the court said "the deputy sheriff's return merely recited that he had served the writ by delivering a copy to Shorty Parsons, vice president of the appellee." The court then pointed out that the law required that service be had upon the president of the corporation or, in his absence, upon certain other officers, and the court held that the service was void. The reason for this holding was explained in *O'Guinn VW, Inc.* v.

Lawson, 256 Ark. 23, 505 S.W. 2d 213 (1974), in these words: "In *Nutrena Mills*, we pointed out that the service was void because the unavailability of the president of the corporation was neither recited in the return nor shown by the evidence." *Id.* at 26.

Although a motion to quash service was granted in *Nutrena Mills*, there was no evidence in that case from which the court could have found a waiver of the defective service. But we have a completely different situation in the instant case. Here, the return states that service was had upon Raymond Cardwell "the duly designated agent for service." The evidence here shows that Cardwell was in fact the proper agent for service and that he became aware of and actually received the summons the same day it was left with the receptionist at his corporation's office. However, instead of making a prompt and diligent objection to the sufficiency of the service by filing a motion or other pleading in the suit, the appellant made an agreement to pay the appellee the amount sued for and, after making substantial payments, it breached its agreement. Now it wants to set aside the judgment in the suit which it ignored and offers the excuse that, because it never really intended to fulfill the agreement it made, it should now be allowed to question the sufficiency of the service giving it notice of the suit.

Of course, "We do not favor default judgment and look with disfavor on substituting actual notice for proper notice," *see A.O. Smith Harvestore Products, Inc.* v. *Burnside*, 282 Ark. 27, 665 S.W.2d 288 (1984), but under the circumstances in this case we do not think the trial judge's decision should be reversed.

The petition for rehearing is denied.

GLAZE, J., dissents.

COOPER, J., would grant rehearing for the reasons expressed in his dissent to the original opinion.

TOM GLAZE, Judge, dissenting. I find nothing in the majority's supplemental opinion that explains its failure to follow the Supreme Court's holding in *Edmonson* v. *Farris*, 263 Ark. 505,

565 S.W.2d 617 (1978). The Court's present reference to Rule 12 of the Arkansas Rules of Civil Procedure lends the majority no aid. One need only read the Supreme Court's decision in *Tucker* v. *Johnson*, 275 Ark. 61, 66, 628 S.W.2d 281, 283 (1982) to understand that the adoption of the Rules did not affect the *Edmonson* holding. Thus, for the same reasons stated in my earlier dissent, I believe this cause should be reversed. *See Southern Paper Box Co.* v. *Houston*, 15 Ark. App. 176, 183, 690 S.W.2d 745, 750 (1985).

ARKANSAS LOUISIANA GAS COMPANY, A Division of Arkla, Inc. *v.* Jack JAMES and Mrs. Jack JAMES

CA 84-400 692 S.W.2d 761

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 1985

Daily, West, Core, Coffman & Canfield, by: *Stanley A. Leasure*, for appellant.

Gary R. Cottrell, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Arkansas Louisiana Gas Company appeals from a judgment awarding Jack James and his wife the sum of $7,500 as compensation for the taking of a portion of his lands by eminent domain. It contends that the trial court erred in denying its motion to strike the testimony of the appellee and his expert witness, and in denying its motions for a directed verdict and for mistrial. We find no error.

The appellant brought this action to acquire a 40 foot right-of-way across appellees' property comprised of 2.3 acres for a

pipeline. At the trial the appellee offered his testimony and that of one expert witness as to the extent of the damage resulting from the taking which amounted to $16,924. Appellant offered testimony from its expert witnesses in rebuttal. The jury returned a verdict in favor of the appellee in the sum of $7,500. After appellee concluded his testimony the appellant moved that it be stricken because he had not testified either to the value of the property actually taken from the easement or the before and after value of the remainder of his property outside the easement and his testimony was therefore irrelevant. We cannot agree. The testimony in that respect is as follows:

Q. Do you have an opinion as to the fair market value of the property, 2.3 acres of property which was taken by this easement?

A. Yes I do.

Q. What is that?

A. You'd like for me to give it to you?

Q. Yes.

A. Okay, I have a total here in two separate figures— —.

Q. Okay, I'm speaking only of the 2.3 acres.

A. Of the 2.3 acres, all right, $7,500 for the 2.3 acres. That is the right-of-way, now, the 152 rods, 40 foot wide.

Q. Yes.

A. Okay, we valued that at $7,600.

Q. And that is your opinion as to — —.

A. The damages, for what the 2.3 acres was worth.

Q. That's the total damage?

A. For my total damages, yes, $16,924.

It is clear to us that the appellee stated that the lands actually taken for the easement had a fair market value of $7,500 ($7,600) and that when added to the reduction in market value of his other lands the total damage was $16,924.

Our law is also firmly established that a motion to strike the entire testimony of a witness is properly denied where any part of that testimony is admissible. *Urban Renewal Agency of the City of Harrison* v. *Hefley*, 237 Ark. 39, 371 S.W.2d 141 (1963); *Ark. State Hwy. Comm'n* v. *Bowman*, 237 Ark. 51, 371 S.W.2d 138 (1963). Even if some portion of appellee's testimony was inadmissible his testimony as to the value of the 2.3 acres actually taken was proof of at least one of the two elements. For that reason alone it was not error to deny a motion to strike the entire testimony. *McCormick, McAlister, supra.*

After his expert had testified but before closing his case appellee was recalled to the witness stand and testified that in his opinion the entire tract had a fair market value of $288,572 before the taking and a diminished value of $261,647 after the taking and that his total damages were $16,924. The appellant then moved to strike this testimony on the ground that the testimony of fair market value of the entire tract before and after the taking is not the measure of damages in partial taking cases and the testimony was therefore irrelevant. The appellant argues that the only measure to be applied for a partial taking is the fair market value of the lands actually taken plus the reduction in market value to the remainder of the tract.

While we might agree that this is the correct measure of damages for a partial taking we cannot agree that failure to strike the testimony of before and after values was prejudicial error. Our court has recognized a difference in measuring just compensation in takings by the sovereign and those by private corporations. The proper measure of just compensation to be awarded in the exercise of the sovereign's right of eminent domain is the difference in the fair market value of the entire tract immediately before and the fair market value of the remaining lands after the taking. *Young* v. *Ark. State Hwy. Comm'n*, 242 Ark. 812, 415 S.W.2d 575 (1967). In that type of case the trier of fact may consider any special benefits resulting from the public improvement and offset any resulting enhancement of value against the damages, for where the public use enhances the value of the remainder of the land, the owner is held to have received just compensation to the extent of that enhancement. *City of Paragould* v. *Milner*, 114 Ark. 334, 170 S.W. 78 (1914).

The Arkansas Constitution permits the State to delegate its power of eminent domain to private corporations but Art. 12 § 9 places the following restriction on the exercise of that right:

> § 9. No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improvement proposed by such corporation, shall be ascertained by a jury of twelve men, in a court of competent jurisdiction, as shall be prescribed by law.

In *Cate* v. *Crawford County*, 176 Ark. 873, 4 S.W.2d 516 (1928) the court construed the requirement that the land owner be compensated *in money* as restricting the set-off of special benefits, or enhancement, against the value of the lands taken for private use. A private corporation as condemnor is liable to the land owner for the fair market value of the lands actually taken and any damage resulting to the remainder of the tract. *Ark. La. Gas Co.* v. *Howell*, 244 Ark. 86, 423 S.W.2d 867 (1968); *Ozark Gas Transmission System* v. *Hill*, 10 Ark. App. 415, 664 S.W.2d 892 (1984). There are no other differences in these two types of eminent domain cases in the measuring of just compensation. This constitutional restriction placed on private corporate condemnors which prevents any set-off in favor of the corporation for special benefits is intended to protect the land owner's rights to just compensation. While testimony as to the before and after values might be prejudicial to the land owner as permitting the trier of fact to consider special benefits, it prejudices no right of the appellant corporation. If there was technical error in admitting this testimony of appellee it was harmless.

It is well settled that the opinion testimony of the owner of property, because of his relationship as owner, is competent and admissible on the question of the value of his property regardless of his knowledge of property values and it is not necessary to show that the owner was acquainted with the market value of his property or that he is an expert on value. Only the weight of the testimony is affected by his knowledge of value and

this testimony should be stricken only where it has no reasonable basis. *Ark. State Hwy. Comm'n* v. *Maus*, 245 Ark. 357, 432 S.W.2d 478 (1968); *Arkla Gas Co.* v. *Downs*, 11 Ark. App. 231, 669 S.W.2d 478 (1984).

The land owner testified that he had lived on this particular tract since 1959. He described his land as being highly improved and productive pasture land. Although he had not sold any land between 1960 and the date of trial he had purchased over 800 acres of land and was generally familiar with the values of land in the community. He testified to those things which he had considered in concluding that the value of his remaining property had diminished, including the facts that the easement ran within 15 feet of his home restricting his use of it and the warning signs were placed across his property along the easement. We cannot conclude that the appellee's testimony had no reasonable basis.

When the appellee was recalled to give his before and after testimony he stated his opinion as to both. The appellant did not cross-examine him to determine the basis on which those opinions had been established. Once the land owner or his expert had expressed his opinion as to the fair market values the burden was upon the condemnor to establish by cross-examination that the landowner or expert witness had no logical basis to support his opinion before the testimony was subject to being stricken. *Ozark Gas Transmission System* v. *McCormick, supra*; *Ark. State Hwy. Comm'n* v. *Johns*, 236 Ark. 585, 367 S.W.2d 436 (1963). Insofar as *Southwestern Bell Tel. Co.* v. *Fulmer*, 269 Ark. 727, 600 S.W.2d 450 (Ark. App. 1980) is at variance with *McCormick* and cases cited there we decline to follow it.

The appellant moved to strike the testimony of the appellee's expert witness Lee Hackler. Mr. Hackler testified that he had been in the business of selling and appraising real estate for twelve years. He testified that he had made an appraisal of the appellee's property on April 21, 1982 "when the pipeline was proposed" but had not yet been put down. He stated that he had visited the property subsequent to the laying of the pipeline and was familiar with it before and after the pipeline was laid. In the course of his examination the following transpired:

Q. Did you make an appraisal on the property?

A. I did.

Q. As to the difference in fair market value?

A. Right, I thought there was at least $12,500 damages to this property.

Q. That's the difference between — —.

A. Market value at the time and the difference because of damages that was made.

Q. In your practice in realty are you familiar with other types of property the same as this property?

A. Yes.

Q. So you had experience in dealing with this type of property?

A. Yes, I sure have.

Q. And you consider the difference in fair market value $12,500?

A. $12,500.

The appellant then moved to strike the testimony because it gave no opinion as to the fair market value of the property taken or the fair market value before and after the taking to the remainder. Appellant argued that this was an improper measure for a partial taking and that the testimony was therefore irrelevant. For the reasons already stated we find no prejudicial error.

The witness clearly stated that in his opinion the difference in the fair market value of the property immediately before and after the taking was $12,500. Ordinarily an expert witness will first state his opinion as to the value of the property immediately before the taking followed by his opinion as to its value thereafter and after making the necessary mathematical calculations state the difference. We do not require that the testimony be given in that mechanical fashion. *Ark. State Hwy. Comm'n* v. *Darling*, 243 Ark. 386, 420 S.W.2d 94 (1967). What our cases do require is an expert opinion as to the difference between the two values. It is clear from the testimony that Hackler made two appraisals—one to establish the market value before and one to establish it after the taking. He was not asked on

cross-examination to state those values; nor was he cross-examined on how he arrived at them. Once the expert witness has expressed his opinion as to the difference in fair market value the burden shifts to the condemnor to establish by cross-examination that he had no logical basis to support his opinion before the testimony is subject to being stricken. *Ozark Gas Transmission System* v. *McCormick, supra*; *Ark. State Hwy. Comm'n* v. *Jones, supra.*

On cross-examination it was developed that Hackler could not recall the actual date of the taking and could not state the width of the easement, the size of the pipeline or how deep the line had been placed in the ground. When asked if he did not think that those factors made a difference in his appraisal he answered that they did and offered to refer to his notes. He was not permitted to do so because appellant then went to a new line of questioning. The appellant argues that without knowledge of the width and depth of the pipeline easement his appraisal had no reasonable basis. We conclude that he did know and recorded these facts at the time he made his appraisals but he simply had no present recall without reference to his notes.

After Hackler had completed his testimony the appellant again moved to strike his testimony stating that it had no foundation as he was unfamiliar with the property at the time of the taking and reasserted his argument that he had applied an improper measure of damages. The appellant now contends that the appraisal should have been stricken because the witness could not state the date of taking and therefore could not know the market value immediately before the taking. The record reflects that the order of entry was dated March 23, 1982. The witness testified that he had made an appraisal of the property at a time when he knew the easement was "proposed" but before the pipe had been laid. His written appraisal was dated April 21, 1982. Our law requires that the appraisal reflect the fair market value of the property as of the date of taking. There is no requirement that the appraisal actually be made on that date. We cannot conclude that an appraisal made within thirty days of that date does not reasonably reflect the required market value.

Hackler testified that the remaining portion of appellee's

property had diminished in value due to the presence of the pipeline. He was asked if he knew of any property value that was decreased by a pipeline easement He answered:

A. I cannot give you a specific yes or no, but I will say this. Any time there is limited use, restriction of property, there is damage to it, so any time you have an easement restriction or reservation it is detrimental to the value of the property.
Q. Can you tell this jury of any property today that was decreased in value because of an underground pipeline?
A. Yes sir, Jack James.
Q. Anyone other than that?
A. Any place that you find an easement I will show you a piece of property that's worth less money.
Q. I'm asking you specifically do you know any comparable that was decreased by the underground pipeline easement?
A. I've never seen an easement that close to a man's house before. I haven't.
Q. Would you tell this jury, just answer my questions? Can you tell this jury — —
A. I cannot give you a specific — —.

Relying on *Ark.-Mo. Power Company* v. *Sain*, 262 Ark. 326, 556 S.W.2d 441 (1977), appellant argues that the expert's testimony should have been stricken because his severance damage testimony was without reasonable basis. We do not agree.

In *Sain* the expert witness testified that the difference in value between a farm before and after the condemnation was $27,197. That testimony was stricken because on cross-examination he admitted that he could not think of a single instance where a transmission line had any effect on the market value of the property. There is no recital of what he said about how he based his opinion that the easement had diminished the value of the property. *Sain* has been the subject of discussion in many of our opinions both published and unpublished. In those opinions we have not construed *Sain* as holding that in every instance where an expert knows of no comparable sale his testimony of diminished value has no reasonable basis. In *Southwestern Bell Tel.*

Co. v. *Fulmer*, *supra* and *Arkansas Louisiana Gas Co.* v. *Downs*, *supra*, we distinguished *Sain* where the expert had knowledge of properties whose values had been affected by the placement of an easement. In *Fulmer* the witness testified that to his knowledge utilities had affected the values of property and in both *Fulmer* and *Downs* the witness knew of a piece of property that could not be sold at any price after the easement had been established. In *Fulmer* we recognized that expert testimony is competent even if based on hearsay and as no two tracts of land are identical, latitude in evaluating comparable sales must be granted. We further recognized that the opinion testimony of an expert can be considered even though his opinion is not based entirely on comparable transactions.

Here the witness testified that although he had no knowledge of a specific tract where the value had been diminished, it was his expert opinion that the easement would affect the determination of a willing buyer to purchase it. It would diminish its value especially where, as here, the easement ran so close to the principal improvements on the property and restricted future expansion. In this instance we conclude that the lack of knowledge of comparable sales went to the weight of the testimony rather than to its admissibility.

Appellant's contention that the court erred in not granting a directed verdict because the evidence was insufficient is based entirely upon its assertion that all of the appellee's testimony and that of his expert should have been stricken. We have concluded that the evidence was properly admitted and is sufficient to sustain the verdict of the jury.

In support of his claim for severance damages the appellee attempted to show damages to his fences and fields and other special damages. He first described his property as it appeared before the taking. In attempting to describe the conditions existing after the construction began he gave some answers regarding the conditions of the area within the condemned strip. After several objections there was an in chambers hearing at which it was explained to the appellee what the proper measure of damages was and that some of the proof he sought to offer was improper and irrelevant. Apparently he was cautioned to restrict

his testimony to the conditions existing on the land outside the easement. Thereafter several other objections were made in court, some of which were sustained and some overruled. After one such objection was sustained the following occurred:

> Q. How much was the house worth prior to the time that the easement went through?
>
> MR. LEASURE: I object to that also. The issue is the value of all of the property off of the easement before and after.
>
> THE COURT: Sustained.
>
> THE WITNESS: Your Honor, may I ask you a question? I am confused. I don't know how to testify ——if I can't say what my property was worth before and I can't say what it was worth afterwards, how can I testify?
>
> THE COURT: You can say it exactly like that but you see, that is what we were talking about in there about thirty or forty minutes or whatever it was, but we are bound by what the Arkansas Supreme Court and the Court of Appeals tells us to do, and that's what we have to go by.

The appellant contends that it was error to overrule its motion for mistrial. Appellant argued that the effect of appellee's comments presented to the jury a picture that appellee was being precluded from telling his story by the legal maneuvering of the appellant. It argues on appeal that the court's response compounded the prejudice by making it appear that the court had sympathy for appellee. Appellant argues that this amounted to a prohibited and prejudicial comment on the evidence and that the jury was irrevocably tainted by the remarks of both appellee and the court.

A mistrial is a drastic remedy and ought not to be resorted to unless there has been an error so prejudicial that justice could not be served by continuing in the trial and there is no other method by which the prejudice can be removed. A broad discretion is vested in the trial court in acting on motions for

mistrial because of his superior position to judge the possibility of prejudice. His exercise of that discretion will not be reversed in the absence of manifest abuse.

The trial court was in a better position to determine the effect of the appellee's statement upon the jury and the reaction they might have to it. He concluded that the appellee had not intended to inflame the jury or obtain its sympathy and that appellee's comments had not had that effect. The appellant has not pointed out to us and our review of the record has not disclosed anything that would indicate that the trial judge was wrong or that his discretion was manifestly abused. We agree with the trial court that the appellee was merely confused because he was being required to change the way he had intended to testify.

Appellant also argues that the judge's comments amounted to a comment on the evidence. This issue was not raised below and will not be addressed for the first time on appeal.

Affirmed.

CORBIN and COOPER, JJ., agree.

Chester BELL *v.* Lucille Slatton BELL

CA 84-380 691 S.W.2d 184

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 1985

David Throesch, for appellant.

Ponder & Jarboe, by: *Dick Jarboe*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Chester Bell appeals from a decree of the Chancery Court of Lawrence County granting Lucille Slatton Bell a divorce and disposing of their properties. We find no merit in any of the five points for reversal advanced and affirm the decree of the chancellor.

The parties were married in December 1981 and separated on January 27, 1984. At the time of the marriage appellee was the owner of a tract of land in Lawrence County. During the marriage the parties acquired properties as tenants by the entirety.

On February 1, 1984 the appellee brought this action for divorce on grounds of indignities to her person consisting of assaults, unmerited reproach, insult and studied neglect. The appellant answered denying any grounds for divorce and counterclaimed for divorce on grounds of personal indignities. By way of counterclaim he further alleged that during the marriage the appellee had executed a deed to her non-marital property in Lawrence County in which she established an estate by the entirety with him. He further alleged that a subsequent deed by him restoring that property to her was obtained by mutual mistake or fraud and should be cancelled. The chancellor found that the appellee had established her grounds for divorce and denied the appellant's counterclaim on a finding that he had failed to prove by a preponderance of the evidence that the deed was result of mutual mistake or fraud and decreed that the property was the sole and separate property of the appellee.

At the trial the appellee called her retarded child to testify in her behalf. He testified that on one occasion he saw the appellant strike his mother. During the course of his examination, however, he testified that the appellee was now living with another man in her house. He testified the other man had been there "this week" and that during the week preceding the trial she had been sleeping in the same bed with this person. The appellee by way of rebuttal testified that the man was living at her house but was paying rent and she denied any sexual involvement with him.

[redacted] The appellant first contends that it was error to grant appellee a divorce because the child's testimony established by a preponderance of the evidence that she was guilty of adultery. We find no merit to this argument. There was no complaint by the appellant that the appellee was guilty of adultery. The appellee denied the allegation and offered an explanation for the presence of that person in her home. The chancellor was not required to believe the testimony of any witness and could find that of the appellee to be more credible. In chancery cases we do not reverse

the findings of a chancellor unless they are clearly erroneous, and in arriving at that conclusion we give due regard to the superior position of the chancellor to judge the credibility of the witnesses and the weight to be given to their testimony. *Burns* v. *Lucich*, 6 Ark. App. 37, 638 S.W.2d 263 (1982). Furthermore, this testimony would relate to misconduct at a time subsequent to the filing of the complaint and could not sustain the allegation of indignities or adultery. It is well established that a divorce will not be granted for causes arising after the action was brought and the grounds must exist before the commencement of the suit or before the counterclaim is filed. In a proper case such evidence may be competent to prove subsequent misconduct, not as a ground for divorce, but as evidence corroborating a propensity to commit the alleged prior acts. *Thomas* v. *Thomas*, 208 Ark. 20, 184 S.W.2d 812 (1945).

In support of her petition for divorce the appellee testified that there had been numerous separations during the period of their marriage, all resulting from his cruelty to her. She stated that he beat her, slapped her, twisted her arm, and knocked her against the wall on many occasions. He had alienated her grown children and her family to such a point that they would no longer visit her. She testified that on some occasions he threw her clothes out of the house, telling her never to return, and accused her of associating with other men. She testified that on the date she last left him he had grabbed her by the hair, pulled her out of a car and severely choked and beat her. He tried to forcibly remove her wedding ring. After that she never returned to his home. Three of appellee's children testified that they had seen appellee in February 1984 when she was very upset and crying. She had red marks around her neck which were clearly visible and her hands were skinned up "pretty good." Her daughter testified that he had so alienated her that she had not visited with appellee for several years. Other relatives testified to similar experiences. The relationship between the party, her children and family is one which is protected by law. Where one unreasonably interferes with this relationship it does constitute personal indignities. *Rosenbaum* v. *Rosenbaum*, 206 Ark. 865, 177 S.W.2d 926 (1944); *Connor* v. *Connor*, 241 Ark. 405, 408 S.W.2d 486 (1966).

The appellant argues that as the appellee had always returned to the marital bed after the separations that all of the

earlier beatings and cruel acts were condoned. Our cases, however, hold that condonation is a conditional rather than absolute remission of the offense and, the implied condition being that the offense will not be repeated, the guilty party shall not in the future commit any marital offense but will treat the injured party with kindness, and if the forgiven party resumes the prior conduct the doctrine does not apply. *Elerson* v. *Elerson*, 6 Ark. App. 255, 640 S.W.2d 460 (1982). There was evidence from one of her adult children that during the first year of the marriage they would break up quite a bit and the appellee would come to the witness's house and show her the bruises. Furthermore, even if the earlier acts of cruelty be deemed conditionally condoned, there was evidence that on the day she finally separated from him in February 1984 he severely beat her, pulled her out of her car by her hair, beat, and choked her. Four or more witnesses stated that they did observe the bruises about appellee's throat and body. She testified that the bruises were the result of the choking and beating. If that event occurred the doctrine of condonation would not apply.

Although the appellee's children did not see this final beating they did observe the marks which she had testified were the results of it. Corroboration of grounds in contested divorce cases may be relatively slight where the divorce is hotly contested. *McNew* v. *McNew*, 262 Ark. 567, 559 S.W.2d 155 (1977). As there was corroboration of a series of beatings indicating a propensity for it, we conclude that the testimony of those who saw the marks on appellee's throat and body shortly after the beating had occurred is sufficient corroboration. She testified that at the time the final beating occurred he had forcibly removed a ring from her finger resulting in injuries to that finger. Several witnesses testified to noting those injuries the next day. We find no error in the chancellor's finding that the appellee had sufficiently proved and corroborated her grounds for divorce.

The appellant next contends that even if the appellee proved indignities to her person, it was error to grant the divorce because she was equally at fault because of her adultery. For the reasons previously stated we find no merit to this contention.

At the time of the marriage the appellee owned a tract of land in Lawrence County. About a month before the final

separation the appellee executed a deed which transferred that title to an estate by the entirety with the appellant. Two days later both parties executed a deed reestablishing title to the property in the sole name of the appellee. Appellant contends that the second deed should be set aside. He contends that because of his illiteracy he was unaware that the deed was not being reexecuted to merely correct a defect in recordation. He further contends that it was represented to him that the second deed was to validate the prior attempt to create an estate by the entirety and that it therefore should be set aside for fraud and misrepresentation.

The appellee testified that the purpose for initially consulting an attorney was because her original deeds were made to her in her former name of Slatton and she desired to have the title transferred to her under her married name of Bell. She indicated that since the date of their marriage the appellant had been insisting that she transfer the title to him but she had steadfastly refused. She stated that when they went to the attorney's office to execute the deed she had intended only to transfer title to herself in her married name but was persuaded by the appellant to consent to the inclusion of his name as well. The parties had mistakenly recorded the deed in Randolph County. The appellant testified that they returned to the attorney's office to reexecute the deed and she insisted at that time that the property be reconveyed to her in her name only.

The attorney testified that he explained to the parties that even though the deed had been recorded in the wrong county it was a valid deed between the parties and that if it was transferred to the appellee in her own name the estate by the entirety would be terminated. The appellee, the attorney and the secretary preparing the deed all testified that appellant knew when the second deed was executed that the title was being restored in appellee.

Both the attorney and the appellee testified that the appellant read the deed before he signed it. Appellant testified that he could not have done so because he was illiterate. Appellee offered testimony that the appellant could read and write and that he understood the contents of documents and papers. On the conflicting testimony the chancellor determined that the evidence of the appellee was more credible and entitled to greater weight. We cannot say that his conclusion that the appellant had failed to

prove by a preponderance of the evidence that the second deed was acquired as a result of fraud, misrepresentation or mutual mistake is against the clear preponderance of the evidence. If the appellee's testimony was believed, the execution of the first deed was merely her gift to him of an interest in the property, and the execution of the deed by him returning it to her was intended to be a return of it to her as a gift. There was no consideration for either deed. We find no error.

Affirmed.

CORBIN and COOPER, JJ., agree.

Linda Lou LYLE *v.* Johnny Butler LYLE

CA 84-340 691 S.W.2d 188

Court of Appeals of Arkansas
Division II
Opinion delivered June 19, 1985

Rex W. Chronister, for appellant.

No brief filed by appellee.

JAMES R. COOPER, Judge. In this divorce case involving the division of marital property, the issue on appeal concerns the correctness of the chancellor's decision to give each party credit for that portion of the downpayment contributed by each of them toward the purchase of a residence held as tenants by the entirety. We hold that the chancellor erred.

The parties have twice married and divorced each other. In the interim between the first divorce and the subsequent remarriage, the appellee purchased two parcels of real property: an unimproved parcel of land in Little Rock and a residence in Fort Smith. After remarrying, the appellee sold both properties and, with the financial assistance of the appellant, made a downpayment on 40 acres and a house located in Sebastian County, Arkansas. It is this tract of land which is involved in the case at bar.

The chancellor granted a divorce and ordered the 40 acre homeplace sold "in accordance with Ark. Stat. Ann., Section 34-1214, except as hereinafter provided". It is undisputed that the 40 acre homeplace was held as tenants by the entirety. The division of such property is governed by Ark. Stat. Ann., Section 34-1215 (Supp. 1983) rather than Section 34-1214. *Warren* v. *Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981). Arkansas Statutes Annotated, Section 34-1215 (Supp. 1983) is the only statutory authority for the division of tenancies by the entirety, and it provides for an equal division of such property without regard to gender or fault. *Warren* v. *Warren*, 11 Ark. App. 58, 665 S.W.2d 909 (1984). Therefore the chancellor erred in dividing that property pursuant to Section 34-1214.

In dividing the proceeds, the first $12,800.00 derived from the sale was set off to the appellee, representing the portion of the downpayment contributed from the proceeds of the sale of his Little Rock and Fort Smith properties. The appellant was awarded a credit of $1,371.31, representing her contribution to the downpayment on the 40 acres. The balance of the sale

proceeds was to be divided equally between the parties.

The chancellor erred in crediting each party with the amount contributed toward the downpayment on the 40 acres. Although it is true that the respective contributions toward the downpayment came from separate funds, the 40 acres was held as tenants by the entirety. In such a situation, there arises a presumption of a gift from the party furnishing the consideration. *Jones* v. *Wright*, 230 Ark. 567, 323 S.W.2d 932 (1959). Although this presumption is rebuttable, it is a strong one. As the Arkansas Supreme Court stated in *Ramsey* v. *Ramsey*, 259 Ark. 16, 531 S.W.2d 28 (1975):

> The presumption is strong, and it can be overcome only by clear, positive, unequivocal, unmistakable, strong, and convincing evidence, partially because the alternative is a resulting trust the establishment of which, under such circumstances, requires that degree of proof. (citations omitted).

Since the presumption of a gift from each of the parties to the other arose, the issue is whether the evidence is sufficient to rebut that presumption. We hold that it is not sufficient. The record reveals that during the interval between the first divorce and the subsequent remarriage, while the couple was living together, the appellee purchased the Fort Smith house and lot in his name only, and that he refused to put the appellant's name on any of the legal documents. The appellee alleged at trial (he did not file a brief on appeal) that those actions are sufficient to demonstrate his state of mind and thus to rebut the presumption that he intended a gift of one-half of his contribution. We find that the evidence in the case at bar falls short of that which is required to rebut the presumption of a gift. Therefore, since we hold that the chancellor's decision was clearly erroneous and against the preponderance of the evidence, we must reverse and remand. ARCP, Rule 52(a); *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). On remand, the chancellor should enter an order dividing the proceeds of the sale equally between the parties.

Reversed and remanded.

CORBIN and GLAZE, JJ., agree.

Felton SNOW *v.* ALCOA

CA 85-46 691 S.W.2d 194

Court of Appeals of Arkansas
Division II
Opinion delivered June 19, 1985

Youngdahl & Larrison, P.A., by: *Diane A. Larrison*, for appellant.

Rose Law Firm, A Professional Association, for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the issue on appeal concerns the doctrine of estoppel as a bar to the appellee's defense of the statute of limitations.

The appellant was injured on the job in 1975 and he was paid the appropriate temporary total disability benefits. He was rated as having a 20% permanent partial disability and he accepted a lump sum payment in October, 1979 as full settlement on that claim. Had he not accepted the lump sum payment, his last payment would have been in December, 1981. The appellant received additional temporary total disability benefits in 1980. In January, 1981, the appellant retired, having reached the age of 62 after 27 years of employment with the appellee.

The uncontradicted testimony indicates that a few days before he retired the appellant had a conversation with a Mr. Holland, the individual in charge of administering the appellee's retirement and workers' compensation plans. Mr. Holland did not testify, apparently because he informed the appellee's attorney that he did not remember anything about Mr. Snow's

retirement or any conversation he had with him. The appellant testified that Mr. Holland informed him that after his retirement he could not draw any further workers' compensation benefits. The appellant testified that, but for Mr. Holland's representation to him that he would become ineligible for workers' compensation benefits upon his retirement, he would have filed for benefits for his loss of wage earning capacity. Shortly after the statute of limitations had expired, the appellant discovered that other similarly situated retired workers were drawing post-retirement workers' compensation benefits. He then contacted an attorney and shortly thereafter a claim for additional benefits was filed.

At the hearing before the administrative law judge, the appellant contended that the appellee should be estopped from asserting the statute of limitations as a defense. The appellant also contended that he was entitled to additional benefits for lost wage earning capacity because his 20% permanent partial disability rating was only an anatomical rating. The appellee argued that the claim was barred by the statute of limitations, and that the appellant's uncorroborated testimony did not establish facts upon which a finding of estoppel could be made.

The administrative law judge concluded that the claim was barred by the statute of limitations. He found that under Arkansas law estoppel may be based on an employer's conduct which lulls the employee into believing that he or she will receive benefits without filing a claim, but that no estoppel arises when the employer denies the worker's entitlement to benefits. The full Commission reviewed the record *de novo* and affirmed the ruling of the administrative law judge. From that decision, comes this appeal.

On appeal, this Court is required to review the evidence in the light most favorable to the Commission's decision and to uphold that decision if it is supported by substantial evidence. Ark. Stat. Ann., Section 81-1325 (Supp. 1983). In order to reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.*, 2 Ark. App. 185, 618 S.W.2d 573 (1981); *Bunny Bread* v. *Shipman*, 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1980). Further,

the question presented to this Court is not whether the evidence would support findings contrary to those made by the Commission, but whether the evidence supports the findings made by the Commission. *Reynolds Mining Co.* v. *Raper*, 245 Ark. 749, 434 S.W.2d 304 (1968). Even if the decision of the Commission is against the preponderance of the evidence, we will not reverse where its decision is supported by substantial evidence. *Hawthorne* v. *Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980); *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979).

Estoppel is an equitable doctrine which is invoked in appropriate circumstances to prevent a party from prevailing on purely technical grounds after having acted in a manner indicating that the opposing party's strict compliance with the technicality would not be required. In *Foote's Dixie Dandy* v. *McHenry, Adm.*, 270 Ark. 816, 607 S.W.2d 323 (1980), the Arkansas Supreme Court stated the necessary elements of estoppel. The Court said:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Foote's Dixie Dandy, supra, at page 823.

We reverse the Commission's decision that the appellee was not estopped to plead the defense of the statute of limitations. Since Holland was the appellee's employee in charge of retirement and workers' compensation claims, and since he had previous dealings with the appellant on workers' compensation matters, the appellee is charged with sufficient knowledge of the facts pertinent to the appellant's potential entitlement to additional benefits after his retirement. The appellant was ignorant of his potential entitlement and, given his past reliance on Holland's judgment in workers' compensation matters, he was justified in relying on Holland's statements. Holland was not obligated to advise the appellant on workers' compensation matters, but having given advice which was erroneous, the appellee is estopped from benefitting from the appellant's justified reliance on that advice. Although we have found no Arkansas case applying the

doctrine of estoppel to the employer's denial of benefits, several other jurisdictions would reach the same result on similar facts. See, *Davis* v. *Jones*, 661 P.2d 859 (1983); *McKaskle* v. *Industrial Commission of Arizona*, 135 Ariz. 168, 659 P.2d 1313 (1982); *Kahn* v. *State of Minnesota*, 289 N.W.2d 737 (1980); *Levo* v. *General-Shea-Morrison*, 280 P.2d 1086 (1955). We reverse the Commission's decision on the estoppel issue and we remand for such further proceedings as are necessary on the issue of the appellant's entitlement to additional benefits.

Reversed and remanded.

CORBIN and GLAZE, JJ., agree.

Windell STEPHENS *v.* ST. VINCENT INFIRMARY

CA 85-1 691 S.W.2d 190

Court of Appeals of Arkansas
En Banc
Opinion delivered June 19, 1985

Gary Eubanks & Associates, by: *James Gerard Schulze*, for appellant.

House, Wallace, Nelson & Jewell, P.A., by: *Scotty Shively* and *W. Michael Reif*, for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case the sole issue is whether the appellant selected as his treating physician, within the meaning of Ark. Stat. Ann., Section 81-1311 (Supp. 1983), the doctors staffing the appellee's emergency room. The administrative law judge held that the appellant's visits to the appellee's emergency room were for emergency medical treatment and that the appellant subsequently made his first selection of a treating physician, a chiropractor, Dr. Konarski. The Commission reversed, holding that the treatment by the chiropractor was not the responsibility of the appellee, because the appellant had failed to follow the statutory procedures for a change of physician. From that decision, comes this appeal.

The appellant was an employee of St. Vincent Infirmary, the appellee. He was injured on September 14, 1982 when he fell while walking down a wet stairwell. He sought treatment in the appellee's emergency room two days later. Approximately one week later he again sought treatment in the emergency room. The charges (if there were any) for the emergency room treatment are not at issue in the case at bar. The emergency room physician's notes indicate that the appellant might need to be examined by a

neurosurgeon because his complaints on his second visit emphasized severe headaches.

On January 13, 1983 the appellant consulted Dr. Konarski, a chiropractor, and she treated him until April, 1983, when she referred him to Dr. Ronald Williams, a neurosurgeon, who in turn referred him to Dr. Leonard, a rheumatologist. The appellee paid for the services rendered by Drs. Williams and Leonard without objection. Dr. Konarski's bills were sent to Blue Cross-Blue Shield, and were not timely delivered to the appellee. When they were finally submitted, the appellee refused to pay, contending that Dr. Konarski's treatment was unauthorized.

An employee of the appellee, Brenda CarlLee, testified that she authorized the payment of bills submitted by Drs. Williams and Leonard because of the notation on the emergency room files that consultation with a neurosurgeon might be necessary. She testified that Dr. Konarski's bill arrived approximately April 15, 1983. She said that someone in the appellant's attorney's office called her and advised that they wanted the appellant to see a specialist, and Dr. Barry Thompson's name was mentioned. Ms. CarlLee informed the caller that she would make a decision about that later. Next, she testified that she received a report from Dr. Konarski, recommending that the appellant see Dr. Ron Williams. Ms. CarlLee wrote the appellant's attorney advising that her company agreed "to pay for Dr. William's treatment as long as you agree that this is his choice of physician". (Appellee's exhibit 9).

The Commission decided this case on a finding that the services rendered by Dr. Konarski resulted from a change of physicians, which is governed by Ark. Stat. Ann., Section 81-1311 (Supp. 1983). The Commission decided that since the appellant had failed to follow the statutory requirements for a change of physician, the appellee was not liable for Dr. Konarski's charges. The only basis for such a decision was either that the appellee/employer had already furnished a physician (the emergency room physicians) or, in the alternative, that the appellant selected the emergency room as his treating physician. Since the appellee has never claimed, either before the Commission or on appeal to this Court, that it furnished the physician, the obvious basis for the appellee's position, and the Commission's decision, is

that the appellant selected the emergency room as his treating physician.

The appellant contends on appeal that the emergency room physicians were not physicians of his choice, in the sense that the Workers' Compensation Act contemplates. He contends that the treatment received in the appellee's emergency room was emergency treatment, and that Dr. Konarski was his first chosen physician. Therefore, says the appellant, the appellee is liable for Dr. Konarski's charges because the employer is liable, under Ark. Stat. Ann., Section 81-1311 (Supp. 1983), for reasonable and necessary medical treatment rendered by a physician first chosen by the injured worker. The appellee responds, contending that the appellant initially selected the emergency room as his treating physician or treating clinic, and therefore the selection of Dr. Konarski was a change of physicians rather than an initial selection.

We agree with the appellant, and reverse. The central issue is whether the Commission correctly decided that, by words or conduct, the appellant selected the doctors staffing the appellee's emergency room as his treating physicians. The record before us does not contain substantial evidence to support such a finding. The appellant sought treatment in the emergency room for the September, 1982 injury on two occasions shortly after his fall, and then again some seven months later. After the first two visits, he chose a treating physician, Dr. Konarski, and he has continued in her care, and that of doctors to whom she has referred him, since that date. We hold that the statute involved, Ark. Stat. Ann., Section 81-1311 (Supp. 1983), contemplates an actual selection of a treating physician rather than the occasional use of emergency room facilities whether for emergency or non-emergency treatment. (We note that the question of whether the employer would be liable for non-emergency treatment in an emergency room is not an issue in the case at bar, nor was the issue of what constitutes an "emergency" decided by the Commission).

It seems clear that the appellee initially took the position that the appellant had not selected a physician by going to the emergency room, at least as of the date of Ms. CarlLee's letter to the appellant's attorney. She agreed to pay Dr. Williams, to whom the appellant had been referred by Dr. Konarski, as long as

it was understood that Dr. Williams was the appellant's choice. There is no evidence in the record to indicate that anyone considered the referral to Dr. Williams as a change of physicians from the emergency room.

The appellee argues that the appellant used the emergency room as a family clinic, and it emphasizes that the appellant testified that he did not have a family doctor. How the appellant used the emergency room on other occasions is irrelevant to a determination of whether, as to this work-related injury, he selected the emergency room as his treating physician. Likewise, his third visit to the emergency room, some seven months after the September, 1982 injury, and several months after Dr. Konarski began treating him, is irrelevant to a determination of whether he initially selected the emergency room as his treating physician, although the employer surely would not have been liable to pay for that visit, unless it was for emergency treatment.

On appeal, we are required to affirm the Commission's decision if it is supported by substantial evidence. Ark. Stat. Ann., Section 81-1325 (Supp. 1983). However, if we are convinced that fair-minded persons, with the same evidence before them, could not have reached the conclusion arrived at by the Commission, we must reverse. *Office of Emergency Services* v. *Home Ins. Co.*, 2 Ark. App. 185, 618 S.W.2d 573 (1981); *Bunny Bread* v. *Shipman*, 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1980). We are convinced that there is not substantial evidence to support the Commission's decision that the appellant selected the emergency room physicians as his treating physicians. Since we reach that conclusion, it is clear that the statutory requirements for changing physicians are inapplicable. We reverse the Commission's decision that the appellee is not responsible for Dr. Konarski's charges, and we remand for further proceedings consistent with this opinion.

Reversed and remanded.

CORBIN and GLAZE, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. I respectfully dissent. In the instant case appellant testified that he was injured on September 14, 1982, and did not seek medical attention until

September 16, 1982, when he visited appellee's emergency room. This was a full two days after his injury. Although the question of what constitutes an emergency was not addressed by the Commission, it is difficult for this writer to view this as emergency treatment. *See, American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983). It was a choice freely exercised by appellant in selecting from numerous physicians available in this county all of whom are listed in the yellow pages of the local telephone directory as well as a choice of at least five emergency rooms of local hospitals. Appellant's action in returning to appellee's emergency room on September 21, 1982, and again on March 15, 1983, for additional treatment of his injury lends further support to the position that appellant had in fact selected the emergency room as his treating physician. In any event, it is not controlling whether appellee or appellant had made the initial selection of the emergency room as appellant's treating physician as appellant would still be required under Ark. Stat. Ann. § 81-1311 (Supp. 1983), to petition the Commission for a change of physicians.

The record reflects that appellant and his attorney were at least apprehensive as to whether appellant had previously selected a physician as evidenced by their filing a change of physicians request to Dr. Ronald Williams. Finally, and what I believe drives the nail into the coffin, appellant testified as follows: "Anytime I'm injured or if I have to have any medical attention, you know, I do go to the emergency room, because I don't have a family doctor." Appellant apparently considered and utilized the emergency room as his usual and customary choice for health care.

I fail to see any "emergency" when appellant waited two days from the date of the injury to go to appellee's emergency room and then waited an additional five days to return to the emergency room for further treatment. The only emergency I can perceive from the facts in the case at bar is in the designation of "emergency" in the term emergency room.

I would affirm the Commission's decision that the services rendered by Dr. Konarski resulted from a change of physicians and that since appellant failed to follow the statutory requirements for a change of physicians, appellee was not liable for Dr.

Konarski's charges.

GLAZE, J., joins in this dissent.

George BIRCH, Administrator *v.* Sue G. COLEMAN

CA 84-378 691 S.W.2d 875

Court of Appeals of Arkansas
Division II
Opinion delivered June 19, 1985

Spears, Sloan & Johnson, for appellant.

Skillman & Durrett, for appellee.

LAWSON CLONINGER, Judge. Appellant, George Birch, brings this appeal from an order of the Probate Court of Crittenden County, admitting a will to probate which was executed on February 5, 1981, by his uncle, James Holcomb. We think the chancellor erred in admitting the will to probate and reverse.

The evidence established that on December 10, 1980, the decedent's wife died and appellee, Sue Coleman, who was not related to the decedent, filed a petition to have herself appointed guardian of the person and estate of the decedent. At that time, the decedent was 85 years old, hospitalized with a heart attack, and physically unable to manage his affairs. On December 23, 1980, the court granted appellee's petition and entered an order appointing appellee guardian of the decedent. On February 1, 1981, the decedent moved into appellee's home and for the most part resided there until his death on October 22, 1982. During the twenty-two month period in which appellee acted as decedent's guardian, she opened at least six different guardianship accounts at a branch bank in Marion, Arkansas, and expended a substantial amount of the decedent's money on furniture and clothes for herself. According to appellee, all of the expenditures were made at decedent's request.

After the decedent's death, two wills purportedly executed by the decedent were filed for probate. One was dated December 30, 1980, and named appellant as primary beneficiary. A second will was dated February 5, 1981, which was five days after decedent's move into appellee's house, and named appellee as primary beneficiary.

The circumstances surrounding the making of the second will are relevant to this appeal. Thomas G. Montgomery, an attorney, did the legal work for appellee in relation to the guardianship estate for the decedent. Mr. Montgomery testified that appellee asked him to prepare a will for the decedent and that appellee asked, "Well, what if he wants to leave something to me?" Mr. Montgomery replied, ". . . in that case I can't prepare the will, you'll have to get somebody else to do it." Following that conversation with Mr. Montgomery, appellee testified that at the decedent's request, she called a woman named Judy Gobbell to come to the house and talk to decedent about his will. Miss Gobbell was not an attorney but was employed at the bank in Marion and had been instrumental in setting up the numerous guardianship accounts for appellee. There was testimony that appellee and Miss Gobbell occasionally saw each other on a social basis.

Miss Gobbell testified that she went to appellee's house and spoke with the decedent who gave her some will forms and asked her to prepare a will for him. She testified that she proceeded to draft the will and that she read this will over the telephone to Thomas G. Montgomery who said the will was fine. Mr. Montgomery denied that this conversation took place. Miss Gobbell testified that she then took the will to appellee's house where she read it to the decedent and witnessed his signature on it. A woman named Kay Osborne also witnessed the decedent's signature at that time and appellee testified that she paid Miss Osborne $15.00 for coming to witness the will. Miss Gobbell testified that during the reading and signing of the will, appellee was in the house but not in the room with decedent, and that appellee never saw the will.

Appellant petitioned the court to contest the second will being admitted to probate for two reasons. He alleged first that the decedent was not mentally competent to execute the will and

second, that appellee exercised undue influence over the decedent and that she procured the will. After a hearing, the court found that the decedent was competent to make and execute the will of February 5, 1981, and that appellee did not exercise undue influence over the decedent to make the will. The court ordered that the second will be admitted to probate and appellant brings this appeal from that order.

Appellant first argues that the court erred in not applying a presumption of undue influence in this case. Appellant contends that because appellee was decedent's guardian, the relationship was confidential and therefore a will leaving most of the decedent's estate to appellee should have been presumptively void. Appellant also argues that the evidence established that appellee "procured" the will and thus the court should have shifted the burden of proof to the appellee to show that the decedent "had both the mental capacity and freedom of will to render the will valid." Appellant admits that the case is one of first impression and that, normally, the one who contests a will must prove undue influence. However, appellant urges this court to apply presumption of the undue influence in cases where a ward makes his guardian the primary beneficiary of his will.

For support, appellant cites several cases from other jurisdictions where the courts have applied a rebuttable presumption of undue influence in situations where guardians have been named principal beneficiaries of their wards' wills. For instance, in *In Re Cowdry's Will*, 77 Vt. 359, 60 A. 141 (1905), the executor, proponent and principal beneficiary of the will in issue, was also the guardian of the decedent before and at the time the will was made. The court held that there was presumption of undue influence which "did more than to take the burden of proof from the contestants and place it upon the guardian. It established prima facie the existence of such influence, and was sufficient to defeat the will unless and until it was overcome by counter-proof. . . ." *Id.* at 142. Also, in *Garvin's, Administrator* v. *Williams*, 44 Mo. 465 (1869), the court held that a guardian is in a confidential relation with his ward, that the most exact good faith is required of him, and that "it was incompetent for him to take a benefit for himself without showing that the benefit flowed from the free, unbiased, independent will and uninfluenced volition of his ward." *Id.* at 478. Finally, in *Pepin* v. *Ryan*, 133

Conn. 12, 47 A.2d 846 (1946), the court held that the guardian of the decedent failed to prove that her influence did not overcome the free agency and independence of the decedent, stating:

> Ordinarily, the burden of proving undue influence rests upon him who seeks to have a will set aside on this ground, but 'where the natural object of the testator's bounty is excluded from participation in his estate, where a stranger supplants children, and the will is in favor of . . . the guardian having charge of his person and estate . . . there is imposed upon the proponents of the will, upon the trial of the issue as thus raised, the obligation of disproving by a clear preponderance of evidence the affirmation of the actual exercise of undue influence by such beneficiaries of the will. *St. Leger's Appeal*, 34 Conn. 434, 450, 91 Am.Dec. 735; *Dale's Appeal*, 57 Conn. 127, 143, 17 A. 757.'

Id. at 847.

In response, appellee points out that the decedent was mentally competent to make the will, even though he was technically under a guardianship. Furthermore, appellee maintains that there is a question about the validity of the guardianship because the decedent had only a physical incapacity. We fail to see the merit in this argument. The evidence clearly established the existence of a guardianship relationship between appellee and the decedent. The decedent was bedridden and living at appellee's house. Appellee conducted substantially all of the decedent's financial transactions. She opened and maintained all of his bank accounts during the period of the guardianship. Appellee filed the petition to have herself appointed the decedent's guardian and she filed an accounting after his death. We do not think at this late date that appellee should be allowed to question the guardianship relationship. Based on these same facts, we do not think that appellee can deny that a confidential relationship existed also.

Arkansas courts have recognized a presumption of undue influence in various situations. For instance, in *Park* v. *George*, 282 Ark. 155, 667 S.W.2d 644 (1984), the court held that where the beneficiaries of the decedent's will had also procured the execution of the will, they had the burden of proving beyond a reasonable doubt that the decedent was not unduly influenced

and possessed the mental capacity to execute the will. In *Reeder* v. *Meredith*, 78 Ark. 111, 93 S.W. 558 (1906), the court recognized that a trustee, by virtue of his relationship to the beneficiaries of the trust, must assume the burden of proving the fairness of a transaction with the beneficiary of the trust which benefits himself. In *Young* v. *Barde*, 194 Ark. 416, 108 S.W.2d 495 (1937), the court recognized the general rule that where special trust and confidence exists between the parties to a deed, the gift to the party holding the dominent position is prima facie void. The court stated that gifts "will be scrutinized with the most jealous care when made between parties who occupy such confidential relation as to make it the duty of the person benefitted by the contract or bounty, to guard and protect the interest of the other and give such advice as would promote those interests." *Id.* at 419.

More on point is the case of *Gingrich* v. *Bradley*, 232 Ark. 884, 341 S.W.2d 33 (1960), where the appellant argued that the appellee, decedent's spiritual adviser, occupied a confidential relationship with the decedent and had both the motive and opportunity to exert undue influence over her, and so the will naming him primary beneficiary should have been set aside. The court recognized that "the circumstances surrounding the execution of this will call for the closest scrutiny and may even give rise to a rebuttable presumption that undue influence was exercised." *Id.* at 890. However, the court went on to find that the weight of the evidence did not require that the will be set aside. Then, in *Union National Bank* v. *Leigh*, 256 Ark. 531, 509 S.W.2d 539 (1974), the court stated that although normally the burden of proving the invalidity of a will is upon the contestants, in this case the proponent of the will, who was the decedent's wife, had the burden of overcoming a rebuttable presumption of undue influence because of her confidential relationship with the decedent and because she was instrumental in the execution of the will. However, the court went on to state that the widow's participation in the drafting and execution of the will was not so dominating or overpowering as to call for proof beyond a reasonable doubt.

We think the above cases clearly support appellant's argument for the application of a presumption of undue influence in the instant case. However, as in the *Union National Bank* case, we do not think appellee's participation in the execution of the

decedent's will was so dominating as to call for proof beyond a reasonable doubt, which appears to be the standard in procurement cases. *See, e.g.*, *Neal* v. *Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981). We agree with appellee that the evidence is insufficient to enable us to find that she procured the will. However, we do not think that a finding of procurement is a necessary prerequisite to our shifting the burden of proof to the proponent of the will. We hold that where a ward names his guardian as a principal beneficiary of his will, the existence of undue influence on the part of the guardian should be presumed and the will should be prima facie void, unless the guardian can show by clear preponderance of the evidence that he took no advantage of his influence with the ward and that the ward's testamentary gift was a result of his own volition.

On appeal from probate courts, we review the case *de novo* and will affirm the order of the probate judge unless his findings are clearly erroneous or clearly against the preponderance of the evidence. Rule 52(a) of the Arkansas Rules of Civil Procedure; *Greenwood* v. *Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979). In this case, we think the evidence is fully developed on the issue of undue influence and based on our *de novo* review, we find that the probate judge's finding of no undue influence is not consistent with the law we have declared herein, and is clearly against the preponderance of the evidence.

The decedent had executed a will in favor of appellant, his nephew, about five weeks before he executed the will in favor of appellee. Several longtime friends of the decedent testified that he was very close to his nephew and considered him like a son. There was no evidence of any rift occurring in that relationship during the five weeks after the decedent named appellant as his principal beneficiary. The evidence does establish that during that time, appellee was appointed decedent's guardian and that decedent moved into appellee's house but remained bedridden. There was evidence that appellant was having health problems at the time and that this prevented his visiting with his uncle. Other friends of the decedent testified that they did not visit him at appellee's house because she made them feel uncomfortable.

Several days after decedent moved in with appellee, she asked a business and social acquaintance of hers, who was not an

attorney, to assist decedent in drawing up another will. This followed a refusal by her regular attorney to prepare a will in which appellee was to be a beneficiary. At that time, decedent was totally dependent on appellee for his personal care and his financial management. It is clear that in the ordinary course of affairs, decedent had the most implicit faith in appellee and that she exercised a considerable amount of influence over him. This is evidenced by her actions and by the expenditures she made in her capacity as decedent's guardian.

We think that when all these circumstances are combined they support our conclusion that appellee failed to show that decedent had the freedom of will necessary to make a legally valid will. We reverse and direct the probate court to dismiss the order admitting the will of February 5, 1981 to probate.

Because we have found the will to be invalid, we do not need to discuss appellant's third argument, that the proof of will is not in compliance with statutory requirements.

Reversed.

GLAZE and MAYFIELD, JJ., agree.

Roy and Janis HILL *v.* FARMERS UNION MUTUAL INSURANCE COMPANY

84-375 691 S.W.2d 196

Court of Appeals of Arkansas
Division II
Opinion delivered June 19, 1985

Cliff Jackson, P.A., for appellants.

Rowland & Templeton, by: *Randell Templeton*, for appellee.

LAWSON CLONINGER, Judge. Appellants raise two points for reversal in this appeal. We find neither persuasive, and we accordingly affirm the judgment of the trial court.

In February, 1983, appellants filed suit against appellee, alleging that a storm in January, 1978, had caused damage to three chicken houses and a barn. They requested, in their amended complaint, $34,280 in damages to the chicken houses, the 12% statutory penalty, reasonable attorney's fees, and pre-judgment and post-judgment interest as provided by law. The case was tried to a jury, who returned a verdict in the amount of $22,000. Appellee then asked the court to determine the date upon which pre-judgment interest began to run and the amount due.

A hearing on the issue was held in August, 1984. The court also considered the question of the statutory penalty and attorney's fees allowed by Ark. Stat. Ann. § 66-3238 (Repl. 1980). Regarding the pre-judgment interest, the court held that it would be calculated at 6% and would begin sixty days from January 6, 1983, the date on which official notice was given appellee of the

claim, rather than from January 11 and 12, 1978, the dates of the loss. The court also held that the statutory penalty and attorney's fees were not allowable because appellants had not recovered the full amount for which they had sued.

Appellants' first point for reversal is that the trial court erred in not granting pre-judgment interest beginning sixty days after the date of loss. The claim for the chicken houses was not filed until five years after the date of loss. The insurance policy provided that a written claim or proof of loss must be filed with appellee giving detailed information about the loss and allowing appellee sixty days after filing to investigate and to decide whether to pay the claim. The judge noted that appellants did not submit a written estimate of damages or photographs of the property, failed to preserve evidence of the damage, and failed to secure a written estimate from a third party.

The Arkansas Supreme Court said, in *Farm Bureau Ins. Co.* v. *Paladino*, 264 Ark. 311, 571 S.W.2d 86 (1978): "Interest may only be awarded from the expiration of the period of time allowed the company in the loss payable clause of a policy to investigate, consider and pay a claim—in this case sixty days after the proof of loss." In the instant case, appellant Roy Hill testified that he had read the insurance policy and on several occasions had submitted written estimates or bills to appellee. He had prepared a written estimate on the damage to the barn in January, 1978, and received a check for the loss. His failure to follow the procedure with respect to the chicken houses was apparently based on a dispute between Mr. Hill and an agent for appellee concerning the definitions of "hail" and "sleet." In any event, official notice of the claim and supporting documentation was not submitted until January, 1983, and we conclude that the trial judge ruled correctly in setting the later date as the time from which pre-judgment interest began to run.

Appellants argue that failure to file a proof of loss is an affirmative defense under Rule 8(c) and should have been pleaded "specifically and with particularity" under Rule 9(c) of the Arkansas Rules of Civil Procedure. In their complaint, appellants pled entitlement to prejudgment interest and appellee denied that they were entitled to it. Appellants' citation to *Garetson-Greason Lumber Co.* v. *Home L.&A. Co.*, 131 Ark.

525, 199 S.W. 547 (1917), as authority for the proposition that *appellee*, the insurer, should have specifically pled the failure to submit a proof of loss is mistaken. That case held that a condition precedent in an insurance policy "is a condition to be performed before a right of action dependent upon it will accrue, such as proof of loss, etc., the performance of which should be pleaded in the complaint." The argument of appellants that failure to file a proof of loss is an affirmative defense is unsupported by either convincing argument or citation to legal authority; we do not consider such an assignment of error on appeal unless it is apparent without further research that it is well taken. *Haynes* v. *Farm Bureau Mut. Ins. Co. of Ark., Inc.*, 11 Ark. App. 289, 669 S.W.2d 511 (1984).

Appellants' contention that their failure to file a proof of loss was waived by appellee is refuted by the fact that the policy, which Mr. Hill acknowledged having read, contains a non-waiver provision in addition to the proof of loss and payment of loss provisions. In *American Fidel. Fire Ins. Co.* v. *Winfield*, 225 Ark. 139, 279 S.W.2d 836 (1955), a case cited by appellants, the Arkansas Supreme Court held that when an insurance company failed to acknowledge receipt of a notice of loss or to request proofs of loss, it was not in a position to declare a forfeiture because proofs of loss had not been furnished within the terms of the policy. This situation differs considerably from one such as the present, where appellants submitted nothing for a period of five years. The trial judge, although recognizing that Mr. Hill and the insurance agent had discussed the damage to the chicken houses, held that appellants bore a responsibility to do something more. Because appellants submitted claims on other damage done to their property during the storm of January, 1978, and were aware of the procedures they were required to follow, we must agree with the trial court.

Appellants argue in their second point for reversal, without citation to authority, that they are entitled to the statutory 12% penalty and reasonable attorney's fees as provided by Ark. Stat. Ann. § 66-3238 (Repl. 1980) because of appellee's denial of pre-judgment interest. This contention was disposed of in *Farm Bureau Ins. Co.* v. *Paladino, supra*, where the Supreme Court said: "We have consistently held that the 12% penalty and attorney's fee . . . can only be awarded when the *exact* amount

sued for is recovered." (Emphasis in original.) *See also Time Ins. Co.* v. *Boren*, 271 Ark. 183, 607 S.W.2d 412 (Ark. App. 1980). As noted above, appellants sought to recover $34,280 and were awarded $22,000.

Affirmed.

GLAZE, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the result reached by the majority opinion. I would point out, however, that in a given case it might not be necessary to file a proof of loss; for example, where the insurance company has already informed the insured that the loss is not covered and will not be paid. In that situation, even if the policy provided that the company had sixty (60) days after the filing of the proof of loss in which to pay the claim, if recovery is had on the policy it would seem that interest would run from the day the company informed the insured it would not pay the loss.

It is not my purpose to discuss this matter but only to call attention to the problem involved. Actually, I see no reason to ask that prejudgment interest run from a definite date. It would seem that a prayer for any such interest to which plaintiff is entitled should be sufficient as prejudgment interest is a matter of law. *See Hopper* v. *Denham*, 281 Ark. 84, 661 S.W.2d 379 (1983).

GERBER PRODUCTS and ASSOCIATED INDEMNITY CORPORATION *v.* Dortha McDONALD

CA 85-55 691 S.W.2d 879

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 1985

Warner & Smith, by: *Wayne Harris* and *Gary Udouj*, for appellant.

Lavey, Harmon & Barnett, by: *John L. Burnett*, for appellant.

DONALD L. CORBIN, Judge. Appellants, Gerber Products, et al, appeal a decision of the Arkansas Workers' Compensation Commission finding appellee, Dortha McDonald, permanently and totally disabled as a result of a spider or other insect bite on her ankle at her place of employment which aggravated or accelerated a preexisting chronic circulatory or venous condition of her lower leg. We affirm.

In appellants' first point for reversal it is alleged that there is no substantial evidence to support a finding that the insect bite was an injury which arose out of and in the course of appellee's employment. The record reflects appellee adduced evidence indicating that she felt a sting on her leg while working in appellant Gerber Products' food processing plant on the squash line. Appellee's co-workers testified that they saw the red bump on her ankle and remembered appellee complaining of the bite and accompanying pain. It was uncontradicted that insects, snakes, frogs, birds and other varmints were observed in appellant Gerber Products' workplace. Dr. Carl Williams, appellee's treating physician, testified that appellee's subsequent symptoms were not inconsistent with a spider bite.

It is well settled that in order for appellee's disability to be compensable, she must prove that the injury sustained was the result of an accident arising out of and in the course of her

employment. "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place and circumstances under which the injury occurred. *J. & G. Cabinets* v. *Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980). There must be a causal connection between the accident and a risk which is reasonably incident to the employment. *Southland Corp.* v. *Hester*, 253 Ark. 959, 490 S.W.2d 132 (1973). There must be affirmative proof of a distinctive employment risk as the cause of the injury. The connection with the employment cannot be supplied by speculation. *Bagwell* v. *Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983). It is not, however, essential that the causal relationship between the accident and disability be established by medical evidence. *Crain Burton Ford Co.* v. *Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984). The Commission should follow a liberal approach in determining whether the accident in fact grew out of and occurred in the course of the employment. *Bunny Bread* v. *Shipman*, 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1979). It is the duty of the Commission to draw all legitimate inferences possible in favor of the claimant and to give the claimant the benefit of doubt. *Owens* v. *Nat'l Health Laboratories Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). We believe the record in the case at bar contains substantial evidence to prove that appellee's injury had a connection with her employment.

Clearly, an insect bite occurring on a vegetable processing line involves a risk distinctly associated with that employment. It involves little imagination to visualize the presence of all types of insects in raw vegetables freshly harvested and brought to appellant Gerber Products' food processing plant. The evidence in the instant case established that an insect bite was a natural and probable consequence or incident of appellee's employment which was the cause of appellee's disability and we find no merit to this argument.

Appellants' final argument concerns its contention "that while there may be 'evidence' establishing a causal relationship between the job injury and the permanent and total disability, that evidence falls short of the requisite, 'substantial evidence' necessary to support the finding on appeal." Stated more succinctly, appellants take issue with appellee's position that the

insect bite aggravated, accelerated or combined with her preexisting disease to produce a disability. A preexisting disease or infirmity of an employee does not disqualify a claim under the arising out of employment requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Black* v. *Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982).

Dr. Carl Williams' testimony, while not totally conclusive as to a medical certainty that the insect bite caused the 1980 ulceration leading to appellee's disability, was of such a character that the Commission could reasonably conclude that the insect bite aggravated, accelerated or combined with appellee's preexisting disease to produce her permanent and total disability. As noted in *Little* v. *Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1984), the test is not whether the insect bite caused the ulceration of the affected area, but whether the insect bite aggravated or accelerated the condition. In this regard, Dr. Carl Williams testified that "assuming a spider bite did occur, it would have accelerated the timing and severity of the skin graft."

Before we may reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.*, 2 Ark. App. 185, 618 S.W.2d 573 (1981). We cannot say that fair-minded persons would not have reached the same conclusion as did the Commission in the case at bar. We find substantial evidence to support the Commission's conclusion.

Affirmed.

CRACRAFT, C.J., and COOPER, JJ., agree.

Sue PATE, et al. *v.* PINEY SEWER IMPROVEMENT DISTRICT NO. 32, et al.

CA 85-167 691 S.W.2d 882

Court of Appeals of Arkansas
Division I
Opinion delivered June 20, 1985
[Rehearing denied July 3, 1985.]

Hurst Law Office, by: *Q. Byrum Hurst, Jr.* , for appellant.

Wood, Smith & Schnipper, by: *Ray S. Smith, Jr.*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. The appellants Sue Pate, Ruby Brawley, Lee Raeside, Joseph Raeside and Lois Ginsberg, individually and as representatives of a class, brought this action seeking an order declaring the assessments made in Piney Sewer Improvement District No. 32 to be declared null and void.

The appellants contended that the procedure followed by the appellees in causing the benefits to be assessed within the district did not comply with the requirements of Ark. Stat. Ann. § 20-705 (Repl. 1968) and that the methods of the district's assessor in assessing total benefits and the benefits to individual properties were arbitrary and capricious. The trial court found that the appellants had failed in their burden of proving these contentions.

The trial court also ruled that the first two issues were properly brought for benefit of the class but he refused class action status to the quetion of individual assessments. The court found that the individual appellants had failed in their burden of proving that the assessments of their properties were arbitrary and capricious. The appellants contend that all of these rulings were erroneous.

On each of these issues the chancellor clearly stated his findings of fact and conclusions of law which adequately explain the decision. Where the opinion, findings of fact and conclusions of law adequately explain the decision we are authorized to issue memorandum opinions stating only essential facts pursuant to our per curiam order of May 2, 1984.

The assessor testified that he had followed the method of assessments provided in Ark. Stat. Ann. § 20-705.

There was no evidence that he did not. In *Turner v. Adams*, 178 Ark. 67, 10 S.W.2d 41 (1928) it was stated that the proper basis for assessment of value for benefits to accrue to each piece of property is to consider the value, area, location of the property, the improvements thereon, its relation to other properties, and every other element which might go to make up the sum total of benefits. The assessor testified that he considered these factors in arriving at his determination. *Turner* also provides that one who attacks the validity of the assessment as a whole has the burden of proving that it was made on the wrong basis. The chancellor found that appellants have not met the burden of proof in this respect. The findings of fact made by a chancellor will not be disturbed on appeal unless they are clearly erroneous.

The appellants next contend that the method used by the assessor in reaching his determination of total benefits was arbitrary and capricious. They argue that he had a financial stake in enlarging the assessments because his fee was based on total benefits assessed. This argument is not based upon any factual data contained in the record. It was undisputed that the assessor's fees were to be based on a percentage of the engineer's estimated cost of the improvement which is, according to the undisputed testimony in the record, a usual and customary provision in assessor contracts with improvement districts. The appellants also argue that the method was arbitrary and capricious because the assessor knew he would not be paid unless his total assessment of benefits exceeded the cost of the improvements. This assessor testified that in over thirty cases in which he had acted as assessor he was aware of no provision that he would not be paid if the assessment of benefits indicated that the construction was not feasible. There was no evidence to the contrary in this case.

The appellants next contend the chancellor's ruling that the assessment of benefits to individual tracts was not the proper subject for a class action was erroneous. We do not agree. If the assessor had used an improper method of assessment or had acted arbitrarily and capriciously in making the assessments the effect would be the same upon all land owners within the district. All assessments thus would be invalid. Where it is alleged that some but not all of the tracts were arbitrarily assessed the issue would not be common to all members of the class. Where any land owner within the district had the right to question the validity of

his individual assessment but had no interest in the validity of the individual assessment of another land owner, there was no common claim. Each would stand or fall on his own individual merit. *Ross v. Arkansas Communities, Inc., et al*, 258 Ark. 925, 529 S.W.2d 876 (1975). We find no error in the chancellor's ruling.

At the time this action was commenced Judge Chesnutt's term as chancellor was to expire in two weeks. His successor, Judge Robbins, although informally setting a docket with the attorneys by agreement, had no authority to enter an order as chancellor. Counsel for the appellees first discussed with Judge Robbins the advancement of this case as required by Ark. Stat. Ann. § 20-721 (Repl. 1968) and January 9th was selected as a tentative trial date.

Appellees' counsel then presented the matter to Judge Chesnutt, the only judge authorized to enter such an order. He pointed out the requirements of the statute that such cases should be advanced and informed him of the date Judge Robbins had agreed on for the trial. Judge Chesnutt entered the order but took no further action in any part of the proceedings. After January 1st Judge Chesnutt entered the firm representing the appellees but he took no part in the trial of the case. Counsel for the appellants determined that more time was needed and Judge Robbins himself thereafter entered a second order resetting the case for January 19th. The appellants moved to disqualify appellees' counsel on the assertion that counsel should avoid not only impropriety but the appearance of impropriety.

The chancellor ruled that under Ethical Consideration 9-3 a lawyer upon leaving judicial office should not accept employment in connection with any matter in which he has had "substantial responsibility" prior to leaving the bench. He declared that our statute requires the acceleration of a case questioning the validity of assessment of benefits because of its importance and the number of parties affected by its disposition. He noted that Ark. Stat. Ann. § 20-721 mandates that such cases be advanced and disposed of "at the earliest possible moment." The court found that an order setting the trial date as required by this statute does not constitute a substantial exercise of responsibility but was merely a ministerial act. He found no impropriety

or appearance of impropriety in appellees' counsel continuing in the case and denied the motion. We agree that there was no abuse of discretion in preventing circumvention of the clear mandate of the statute on such a minor and technical point. The granting of such a motion would have postponed the desired speedy disposition indefinitely.

We find no error and affirm.

CORBIN and COOPER, JJ., agree.

Sue PATE, et al. *v.* PINEY SEWER IMPROVEMENT DISTRICT NO. 32, et. al.

CA 85-167 691 S.W.2d 882

Court of Appeals of Arkansas
Opinion delivered June 20, 1985

PER CURIAM. Since both parties requested that this case be advanced in the public interest our opinion is delivered this date. We are also limiting the time for filing petition for rehearing to June 28, 1985.

Raymond HALL *v.* STATE of Arkansas

CA CR 85-26 691 S.W.2d 884

Court of Appeals of Arkansas
Division I
Opinion delivered June 26, 1985

Skillman & Durrett, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Raymond Hall appeals from his conviction of the crime of theft by receiving contending that the trial court erred in denying his motion for a mistrial based on a statement made by the prosecuting attorney during the closing arguments which was alleged to be a comment on the defendant's failure to testify in his own defense. We do not agree.

About 4:00 a.m. on June 19, 1984 a sports center was burglarized and eleven hand guns were stolen. About an hour later a vehicle driven by the appellant and occupied by Johnny Cash and Maurice Knox was stopped by the police. A red tote bag belonging to the appellant and containing the eleven stolen hand guns was found in the trunk of the vehicle. Shortly after his arrest the appellant made a statement to police officers that he did not know that the stolen guns were in his vehicle. He stated he had picked Cash and Knox up on the street and they had put the bag in the trunk. Subsequently he gave a second voluntary statement which, when read in the light of the testimony of Cash and appellant's girlfriend, indicated that he knew the guns were stolen and that he was expected to transport them in his vehicle to a fence in Memphis.

Cash testified that on one previous occasion he and Knox had burglarized a sports center and arranged with the appellant to transport the goods to Memphis for sale to an acquaintance of the appellant named Smith. He testified that on the night in question he had previously informed the appellant that he and Knox would again steal some hand guns and requested the appellant to transport them to Smith. He stated that the appellant knew the burglary would take place and the part he was to play in it and he was undertaking to transport the stolen property to Memphis when apprehended.

Appellant's girlfriend stated that she was aware of the first incident when the guns were stolen and appellant had taken them to Memphis to be sold. She was in the apartment when Cash and Knox came the second time. She testified the appellant told her that they had broken into the gun shop again and that they were on their way to Memphis to Smith's house to dispose of them. On the witness stand she admitted having made a statement of events of the evening in question.

The appellant in his written statement admitted that he had been approached by Johnny Cash and Maurice Knox at his home to take them to Memphis to sell some guns "just like the other ones that they had." He admitted calling Smith in Memphis who told him to bring the guns. There was considerable testimony which established that Cash, Knox and the appellant had been together for the earlier part of the evening up until at least 1:00 or

2:00 o'clock on the morning of the burglary.

During the course of appellee's closing argument on rebuttal an objection was made. Although the matter objected to is not transcribed the following appears in the record:

> BY THE COURT: Your objection is that the last comment pertaining to the two statements being the only thing that we have from Raymond Hall was a comment on his failure to take the stand.
>
> BY MR. McDOUGAL: Yes.

At that point a motion for mistrial was denied and the court again read to the jury an instruction previously given that remarks made during the trial and closing arguments by the attorneys are not evidence and if they have no basis in the evidence should be disregarded. In a hearing on a motion to modify and expand the record no one could recall the exact words used by the prosecutor but the court determined that the language the court used at the time the objection was made "must have been close to the language used" by the prosecutor.

There was no request for the court reporter to make a stenographic record of the closing arguments. Although it would be better practice to require a verbatim record of the entire proceedings, it is not error if the trial court does not require the court reporter to make a stenographic record of arguments when counsel fails to request it. Ark. Stat. Ann. § 22-352 (Repl. 1962), *McCain* v. *State*, 132 Ark. 497, 201 S.W. 840 (1918); *Maxwell* v. *State*, 284 Ark. 501, 683 S.W.2d 908 (1985).

Appellant argues that this comment by the prosecutor was calculated to draw and did draw the jury's attention to the fact that the appellant had elected not to testify in his own behalf. The law is settled that the comment on the failure of a defendant to testify in a criminal trial is a violation of the Fifth Amendment right against self incrimination, which is made applicable to the states by the Fourteenth Amendment. *Griffin* v. *California*, 380 U.S. 609 (1969); *Pruett* v. *State*, 282 Ark. 304, 669 S.W.2d 186 (1984); *Weaver* v. *State*, 271 Ark. 853, 612 S.W.2d 324 (1981). In *Griffin* and *United States* v. *Hasting*, ___ U.S. ___, 76 L.Ed.2d 96 (1983) the United States Supreme Court held that such an error is not prejudicial per se and a reviewing court has a duty to

determine if absent the prosecutor's statement it is clear beyond a reasonable doubt the jury would have returned a verdict of guilty.

In *McDonough Power Equipment, Inc.* v. *Greenwood*, ___ U.S. ___, 78 L. Ed. 2d 663 (1984) the court declared that a litigant is entitled to a fair trial but not a perfect one for there are no perfect trials and pointed out that the courts have come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "citadels of technicality." The court further pointed out that harmless error rules embody the principle that courts should exercise their judgment in preference to automatic reversal for error and should ignore errors that do not affect the essential fairness of the trials. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). The courts have also declared that overwhelming evidence of guilt is a factor in reviewing any allegation of prejudicial error. In reviewing the evidence in this case we find no prejudicial error was committed and that the appellant received a fair trial.

In *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982) the court declared that before an error of constitutional proportions may be considered harmless it must be harmless beyond reasonable doubt and this court should be able to say that untainted evidence of defendant's guilt was overwhelming before we can consider whether an error was harmless. In this case all of the evidence indicated guilt. The appellant's second statement, read in connection with the other evidence, admitted his participation in the crime.

We do not intend to say that comment of a prosecutor could not be so inflammatory as to be prejudicial even where the evidence against the defendant is extremely damaging and strong. We can visualize circumstances in which a statement could be so prejudicial as to cause us to vary that rule and say that the statement was so gross that it might have tipped the scale in the State's favor. Here we do not know exactly what the prosecutor said or the context in which it was said. We have no way of knowing what statements immediately preceded the one objected to or the context in which the prosecutor was then speaking. The trial court was in a position to note the manner and delivery of such statements and the inflections or emphasis used and is therefore in a better position to understand how the jury

perceived it. *Pruett* v. *State*, *supra*. The trial court determined that the statement of the prosecutor was not so prejudicial as to warrant a mistrial. Without a record of what was actually said and the context in which it was said, we must presume that the trial judge was correct. *Maxwell* v. *State*, *supra*.

Affirmed.

COOPER and CORBIN, JJ., agree.

ROBERTS-McNUTT, INC. *v.* Michael J. WILLIAMS

CA 85-40 691 S.W.2d 887

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1985

Friday, Eldredge & Clark, by: *William M. Griffin, III*, for appellant.

Laws & Swain, P.A., by: *Timothy W. Murdoch*, for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the Commission adopted the administrative law judge's opinion and found the appellant entitled to receive benefits. From that decision, comes this appeal.

On November 3, 1982, while employed by Western Waterproofing in Oklahoma, the appellee suffered a compensable back injury. On January 17, 1983, Dr. Warren G. Low performed a lumbar laminectomy at L3/4, excising the disc and exploring the L5/S1. On April 4, 1983, Dr. Low released the appellee, assessing his permanent partial disability at 20% to the body as a whole. Dr. Low noted that there was no evidence of disc space infection or other abnormalities. Western Waterproofing paid the appellee $18,000.00 compensation for his permanent partial disability.

Shortly after he was released by Dr. Low, the appellee applied for a job with the appellant. On his job application, dated April 18, 1983, the appellee stated that he had no prior physical conditions which might limit his ability to work. The appellee and one of his witnesses, Freddy Scott, testified that the appellee told Raymond Roberts, president of the appellant corporation, about the prior back condition and that Roberts instructed the appellee not to include that information on his application, as it would increase the company's insurance rates. Roberts testified that he did not tell the appellee to conceal his prior injury, and that he did not know of the prior injury until the appellee injured his back while working for the appellant.

The appellee began work for the appellant on either May 2, 1983, or May 3, 1983, and, after working one full day, slipped and fell while attempting to move a 300 pound scaffold on wet ground, injuring his back. The appellee was treated for this injury by Dr. William Blankenship. Initially, Dr. Blankenship diagnosed the appellee's injury as an acute strain to the lumbar spine. He further noted that the appellee, by history, had previously injured his back, with pain primarily in his right side and leg, but that he

had been pain-free for the two months prior to the May, 1983, injury. Dr. Blankenship noted that the May, 1983, injury resulted in pain in the left side and leg (later spreading to both legs). On September 9, 1983, Dr. Blankenship stated in a letter that, after comparing the myelograms from the earlier injury, it was his opinion that the appellee was suffering from a continuation of his original injury.

The appellant initially accepted the claim as compensable, paying medical and temporary total disability benefits. Now the appellant fully controverts the claim. The Commission, without discussion, found that the May, 1983, injury was an aggravation of the preexisting injury or a new injury, thus rendering the appellant liable for the benefits. Furthermore, the Commission, finding the testimony of Scott and the appellee to be the more credible, held that the appellant was estopped from raising the defense of misrepresentation.

At the hearing before the Commission, the appellant requested permission to introduce as additional evidence a medical report prepared by a Dr. Metcalf on April 5, 1983, and a copy of a joint petition settlement agreement between the appellee and Western Waterproofing. Both of these documents relate to the earlier injury. Dr. Metcalf's report rated the appellant's permanent partial disability at 40.5% to the body as a whole (20.5% for physical limitation and 20% for pain). The joint petition agreement, dated April 21, 1983, states that the appellee was 27% disabled. The appellant, in seeking to have these documents introduced into evidence, stated that, despite its ongoing investigation, the documents had just been discovered. The Commission, noting that the administrative law judge had reserved the question of permanent disability for future determination, held the appellant had failed to show that the documents were relevant, were not cumulative, or were of a nature likely to change the result in the case. The Commission observed that the appellant was not precluded from offering the documents during further proceedings to determine permanent disability.

The appellant first contends that the Commission erred in holding that the appellant was estopped from raising the defense of misrepresentation on the employment application. Under the test set forth in *Shippers Transport of Georgia* v.

Stepp, 265 Ark. 365, 578 S.W.2d 232 (1979), the employer must show three things in order to successfully raise the defense of misrepresentation on an employment application:

> (1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

265 Ark. at 369 (quoting 1B A. Larson, *Workmen's Compensation Law*, Section 47.53). All these factors must be present in order to claim the defense. *Id.* The appellee's testimony, corroborated by that of Scott, was that the appellant knew of the prior injury and instructed the appellee not to include that information on his application. Questions of credibility and the weight to be given the evidence are exclusively within the province of the Commission. *Morrow* v. *Mulberry Lumber Co.*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). The reviewing court may not displace the Commission's choice between two fairly conflicting views even though, if it were reviewing the matter *de novo*, the court might have made a different decision. *De Francisco* v. *Arkansas Kraft Corporation*, 5 Ark. App. 195, 636 S.W.2d 291 (1982). Here the Commission chose to believe the testimony of Scott and the appellee over that of Roberts. We cannot say that the Commission erred in so doing. We find that this evidence constitutes substantial evidence, supporting the Commission's decision that the appellant was estopped from asserting the *Shippers* defense. The appellant could not have relied on the misrepresentation when it knew the true facts before the appellee was hired.

[redacted] The appellant next contends that there is no substantial evidence to support the Commission's finding that the May, 1983, injury was either a new injury or an aggravation, rather than a recurrence, of the prior injury. If the second injury is a recurrence of the first, the employer at the time of the first injury is liable. *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963). If, however, an intervening cause, such as a second accidental injury, aggravates the original injury, then the employer at the time of the second injury is responsible for the

consequences of that second injury. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). "[I]n all our cases the test was and is the same: Is the second episode a natural and probable result of the first injury or was it precipitated by an independent intervening cause?" 7 Ark. App. at 72.

In the case at bar, Dr. Low's report of April 4, 1983, releasing the appellee for work, indicated that no disc space infections or other abnormalities existed. It is undisputed that the second injury occurred immediately after the appellee slipped while attempting to move a 300 pound scaffold on wet ground. Although Dr. Blankenship's September 9, 1983, letter states that the May, 1983, injury was a continuation and recurrence of the previous injury, his May 3, 1983, letter stated that the appellee had suffered an acute lumbar strain. As noted earlier in this opinion, the weight to be given these reports is the province of the Commission, not this Court. *Morrow, supra.* It is the Commission's responsibility, as the fact finder, to reconcile any conflicts in the evidence. *City of Magnolia* v. *Caswell*, 269 Ark. 708, 600 S.W.2d 32 (Ark. App. 1980). There is substantial evidence which supports the Commission's finding that the May, 1983, injury was either an aggravation of the earlier injury or a new injury. Therefore, even though the evidence might support the opposite result, we must affirm.

The appellant's final point concerns the Commission's right to remand a case to the administrative law judge for the taking of additional evidence under Ark. Stat. Ann. Section 81-1327 (c) (Supp. 1983). The appellant contends that the Commission abused its discretion in denying its motion for the submission of additional evidence. In *Nicholas* v. *Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983), we stated:

> Clearly the Commission is vested with discretion in determining whether and under what circumstances a case appealed to them should be remanded for the taking of additional evidence. *On appeal an exercise of that discretion will not be lightly disturbed.*

9 Ark. App. at 267. (quoting *Haygood* v. *Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982).) A case should only be remanded if the newly discovered evidence is relevant, is not merely cumula-

tive, would change the result, and was diligently discovered and produced by the movant. *Mason* v. *Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960); *Hill* v. *White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984); *Haygood* 5 Ark. App. at 133. The Commission found that the appellant failed to meet these criteria, and since we find no abuse of the Commission's discretion, we affirm on this point.

The newly discovered evidence is non-cumulative only to the extent it establishes a different degree of permanent disability than that established by the evidence previously considered. The remainder of the evidence is cumulative, as it merely affirms Drs. Low and Blankenship's records, indicating the location of the injury, the pain suffered by the appellee, and that the previous claim had been settled. In the case at bar, the degree of permanent disability apportionable between the employers is not an issue, since that question was specifically reserved for future proceedings. The Commission correctly noted that this evidence may be offered on the permanent disability question at a later date.

Affirmed.

CLONINGER, CORBIN, and GLAZE, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. I have no choice but to dissent. The rule is long-standing that "before a decision of the Commission may be reversed on appeal, it must appear that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission." *Office of Emergency Services* v. *Home Ins. Co.*, 2 Ark. App. 185, 618 S.W.2d 573 (1981). Upon review we must view the evidence in the light most favorable to the Commission's decision and uphold that decision if supported by substantial evidence. *See*, *Office of Emergency Services*, *supra*. I fail to see how the Commission, whom I know to be fair-minded persons, could have reached the conclusion they did on the facts of this case. While it is well settled that questions of credibility are for the Commission to determine, I cannot affirm a decision that is based on so clear a falsehood. There is simply no substantial evidence to support the appellee's version of the facts.

The appellant in this instance should have prevailed in

reliance upon *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). The appellee testified along with his witness that Raymond Roberts, appellant's president, instructed appellee to put down on his employment application that he had suffered no prior injuries because it would cause the company's insurance rates to go up. The evidence was uncontradicted that the appellant was self-insured. I would have to defer to the Commission's decision had the appellant in this case not been self-insured but as it was, there was no conceivable reason for Raymond Roberts to have told the appellee to falsify his application. There was no insurance for which rates could have been raised. Raymond Roberts' Company would have had to bear the cost of any injury suffered by the appellee. Mr. Roberts further testified that the job demands upon the appellee were very physical and he would have hesitated to hire him had he been aware of his back problems. Also consider that appellee had just received an $18,000 compensation award in Oklahoma in April 1983, yet ten days later applied for the job with appellant, went to work on May 2 or 3, and suffered an injury the following day. These facts support the total inconsistency of appellee's story. It is obvious that appellee and his witness were lying.

Further, I would reverse on the second issue because there is no substantial evidence to support an award on the basis of an aggravation of appellee's prior injury.

Appellee settled his Oklahoma workers' compensation claim in mid-April of 1983 for $18,000. Thereafter, on April 18, 1983, appellee applied for a job with Roberts-McNutt. He began work on May 2 or 3, 1983, and was allegedly injured the next day, within a month after his release with the exact same injury and a 20% disability rating. Moreover, the injury with Roberts-McNutt occurred within three months of his extensive back surgery. Dr. Blankenship's records indicate that exactly the same areas were involved in the prior injury and the later injury. Dr. Low's records verify this fact. Moreover, Dr. Blankenship reviewed Dr. Low's records and tests and compared them with those done in Little Rock and stated that this injury was a recurrence of the prior injury. Appellee testified that the pain which he experienced after the second injury was the same as he experienced after the first injury in Oklahoma. Appellee had continuing symptoms between his release and his alleged second injury as noted in Dr.

Low's report of April 4, 1983. Appellee presented no medical testimony that this was an aggravation of a prior injury. Rather, the sole medical evidence on this point was that it was a recurrence of the prior injury.

In light of the extensive surgery performed within months preceding the second injury and that appellee was given a 20% disability rating because of the exact same problem within three and one-half weeks of his second injury, there can be no question but that this is a recurrence of the prior injury.

I would unhesitatingly reverse this case.

Michael Daniel HERRINGTON *v.* STATE of Arkansas

CA CR 84-161 692 S.W.2d 251

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1985

Switzer & Switzer, by: *Bruce D. Switzer*, for appellant.

Steve Clark, Att'y Gen., by: *Sandra Tucker Partridge*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. In this appeal of his criminal conviction, appellant raises two points for reversal. Both deal with alleged deficiencies in an affidavit submitted to a municipal judge by an Arkansas State Police investigator requesting a search warrant. We hold that the affidavit was not fatally defective and the warrant was properly issued. The judgment of the trial court is therefore affirmed.

Appellant was charged with the offense of possession of a controlled substance with intent to deliver under Ark. Stat. Ann. § 82-2617 (Supp. 1983). At trial, the State introduced evidence obtained pursuant to a search warrant, consisting of one pair of

Ohaus scales, a pair of hemostats, and 1.9 ounces of marijuana. The jury found appellant guilty of the charge of knowing or intentional possession of marijuana and passed sentence of imprisonment for one year and a fine of $1,000.

The two points argued by appellant have their source in the trial court's denial of his motion to quash the search warrant and to suppress the evidence on the basis of the asserted defects in the accompanying affidavit. That disputed affidavit is set forth in pertinent part:

> David M. Foy, ASP Investigator, having been duly sworn in the form and manner required by law, on oath states:
>
> I have probable cause to believe that on or in the residence, grounds and outbuildings located at Rt. 4, Box 405, Crossett, or the 1981 Chev. pickup w/AR veh lic IWE-892 in the charge or possession of Michael Herrington, the following items or property is contained or concealed: marijuana and other controlled substances; and that such items or property are contraband.
>
> The facts upon which I base my request for a Search Warrant are: An informant whom I have used several times and whose information has been accurate advised me that he had seen marijuana and other controlled substances in the house and on the premises occupied by Herrington.

The affidavit was dated June 3, 1982.

In his first point, appellant contends that the trial court erred in denying the motion to quash because the affidavit did not specify the time when the informant saw the "marijuana and other controlled substances." He relies upon the case of *Collins* v. *State*, 280 Ark. 453, 658 S.W.2d 877 (1983), in which the Arkansas Supreme Court reversed convictions for growing marijuana, pointing to a faulty affidavit:

> We find one defect that cannot be cured. The affidavit mentions no time during which the criminal activity occurred. This defect could have been cured by the magistrate before he issued the warrant by either taking

> testimony from the officer and making a record of it, or simply requiring a new affidavit or amendment to the one presented.

Since *Collins* was decided, however, both the United States and Arkansas Supreme Courts have handed down decisions that have modified the rule governing the sufficiency of an affidavit for a search warrant. *United States* v. *Leon*, ___ U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *Lincoln* v. *State*, 285 Ark. 107, 685 S.W.2d 166 (1985).

The United States Supreme Court, in *Leon*, *supra*, said that an affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause in the light of the totality of the circumstances. In *Leon*, the informant had witnessed a drug sale five months earlier. The Court stated that the affidavit depended upon facts set forth demonstrating that the basis of the informant's knowledge was fatally stale. In upholding the validity of the search based upon the faulty affidavit, the Court recognized a "good faith" exception to the exclusionary rule, stating: "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."

As the Arkansas Supreme Court noted in *Baxter* v. *State*, 262 Ark. 303, 556 S.W.2d 428 (1977), affidavits for search warrants must be tested and interpreted by magistrates and courts in the light of common sense. This practical approach was endorsed in *Collins*, *supra*, where the Arkansas Supreme Court said: "The only softening of this position [that some mention of time must be included in the affidavit for a search warrant] occurs when time can be inferred from the information in the affidavit." In the instant case, the magistrate who received Investigator Foy's affidavit could have inferred from the detailed recital of suspected locations of the contraband, the use of the present tense regarding the suspected locations of the contraband, and the highly transportable character of the contraband itself, that the informant's communication had been recent. *See Collins* v. *State*, *supra*. The language of the affidavit does not suggest that the investigator was dishonest or reckless in preparing it or that he

did not entertain an objectively reasonable belief in the existence of probable cause. There is, to the contrary, every evidence of good faith on the affiant's part. The difference in the factual situation in *Leon* and the instant case is that in *Leon* the information of the informant was affirmatively shown to be stale; in the case here before the court, there is not only no evidence to indicate that the information was stale, there is positive evidence that it was current. The magistrate properly issued the search warrant, and the trial court correctly denied appellant's motion to quash the warrant and to suppress the evidence.

Appellant's second point for reversal, that the court below erred in denying the motion to quash because the affidavit failed to establish the reliability of the informant, is based solely upon the superseded two-pronged test established in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and employed by the Arkansas Supreme Court in *State* v. *Prue*, 272 Ark. 221, 614 S.W.2d 221 (1981). The new test, set forth in *Illinois* v. *Gates*, ___ U.S. ___, 103 S.Ct. 2317 (1983), and embraced by the Arkansas Supreme Court in *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983), is one based upon the totality of the circumstances. Under it, the magistrate, in determining the sufficiency of an affidavit, must make a practical, common sense decision concerning the informant's reliability based on all the circumstances recounted in the affidavit.

The affidavit in the present case provided (as may be seen in the quoted text above) three significant facts pertaining to the informant's reliability: (1) the affiant had used the informant as a source of information "several times"; (2) the informant's information had proved accurate in the past; (3) the informant disclosed specifically that he had seen "marijuana and other controlled substances" in and on appellant's house and premises. We are of the opinion that these indicia of reliability ensured that the issuing magistrate had a substantial basis for concluding that probable cause existed. *See Illinois* v. *Gates*, *supra*.

Affirmed.

CORBIN, COOPER and GLAZE, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I disagree with the majority decision because, using the authority of *United States* v.

Leon, 468 U.S. ___, 104 S.Ct. 3405 (1984), the majority has overruled the Arkansas Supreme Court's decision in *Collins* v. *State*, 280 Ark. 453, 658 S.W.2d 877 (1983). This Court, in our *Collins* v. *State*, 9 Ark. App. 23, 658 S.W.2d 881 (1983), held that time could be inferred in a search warrant where no time was specified. The Arkansas Supreme Court, by a unanimous vote, reversed our decision and held that the absence of time in a warrant was one defect which could not be cured.

I am of the opinion that the absence of time in an affidavit is such a fundamental omission that it cannot be cured by the police officers' objective good-faith reliance on the warrant issued by a magistrate. In *Leon*, the Court listed four exceptions to the "good faith" exception to the exclusionary rule, which would mandate suppression. The Court said:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. (citation omitted). The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 60 L. Ed. 2d 920, 99 S. Ct. 2319 (1979); in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (citations omitted). Finally, depending on the circumstances of a case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. (citations omitted).

104 S.Ct. at 3421-22.

Thus the Supreme Court has recognized that not all defects can be cured by "good faith". I submit that time is a defect which cannot be so cured. *But see United States* v. *Savoca*, No. 83-3510 (6th Cir. May 3, 1985) (available June 13, 1985, on

WESTLAW, Allfeds database); *State* v. *Wood*, 457 So.2d 206 (Ct. App., La. 1984).

In *Collins* v. *State*, No. 84-243 (Fla. Dist. Ct. App. Feb. 22, 1985) (available June 13, 1985, on LEXIS, Genfed library), the affidavit which supported the issuance of a search warrant was not sworn to by the officer. The court held that a search warrant unsupported by an oath was not "a mere technicality that good faith can cure." I would hold, as did the Arkansas Supreme Court in *Collins*, *supra*, that "time is crucial" and that requiring a reference to time in an affidavit is not "an unreasonable nor technical demand of the law". *Collins*, 280 Ark. at 456-57. Further, I agree with the Court's statement that "[W]e use a practical, common sense approach to examine search warrants but that approach cannot cure omissions of acts that are undisputedly necessary". 280 Ark. at 457.

Additionally, I disagree with the majority's decision that, under the totality of the circumstances test outlined in *Illinois* v. *Gates*, 462 U.S. 213, adopted by the Arkansas Supreme Court in *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983), the informant's reliability was established. The references to the informant and his past information and its accuracy are purely conclusory, and, in my view, insufficient to meet even a relaxed "common sense approach".

Leon requires that a "reasonably well-trained officer" have a reasonable knowledge of what the law prohibits. 104 S.Ct. at 3420 n. 20. Arkansas law is clear that some mention of time must be contained in the affidavit. *Collins*, 280 Ark. at 456-57. This is a basic principle every well-trained officer should know. In light of the conclusory nature of the allegations regarding the informant's reliability and the total lack of any indication of time in the affidavit, I submit that the majority has erred in failing to apply *Leon's* third exception. This affidavit is "so lacking in indicia of probable cause" that it renders official belief in its sufficiency "entirely unreasonable". *See Leon*, 104 S. Ct. at 3421-22. I dissent.

CORBIN and GLAZE, JJ., join in this dissent.

George E. MARSHALL *v.* ALCOHOLIC BEVERAGE CONTROL BOARD and Debra PARKER

CA 85-38 692 S.W.2d 258

Court of Appeals of Arkansas
Division I
Opinion delivered June 26, 1985

Gibson Law Firm, by: *John F. Gibson, Jr.*, for appellant.

Donald R. Bennett; and *Huey & Vittitow*, by: *Clint Huey*, for appellee and intervenor.

DONALD L. CORBIN, Judge. Appellant, George E. Marshall, applied for an off premises retail beer permit. The application was denied by appellee, Alcoholic Beverage Control Board. The Pulaski County Circuit Court affirmed appellee's decision. We affirm.

Appellant sought an off premises beer permit to be used in conjunction with a country grocery store to be located on the west side of a rural community known as Mt. Tabor within Live Oak Township. The proposed site was to be located on State Highway 138, a paved road approximately nine miles north of the city of Monticello in Drew County. At the time of appellant's application, there were four beer permit holders operating within Live Oak Township in Drew County. Two were located at Pine Hill on the east side of the Mt. Tabor community. These two permits

were held by the intervenors, Debra Parker and her husband. They operated the Pine Hill Grocery and the Pine Hill Liquor Store at the Pine Hill intersection which was about three miles from appellant's proposed permit site at Mt. Tabor.

Appellant alleges on appeal that the trial court erred in finding that appellant failed to show that the public convenience and advantage would be served by issuing him a beer permit and that the Board's decision was not founded upon substantial evidence.

The rules governing judicial review of decisions of administrative agencies are well settled and are the same for both circuit and appellate courts. This review is limited in scope and such decisions will be upheld if supported by substantial evidence and are not arbitrary, capricious or characterized by an abuse of discretion. *Carder* v. *Hemstock*, 5 Ark. App. 115, 633 S.W.2d 384 (1982); *Snyder* v. *Alcoholic Bev. Control Bd.*, 1 Ark. App. 92, 613 S.W.2d 126 (1981).

Appellant had the burden of proof to establish that the public convenience and advantage would be served by issuing him a beer permit. The Board's decision was supported by the following findings:

1. There were statements for and against the application.

2. Three witnesses appeared and testified before the Board, one for the application and two against.

3. The sheriff of Drew County opposed the application.

4. Appellant proposed a country store only in the event a beer permit was issued.

5. No evidence was offered by appellant as to the prices charged in the area or whether the present permit holders were in fact serving those persons who sought beverage service. The evidence did not show whether the public was or was not being served.

6. Appellant's application was for the purpose of the sale of beer only and not for a grocery store.

7. No independent testimony by appellant or any other person was received on the issue of public convenience and

advantage.

8. A property owner across from the proposed site appeared and objected to the permit.

These findings were substantial enough to support the Board's conclusion that there was inadequate proof that the public convenience and advantage would be promoted by the issuance of the permit. Ark. Stat. Ann. § 48-301 (Supp. 1983), provides that it is the public policy of this State that the number of permits for the sale of alcoholic beverages be restricted. Appellant's proof that the public's convenience and advantage would be promoted by the issuance of a permit was sadly deficient when viewed under our standard of review. In fact, under the facts of this case, we would have been compelled to reverse the decision of the Board had it granted the permit.

Appellant's final assignment of error alleges that the trial court erred in refusing to remand the case to appellee Alcoholic Beverage Control Board for appellant to present additional material evidence. The hearing before appellee Alcoholic Beverage Control Board was held on January 18, 1984, and on February 8, 1984, appellant by letter to the Board requested the opportunity to present additional evidence to it. Appellant's letter stated that several people were unable to attend the hearing due to inclement weather who would have given evidence on the issue of public convenience and advantage as well as the opposition by the sheriff. This request was denied by the Board in its decision on February 16, 1984. On November 6, 1984, appellant filed his motion to present additional evidence with the circuit court. The reasons stated in the motion were essentially the same as those contained in appellant's prior letter to the Board. The trial court found that appellant's motion should be denied since it did not meet the full requirements of Ark. Stat. Ann. § 5-713(f) (Supp. 1983). Appellant argues on appeal that both the Board and the trial court abused their discretion in denying him the right to get another memorandum from the sheriff and to present the testimony of others who were prevented from attending the hearing on the day of the hearing.

[redacted] The record reflects that a severe winter storm was in progress on the day of the hearing before the Board. The hearing was called to order and counsel for appellant was specifically

asked if he wanted a continuance to which he replied, "We would rather go ahead." Appellant's only objection articulated to the Board at the hearing concerned the Board's staff taking the sheriff's objections to the permit over the telephone. The sheriff was unable to attend due to the road conditions. It appears from the record that appellant waived his objection to the hearsay testimony of the sheriff but renewed the objection upon receiving the Board's unfavorable vote denying his application for the permit. Appellant did not object when the record was closed and it became evident that a vote was about to be taken on his application. Although the evidence taken by the Board from the sheriff by telephone was clearly hearsay and may have been in error, we believe it was harmless. Appellant failed to request another hearing or a continuance in order that he be able to cross-examine the sheriff, and as a consequence is precluded from now complaining that he was denied the rights of confrontation and cross-examination. *See, Farmer* v. *Everett, Director*, 8 Ark. App. 23, 648 S.W.2d 513 (1983).

Appellant's request to both the Board and the trial court to present additional evidence consisted of only general and conclusory statements. Ark. Stat. Ann. § 5-713(f) provides:

> If, before the date set for hearing, application is made to the court, for leave to present additional evidence, and the court finds that the evidence is material and there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as may be just. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

It is clear from our reading of the above statute that the trial court may order the case remanded to the Board, upon such conditions as may be just, to hear additional evidence if the court finds that the additional evidence is material *and* there were good reasons for the failure to present it in the proceeding before the Board. Upon remand, the Board can modify its findings and decision by reason of the additional evidence and file the additional evidence and the results with the trial court for review. We

believe the trial court's sound discretion in this regard is analogous to the conditions we discussed in a Workers' Compensation case, *Mason* v. *Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960), to wit: (1) Is the new evidence relevant; (2) is it cumulative; (3) would it change the result; and (4) was the movant diligent.

The trial court should first view the application for additional evidence to determine if the party was diligent and then determine if the application merely has general or conclusory statements as to the additional evidence. The trial court in the exercise of its discretion may conduct a hearing to determine whether the additional evidence fits within the requirements of the statute utilizing the criterion found in *Mason, supra.* In any event, if the trial court finds that under the requirements of the statute additional evidence should be taken, the trial court must then remand the case to the Board for it to hear the additional evidence. The record and pleadings in the case at bar do not support a finding that the evidence was material and that there were good reasons for appellant's failure to present it to the Board and we cannot say that the trial court abused its discretion in refusing to grant appellant's motion to present additional evidence. As noted previously, the burden was upon appellant to establish that the public convenience and advantage would be served by issuing him a beer permit. The responsibility of presenting evidence to this end was upon appellant and we cannot say that he had good reason for his failure to do so. Although any evidence as to the public convenience and advantage was certainly material, appellant cannot now complain that the refusal by the court to grant his motion was error. Had appellant requested a continuance in view of the weather and the failure of his alleged witnesses to appear, it is clear that the Board would have granted one. In addition, his motion to the trial court was deficient under § 5-713(f) and we, accordingly, find no merit to this contention.

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

Russell WEBBER *v.* STATE of Arkansas

CA CR 85-12 692 S.W.2d 255

Court of Appeals of Arkansas
Division I
Opinion delivered June 26, 1985

Gannaway, Darrow & O'Bryan, by: *Joe O'Bryan*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Russell Webber, was tried and convicted by a Lonoke County Circuit Court jury for the offense of sale of a controlled substance. He was sentenced to three years in the Arkansas Department of Correction. We affirm.

On January 24, 1984, John Hannibal was acting as an undercover narcotics officer. He obtained a job with Dreamline Manufacturing in Cabot, Arkansas, to investigate a suspected narcotics trafficking operation believed to be connected with Dreamline. Hannibal approached appellant, an employee of Dreamline, and inquired if appellant knew where he could obtain a bag of marijuana. Appellant said he could get him some after work. At the end of the work day, appellant rode with Hannibal to Austin, Arkansas, to a mobile home. Hannibal gave appellant forty dollars. Appellant went to the door of the mobile home and upon knocking was greeted by a young woman who stated that her husband had some pot to sell but he was not home at the time. As Hannibal and appellant were leaving, appellant spotted his

source and they went back to the mobile home. Appellant took Hannibal's forty dollars and went into the mobile home but returned for change for a twenty because appellant said it was thirty-five dollars for the purchase rather than forty dollars. Appellant went back into the trailer and upon returning to Hannibal's car, appellant gave Hannibal a quarter ounce of marijuana.

I.

APPELLANT CONTENDS THAT HE WAS ENTRAPPED AS A MATTER OF LAW.

Appellant first argues that the trial court erred in not holding as a matter of law that he had been entrapped. Following the examination of Officer John Hannibal, appellant orally moved to dismiss the charges on the basis that he was entrapped as a matter of law. The trial court denied the motion stating that based upon the evidence before it at that time, there was insufficient evidence of the defense to grant the motion. Entrapment is an affirmative defense and is defined at Ark. Stat. Ann. § 41-209(2) (Repl. 1977), as follows:

> Entrapment occurs when a law enforcement officer or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The Arkansas Supreme Court in *Leeper v. State*, 264 Ark. 298, 571 S.W.2d 580 (1978), stated:

> We could say that there was entrapment *as a matter of law* only if there was no factual issue to be resolved by the trial court, i.e., if there was no substantial evidence to the contrary, when the evidence is viewed as we must. (Emphasis theirs) [cites omitted]

Conduct of the officer or informant merely affording the accused the opportunity to do that which he is otherwise ready, willing and able to do is not entrapment. *Spears* v. *State*, 264 Ark. 83, 568 S.W.2d 492 (1978). Judge Fogleman in *Spears*, *supra*, stated that Ark. Stat. Ann. § 41-209 did not materially

change the law. Under prior case law where the defense was entrapment, a searching inquiry into the defendant's conduct and predisposition had been held to be appropriate on the issue. In the case at bar appellant argues that the sole focus of Ark. Stat. Ann. § 41-209 is upon the conduct of the law enforcement officer or person acting in cooperation with him under the authority of *Mullins* v. *State*, 265 Ark. 811, 580 S.W.2d 941 (1979). However, Justice Fogleman in *Spears*, *supra*, explained that:

> The statute changes the rule only by focusing the inquiry so as to attribute *more* importance to the conduct of the law enforcement officers than to any predisposition of the defendant, and the question is directed to the effect of that conduct on "normally law-abiding persons." (Emphasis theirs)

It was further stated there that:

> Thus, defendant's conduct and predisposition, both prior to and concurrent with, the transactions forming the basis of the charges are still material and relevant, on the question whether the government agents only afforded the opportunity to commit the offenses with which he is charged. [cite omitted]

Appellant has the burden of establishing the existence of entrapment by a preponderance of the evidence. Ark. Stat. Ann. § 41-110(4) (Repl. 1977). In the instant case, the facts were not in dispute. Appellant, having the burden of proof, failed to present any evidence to indicate that he was induced by governmental conduct of a character likely to cause a normally law-abiding person to commit the offense. The evidence clearly reflects that the court could readily conclude that appellant had the predisposition contemplated under the guidelines of existing case law to commit the offense.

The trial court had only the testimony of Officer Hannibal as evidence at the time appellant moved to dismiss the charge. Appellant had not met the requisite burden of proof and we cannot say the trial court erred in refusing to grant the motion and in not holding appellant was entrapped as a matter of law. We find no error on this point.

II.

APPELLANT CONTENDS THAT HE WAS AN AGENT OF THE BUYER AND NOT OF THE SELLER AS A MATTER OF LAW.

Appellant's second argument is that he was an agent of the buyer and not of the seller as a matter of law, and that, therefore, he cannot be guilty of "selling" marijuana. This argument, however, overlooks the fact that Ark. Stat. Ann. § 82-2617(a)(1)(iv) (Supp. 1983), prohibits "delivery" rather than "sale." "Delivery," in turn, is defined by statute in Ark. Stat. Ann. § 82-2601(f) (Supp. 1983), as follows:

> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship.

Thus, in *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979), an appeal from conviction on charges of delivering heroin, the Arkansas Supreme Court held that:

> The offense with which Parker was charged does require actual, constructive or attempted transfer of a controlled substance in exchange for money or something of value, but the fact that the person making the transfer acts as the agent of either the seller or the purchaser does not remove the transfer from the coverage of Ark. Stat. Ann. § 82-2601(f). (cites omitted)

Therefore, in this case, it makes no difference whether appellant was only acting as an agent for the purchaser, as the statutory provisions noted above negate appellant's defense. The issue is simply whether he made a transfer in exchange for something of value. Here, appellant did execute such a transfer, as it is undisputed that he took Hannibal's money, purchased the marijuana, and then transferred the marijuana to Hannibal.

III.

APPELLANT CONTENDS IN HIS THIRD POINT FOR REVERSAL THAT HE WAS CONVICTED OF A FELONY NOT DEFINED AS SUCH AND WAS DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

The basis of this argument is premised upon the fact that Ark. Stat. Ann. § 82-2617(a)(1)(iv) (Supp. 1983), did not specifically designate the offense with which appellant was charged as a felony. This issue was not presented to the trial court. In *Toland* v. *State*, 285 Ark. 415, 688 S.W.2d 718 (1985), the Arkansas Supreme Court was confronted with the same issue. In disposing of this argument Justice Purtle stated, "We do not find in the abstract or record that this argument was presented to the trial court. Therefore, it cannot be raised for the first time on appeal." *Wright* v. *State*, 270 Ark. 78, 603 S.W.2d 408 (1980). We follow this rule and reach the same conclusion.

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

Denise SMITH *v.* STATE of Arkansas

CA CR 85-25 692 S.W.2d 622

Court of Appeals of Arkansas
Division II
Opinion delivered June 26, 1985

William R. Simpson, Jr., Public Defender and *Thomas J. O'Hern*, Deputy Public Defender, by: *Jerome T. Kearney*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Velda P. West*, Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals from convictions for negligent homicide and concealing birth. Her only point for reversal is that the trial court erred in admitting into evidence a prior criminal charge. We affirm.

Appellant was charged in March, 1984, in connection with the events surrounding the birth and subsequent death of her infant son. Prior to trial, appellant filed a motion in limine, seeking to prevent the State from raising at trial any reference to a 1982 charge of endangering the welfare of a minor—a charge which resulted from appellant's having abandoned her infant daughter. At an omnibus hearing, the court granted the motion, subject to reconsideration upon hearing testimony at trial.

At trial, after calling six of its eight witnesses, the State asked the court to reconsider its granting of appellant's motion in limine. In his opening statement, defense counsel had commented that people make mistakes, tragic mistakes, and that appellant was alone and frightened, and did not know what else to do. The State argued that by making these remarks, appellant was trying to use mistake as a defense, and that the State should be allowed to present evidence to rebut that contention. The court reversed its earlier ruling and allowed testimony about the prior charge.

Appellant argues that, since she did not testify and did not, during cross-examination of the State's witnesses, open up the issue of her character, the court should not have admitted testimony of prior acts. Appellant further argues that since opening statements are not evidence, the judge, who said his ruling was subject to modification upon hearing testimony at trial, erred in reversing himself. Appellant also complains that the State should have objected to defense counsel's comments in his opening statement when they were made.

Under Uniform Rule of Evidence 404(b), evidence of other offenses may be admissible for purposes such as proving motive, opportunity, intent, preparation, plan, or absence of mistake or accident. The Arkansas Supreme Court has held that, if the evidence sought to be introduced under 404(b) has relevance independent of merely showing the accused's bad character, and if it meets the "probative value versus unfair prejudice" balancing test of Uniform Rule of Evidence 403, it is admissible. *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980).

We cannot say in this cause that the court abused its discretion in admitting the evidence under 404(b), and in reaching this decision, neither the defense counsel's comments during his opening statement nor the fact that appellant did not testify are significant. The 1982 charge was relevant in proving appellant's intent, motive, preparation or plan regarding her actions in 1984, and we find no error in its admission.

Affirmed.

MAYFIELD and CLONINGER, JJ., agree.

Tommy HOLT *v.* STATE of Arkansas

CA CR 85-35 692 S.W.2d 265

Court of Appeals of Arkansas
Division I
Opinion delivered July 3, 1985

Henry & Moore, by: *John R. Henry*, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was convicted in the Harrisburg Municipal Court of driving while intoxicated and he was sentenced to pay a fine of $800.00, and serve ten days in jail. His driver's license was suspended for one year, and he was required to attend a safety school. He appealed to Poinsett County Circuit Court where he was convicted by a jury and sentenced to serve six months in the county jail and to pay a fine of $1,500.00. From that decision, comes this appeal.

In the early morning hours of August 6, 1983 the appellant was observed at a police roadblock on a state highway in Poinsett County, Arkansas. Officer Randy Tombs of the Arkansas State Police testified that at approximately 12:40 A.M. he and another trooper were conducting the roadblock. Officer Tombs was in the process of issuing warning tickets to two motorcyclists when the appellant drove through the roadblock at a speed of approximately 25 to 30 miles per hour. He testified that another officer was in the middle of the road attempting to flag the appellant down. The vehicle stopped, and the appellant got out of the vehicle. The officer testified that he administered various field sobriety tests and, when asked by the trial judge, he stated that the appellant was intoxicated and that he was a danger to himself and to others as an operator of a vehicle. Phillip Fleming, a Poinsett County Deputy Sheriff, testified that he administered the breathalyzer test, and that the appellant registered 0.13%. As no issue is raised on appeal as to whether the proof was sufficient to show intoxication, or that the appellant was in control of the vehicle, we will not detail the facts concerning those matters any further.

One issue raised on appeal concerns the legality of the appellant's arrest, and the focus of the appellant's argument is that the charges against the appellant should have been dismissed because the police officers had no legitimate reason to stop him. Therefore says the appellant, since there was no valid stop, nor probable cause to stop, his detention was illegal, and his subsequent arrest was invalid as violative of the Fourth Amendment to the Constitution of the United States. The constitutional issue was presented to the trial court at the close of all the evidence when the appellant moved that the trial court dismiss the charges on the basis that the stop was illegal. The appellant did not file a motion to suppress the evidence obtained as a result of the roadblock, nor did he object when that evidence was submitted to the jury.

[redacted] We decline to reach the merits of the issue raised by the appellant because the issue was not properly presented to the trial court. Although the appellant, on appeal, labels his motion a "motion to dismiss," in reality it was a motion to suppress the evidence coupled with a motion for a directed verdict. Motions to suppress are governed by Rule 16.2 of the Arkansas Rules of

Criminal Procedure. Rule 16.2(b) requires that such a motion be timely filed, but not later than 10 days before trial, except that the trial court has discretion to allow a later motion to suppress on a showing of good cause. No motion to suppress was filed prior to trial, and no attempt was made to demonstrate good cause for waiting until the close of all evidence to attempt to exclude a portion of the evidence which was presented to the jury without objection. We hold that the attempt to suppress the evidence was not timely, and need not have been considered by the trial judge. *Jackson* v. *State*, 266 Ark. 754, 585 S.W.2d 367 (Ark. App. 1979), cert. denied, 444 U.S. 1017, 100 S.Ct. 670, 62 L.Ed.2d 647 (1980). Further, since there was no objection to any of the evidence or testimony at the time it was presented to the jury, there was no basis for striking that evidence later.

Since we have treated the appellant's motion to dismiss as a combined motion, to suppress evidence and for a directed verdict, we test the sufficiency of the evidence to support the conviction. A directed verdict is proper only when no fact issue exists, and on appeal we are required to view the evidence in the light most favorable to the State and to affirm if there is substantial evidence to support the jury's verdict. *Wilson* v. *State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983). In the case at bar, we hold that the evidence is sufficient to support the appellant's conviction.

The appellant also argues that the trial court erred in failing to grant a mistrial. The trial judge, during the direct examination of the arresting officer, inquired of the officer as to what his opinion was regarding the danger presented by allowing the appellant to continue driving. The appellant contends that this inquiry constituted a comment on the evidence, prohibited by Article 7, Section 23 of the Arkansas Constitution, thus entitling him to a mistrial. We disagree. It is true that the judge did ask a question of the witness, but that action did not constitute a comment on the weight to be given the answer. A mistrial is an extreme remedy, and should be utilized only as a last resort. *Ellis & Green* v. *State*, 4 Ark. App. 201, 628 S.W.2d 871 (1982). On appeal, the issue before this Court is whether the trial court abused his discretion in refusing to grant the motion for a mistrial, and in the case at bar, we find no abuse of discretion.

Affirmed.

CRACRAFT, C.J., and CORBIN, J., agree.

Paul MARSH and Renee MARSH *v.* Richard HOFF

CA 84-417 692 S.W.2d 270

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1985

Guy Jones, Jr., P.A., for appellant.

Hardin & Hardin, for appellee.

JAMES R. COOPER, Judge. This is an appeal from the decision of the Faulkner County probate court denying the appellants' petition for guardianship of a minor child, Christina Hoff, and ordering her return to her natural father, the appellee. The appellants also appeal from the trial judge's decision holding their attorney in contempt. They further contend that the trial judge should have recused on his own motion. We reverse and remand as to the guardianship petition, affirm as to the contempt, and find it unnecessary to reach the issue of the trial judge's recusal.

The appellant Paul Marsh is Christina's half-brother, and Renee Marsh is Paul's wife. Christina, who was ten years old at the time of trial, is the natural child of the appellee and Helen Hoff, who died in May, 1983, after a lengthy illness. Helen Hoff and the appellee were divorced in 1978, and custody was placed in Helen.

When the seriousness of Helen's illness became apparent, she placed Christina with a friend, Vivian Lewis. The appellee removed the child from Ms. Lewis' custody in December, 1982. In August, 1983, after the appellee was stricken with Guillain-Barre syndrome and was hospitalized, the appellants took Christina into their home. The record shows that both moves were at the child's request. In November, 1983, the appellants obtained an *ex parte* order which granted them a temporary guardianship over Christina. On March 26, 1983, the trial was held, and the probate judge took the matter under advisement,

pending receipt of home studies to be conducted by the Arkansas Department of Social Services. (Those reports, though received by the trial judge, and apparently considered by him, are not part of the record.) On May 10, 1983, the court, in a letter opinion, acknowledged receipt of the home studies, and denied the appellants' petition, finding that it was in the best interest of the child to be placed with her natural father. The court ordered that she be delivered to her father on May 25, 1983. The court found that Christina should be placed under a protective order with social services and further detailed the manner in which the child's social security benefits were to be expended. Although the order does not contain any reference to the appellee's live-in girl friend, the letter ruling indicated that the court intended that such a living arrangement end.

We review probate proceedings *de novo*, reversing the probate judge's decisions on factual matters only if they are clearly erroneous. *Rose* v. *Dunn*, 283 Ark. 42, 679 S.W.2d 180 (1984). The probate court has discretion in determining whom to appoint as guardian of a minor, and the court's action will not be overturned except in a case of manifest abuse. *Knight* v. *Deavers*, 259 Ark. 45, 531 S.W.2d 252 (1976); *Monroe* v. *Dallas*, 6 Ark. App. 10, 636 S.W.2d 881 (1982). In this case we find that the trial judge abused his discretion in placing Christina with her father, and therefore we reverse.

Renee Marsh testified that the appellee's living conditions were filthy; she saw dirty clothes and dishes scattered about and little furniture in the house. The appellee acknowledged that Ms. Marsh's description could be accurate, but that he did not know since he was not present when Ms. Marsh was in the home. He testified that the residence was now clean. Christina testified that the house was filthy and roach-infested; she was forced to wear stained clothing; and she had to bathe in a nearby creek because the bathroom was not fit to use and there was no hot water. Mr. Hoff testified that the bathroom problem had been remedied. Christina also testified that some of her meals consisted of vegetables which had been retrieved from dumpsters located behind area businesses and that she had to eat such food or starve.

It is undisputed that Mr. Hoff had a live-in girlfriend named Cheeta Smith at the time of the hearing. She, along with her

twenty-year-old son and sixteen-year-old daughter, had resided with the appellee for two and one-half years. The appellee indicated that he had no intention of marrying Cheeta, and that he saw nothing wrong with such an arrangement. He did indicate that if the judge desired, he would either move Cheeta out or marry her. Christina testified that Cheeta was dirty, cursed her frequently, and threatened her on occasion, and in the eight months Christina lived with her father, Cheeta prepared only about eight meals.

The appellee is totally disabled because of a knee and back injury and because of the Guillain-Barre disease, which is a disease of the central nervous system. He testified that he had the time and the ability to care for Christina, but he also admitted that taking care of his own needs and doing his rehabilitative exercises takes up all of his time. He testified that Cheeta did all of the household chores and that, if she were to leave, he would have to perform those tasks.

The paramount consideration when appointing a guardian for a child is the best interest of the child. *Bennett* v. *McGough*, 281 Ark. 414, 664 S.W.2d 476 (1984). The parental preference provided for in Ark. Stat. Ann. Section 57-608 (Repl. 1971) is only one of the factors to be considered by the court in determining who would be the most suitable guardian. *Monroe*, 6 Ark. App. at 11-12. While the investigative home studies were requested, completed, and returned to the trial court, they are not part of the record. Therefore, we will not consider the excerpt included in the appellee's brief. *State Farm Fire and Casualty Insurance Co.* v. *Mobley*, 5 Ark. App. 293, 636 S.W.2d 299 (1982).

The trial court stated, and the record shows, that the appellants can provide Christina with a much more pleasant life than can her father. According to Ms. Lewis, Mr. Marsh and Christina had a close relationship and that they had been raised together. Christina had not lived with her father for any extended period of time after the divorce until he took her from Ms. Lewis' home in December, 1982. The record shows that both of the appellants care for Christina; they take a strong interest in her school work; they discipline her when necessary; and they provide suitable care for her when their respective work schedules

overlap. Christina testified that she preferred to live with the appellants rather than with her father. While it is not controlling, a child's preference is to be considered in determining custody. *Page* v. *Page*, 210 Ark. 430, 196 S.W.2d 580 (1946). The only negative factors in granting the guardianship to the appellants is their age, he being 18 at the time of trial, and his wife 21.

After viewing the evidence in its entirety, giving due regard to the trial court's ability to determine the credibility of the witnesses, ARCP Rule 52(a), we hold that the clear preponderance of the evidence of record shows that Christina's best interests will be served by granting the guardianship petition filed by the appellants.

We do agree with the probate judge that Christina needs to be reacquainted with her father. Therefore, on remand, we direct that the probate judge take into account the present circumstances of the parties and set visitation accordingly. Also, we agree with the probate judge's determination that controls need to be placed on the expenditure of Christina's social security benefits. Therefore, on remand, we direct that the probate judge establish appropriate safeguards regarding those funds.

As to the issue of the citation of the appellant's attorney for contempt, we have serious doubts as to its validity, inasmuch as Christina was delivered to her father on May 25, 1983, the date the appellants were ordered to deliver her. However, this issue is not properly before this Court. The appellants are not the aggrieved party in the contempt action; their attorney is the party who was held in contempt. Only a party aggrieved by the court's order can appeal that order. *Beard* v. *Beard*, 207 Ark. 863, 183 S.W.2d 44 (1944). The appellants, having been absolved of the contempt charge, cannot appeal from an order which was to their benefit. *Kelley* v. *Kelley*, 253 Ark. 378, 486 S.W.2d 5 (1972). Rather, at the time this contempt arose, the attorney's remedy was to petition the Arkansas Supreme Court to review his conviction for contempt by writ of certiorari. *See, Frolic Footwear* v. *State*, 284 Ark. 487, 683 S.W.2d 611 (1985); *Williams* v. *Williams*, 12 Ark. App. 89, 671 S.W.2d 201 (1984). However, in *Frolic Footwear*, the Supreme Court held that, as of February 4, 1985, all criminal contempt cases were to be reviewed by appeal instead of certiorari. 284 Ark.

at 490. Therefore, the proper procedure for the review of a citation holding a party's attorney in criminal contempt is for the attorney, not the party, to appeal the conviction. In the case at bar, neither a petition for a writ of certiorari nor an appeal was filed on behalf of the attorney. Therefore, we will not consider the validity of the trial court's ruling. *See, Williams*, 12 Ark. App. at 93.

Because we reverse the trial court's decision regarding the guardianship, we need not reach the issue raised by the appellant concerning the trial judge's failure to recuse.

Reversed and remanded.

Tony Lynn SNYDER *v.* CITY OF DEWITT

CA CR 85-27 692 S.W.2d 273

Court of Appeals of Arkansas
Division I
Opinion delivered July 3, 1985

Malcomb R. Smith, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen. for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was convicted of DWI and sentenced to pay a fine of $450.00, serve one day in the county jail (less credit for time served) and his driver's license was suspended for 90 days. From that decision, comes this appeal.

On February 24,1984, DeWitt police officer Moses Turner responded to an accident report and found an unattended truck in a ditch. Shortly thereafter, the appellant and another individual, Charles Peoples, arrived in another vehicle. They attempted to tow the truck from the ditch. Officer Turner testified that the appellant informed him that he had been operating the vehicle when it ran into the ditch. He also testified that he could smell alcohol on the appellant's breath. He testified that there were no other physical indications that the appellant was intoxicated. The officer testified that the appellant registered 0.10% on the breathalyzer and, based on that fact, he charged the appellant with DWI.

At that point in the trial, the city rested, and the appellant made several motions. First, the appellant asked the court to strike the breathalyzer test results since, he alleged, the machine was not working properly. Second, he moved to strike any testimony concerning statements made by the appellant because he had not been advised of his *Miranda* rights when he made the statements. Third, the appellant moved to dismiss because there was no corroboration of the appellant's confession to the officer that he had been driving the vehicle. The court took the motions under advisement and the record does not include any indication that the court ruled on the motions, other than the fact that the appellant was found guilty.

The appellant argues on appeal that there was no

evidence corroborating his alleged confession at the scene of the accident. The confession, according to the officer, consisted of the appellant's statement that he had been driving the vehicle. The appellant denied having made that statement to the officer. Arkansas Statutes Annotated, Section 43-2115 (Repl. 1977), provides that "[a] confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed." We hold that the appellant's alleged statement that he had driven the vehicle into the ditch merely constituted an admission of one element of the offense and not a confession. A statement amounts to a "confession" only if there is an admission of guilt as to the commission of a criminal act. *Workman* v. *State*, 267 Ark. 103, 589 S.W.2d 21 (1979). The appellant, according to the alleged statement, only admitted to operating the vehicle, not to operating it while intoxicated.

The appellant also argues that the trial court erred in admitting into evidence his alleged statement that he had driven the vehicle into the ditch. His argument is based on the premise that the admission was elicited before he was given his *Miranda* rights. We do not agree. The record in this case reveals that, almost immediately upon his arrival at the accident scene, the appellant admitted that he drove the vehicle into the ditch. The arresting officer appears to have been the only law enforcement officer present at the scene, and there were several spectators present during the investigation. The appellant would not have been justified in believing that he was in custody at the time the officer asked who had been driving the vehicle. The appellant's inculpatory statement was not made while he was "in custody," or while he was the subject of a "custodial interrogation". The circumstances at the time the statement was allegedly made were not sufficient to exert such pressure on him so as to impair the exercise of his privilege against self incrimination and require him to be advised of his constitutional rights to remain silent and to have an attorney present during questioning. *Berkemer* v. *McCarty*, 468 U.S. ___, 82 L.Ed.2d 317 (1984).

We find no error, and therefore we affirm.

Affirmed.

CRACRAFT, C.J., and CORBIN, J., agree.

Patsy Fay DEATON *v.* Freemont DEATON

CA 85-29 692 S.W.2d 267

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1985

Garland Q. Ridenour, Ltd., for appellant.

Charles P. Allen, for appellee.

LAWSON CLONINGER, Judge. The appellant, Patsy Fay Deaton, appeals from an order of the Phillips County Chancery Court, holding her responsible for one-half (½) of a mortgage debt which she and her husband, appellee, Freemont Deaton, had incurred on their residential property. We think the chancellor's order was correct and affirm. We have noted appellee's criticism

of appellant's abstract and we agree that it is difficult to ascertain the facts from the record as it is presented to us in this case. However, we think the record and abstract are sufficient enough to allow us to find that the chancellor did not err in his findings.

The parties were divorced in April of 1982. At that time, they owned a house and three lots as tenants by the entirety. The chancellor ordered that the tenancy be dissolved and that the parties should hold title to the property as tenants in common. Appellee was awarded temporary possession of the house and was to make the mortgage payments, but the chancellor ordered the parties to list the property immediately with a realtor.

Two years later, the chancellor finally ordered that the property be sold at a public sale. During those two years, appellee failed to make certain support payments and he took more than his fair share of the parties' personal property. The chancellor conducted hearings on these issues and awarded judgments for these and other items in favor of appellant and imposed several liens in amounts undisclosed by the record on appellee's equity in the house for these judgments.

At the public sale, which was conducted in May of 1984, appellee's brother purchased the property for $50,000. It appears from the record that appellant's judgment liens against appellee were paid out of the sale proceeds with no objection. The chancellor subsequently found that the mortgage debt on the property should also come out of the sale proceeds. He thus entered an order stating that appellee's brother had taken the property free and clear of the outstanding mortgage debt owed by the parties, and that appellant was responsible for one-half of that mortgage debt. It is from this order that appellant brings this appeal.

Appellant argues first that the chancellor erred in not finding that the property was sold subject to the mortgage. For support, appellant cites the general rule that at judicial sales, the purchaser acquires the same title and rights as the person whose interest is being sold, and thus, he takes the property subject to all liens. *See Jones* v. *Nix*, 232 Ark. 182, 334 S.W.2d 891 (1960). Appellant also points out that if the property was sold free and clear of any liens then the public notice of the sale should have so specified.

Appellant also argues that appellee should have been estopped from making a claim for one-half of the mortgage debt *after* the sale had been conducted and confirmed by the court. According to appellant, appellee should have brought the issue to the court's attention prior to the public sale.

Finally, appellant argues that the chancellor did not have the inherent power or statutory authority to impose on the property the judgment liens for funds due appellant from appellee. We assume that appellant's point is that the chancellor acted equitably in not passing these unauthorized "liens" on to the purchaser of the property but that he acted inequitably in not passing the mortgage on to the purchaser of the property.

Appellee responds by arguing that the chancellor correctly held that appellant was responsible for one-half of the mortgage debt. Appellee points out that all prior orders of the chancellor were to the effect that the parties would be responsible for the mortgage. Also, the chancellor had found that appellant's position regarding the mortgage debt was inconsistent with her position regarding the judgment liens in her favor. He stated that appellant could not "in good conscience argue that the bidder take subject to the mortgage lien, but not to the judgment lien which was satisfied from the proceeds."

Appellee also argues that he should not be estopped from questioning the payment of the mortgage because throughout the course of these proceedings, the chancellor had consistently ordered that the "net" proceeds from the property would be divided between the parties. Therefore, appellee maintains that his position has remained unchanged.

Finally, appellee submits that even if the chancellor did not have the authority to impose the judgment liens on the property, nevertheless, appellant received the funds for those liens and therefore she should not be allowed to complain.

In our review of chancery cases, we do not reverse the findings of the chancellor unless they are clearly erroneous or clearly against the preponderance of the evidence. *See Weathers* v. *Weathers*, 9 Ark. App. 300, 658 S.W.2d 427 (1983). Here, we do not think the chancellor's finding that appellant was responsible for one-half of the mortgage debt is clearly erroneous.

Appellant has been before the chancellor for numerous hearings pursuant to the settlement of this case. She has been aware of her responsibility for part of the mortgage throughout the proceedings and as appellee pointed out, in March of 1982, the chancellor ordered the equal division of the "net" proceeds from the sale of the property.

We are not persuaded by appellant's argument that the judgment liens in her favor were invalid. The record does not establish that she made any objection to the creation of the liens at any time and her utilization of this argument to relieve her of the mortgage debt responsibility, after receiving payment of the liens, is untenable.

Furthermore, while the cases appellant cites do support the general rule that purchasers at judicial sales take the property subject to all encumbrances, these cases are factually dissimilar to the one at bar. None of the cases dealt with a chancellor's order in a divorce proceeding declaring that the purchaser at a judicial sale takes free of all liens and holding the sellers liable for their mortgage debt. We think the chancellor correctly dealt with the parties under the facts of this case as revealed by the somewhat inadequate record. The appellant has failed to demonstrate error; therefore, we do not think the chancellor's order was clearly erroneous and we affirm.

MAYFIELD, J., dissents.

Harry Jerry JONES *v.* STATE of Arkansas

CA CR 85-5 692 S.W.2d 775

Court of Appeals of Arkansas
Division I
Opinion delivered July 3, 1985
[Supplemental Opinion on Denial of Rehearing August 28, 1985.]

John H. Bradley, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant Harry Jerry Jones was convicted of aggravated robbery by an Osceola District, Mississippi County jury and sentenced to twenty years imprisonment. Appellant raises seven points for reversal on appeal.

I.

Appellant argues that the trial court erred in reopening the case and admitting further testimony after the case had been submitted to the jury.

After the case was submitted to the jury, the jury returned to the courtroom to ask the trial judge two questions. The jury wanted to know (1) if witnesses who had identified the appellant during the trial had identified him at any other time, and (2) if appellant had a gold tooth. The trial judge properly explained to the jury that supplementary evidence on these issues could not be given and that they should concern themselves only with the evidence before them. After the jury resumed deliberation, the prosecution made a motion to reopen the case for the presentation of additional evidence. This motion was granted and the jury returned to hear the testimony of police officers Pugh and Womack that appellant had a gold front tooth on the night of his arrest and that a gold tooth was part of the description of the robber given by one of the witnesses. The jury resumed deliberation and shortly returned a verdict of guilty.

Reopening a case for the taking of additional evidence after the case has been submitted to the jury is a matter within the sound discretion of the trial court and a ruling by the trial court on such a matter will not be reversed absent an abuse of

discretion. *Curtis* v. *State*, 279 Ark. 64, 648 S.W.2d 487 (1983); *Powell* v. *State*, 270 Ark. 236, 605 S.W.2d 2 (1980); *Williams* v. *State*, 262 Ark. 219, 555 S.W.2d 231 (1977); *Whittaker* v. *State*, 173 Ark. 1172, 294 S.W. 397 (1927); *Smith* v. *State*, 162 Ark. 458, 258 S.W. 349 (1924); *Teel* v. *State*, 129 Ark. 180, 195 S.W. 32 (1917); *Garner* v. *State*, 97 Ark. 63, 132 S.W. 1010 (1910). However, reopening a case at this stage of the proceedings must be done with the utmost caution. The orderly progression of our trial process on which we so heavily rely, would be seriously undermined were requests to reopen casually granted. In addition, evidence heard at this time may be given undue emphasis by the jury prejudicing the party against whom it is offered. These considerations must be carefully weighed against the desirability of giving the jury all possible relevant evidence with which to conduct its truth-finding process. Our Supreme Court has held that evidence which is not relevant, is merely cumulative or was not diligently pursued during the trial does not provide a proper basis for reopening a case. *Curtis* v. *State*, 279 Ark. 64, 648 S.W.2d 487 (1983); *Powell* v. *State*, 270 Ark. 236, 605 S.W.2d 2 (1980); *Smith* v. *State*, 162 Ark. 458, 258 S.W. 349 (1924). Alternatively, evidence which was relevant, not cumulative or in essence constituted new evidence has been deemed admissible. *Williams* v. *State*, 262 Ark. 219, 555 S.W.2d 231 (1977).

In this case, we find that the evidence admitted was not particularly relevant. During the trial, the only mention of a gold tooth was made by Lt. Bobo who testified that he was told the robber had a gold tooth as part of the description given by one of the witnesses to the robbery. No mention was made of appellant's having a gold tooth. In their testimony none of the witnesses mentioned the gold tooth in describing the robber or in identifying the appellant. More importantly perhaps, was the State's lack of diligence in pursuing this line of questioning. The State had ample opportunity to bring the gold tooth to the attention of the jury in both the testimony of the police officer and in that of the eyewitnesses. In light of the doubtful relevance of the after-admitted testimony and the lack of diligence shown by the State in presenting this evidence during trial, it was inappropriate to reopen the case for the admission of evidence once the case went to the jury. We reverse on this point.

II.

Appellant argues that the trial court erred in failing to suppress the eyewitness identification because it was tainted by a prejudicial lineup identification. Appellant's argument is predicated on the rule that where a lineup was not conducted with complete fairness to the accused, the State has the burden of proving by clear and convincing evidence that the witness's subsequent identification was based on independent observations and not tainted by the lineup procedure. *Montgomery* v. *State*, 251 Ark. 645, 473 S.W.2d 885 (1971). Thus the question has two parts: whether the lineup procedure was so unfair as to taint subsequent identifications; and if so, whether the State met its burden in proving the subsequent identifications reliable.

There are many factors to be considered in determining the reliability of a lineup procedure: the opportunity of a victim to observe the crime and its perpetrator; the lapse of time between the crime and the lineup; discrepancies between descriptions given the police and the defendant's true physical characteristics; the occurrence of pretrial misidentification; the certainty of the witness in identifying the accused; and the totality of the facts and circumstances regarding the identification. *Cook* v. *State*, 283 Ark. 246, 675 S.W.2d 366 (1984), citing *Glover* v. *State*, 276 Ark. 253, 633 S.W.2d 706 (1982).

In this case the lineup was conducted within two days of the crime; the crime occurred under circumstances in which the witnesses had ample opportunity to observe the suspect; the witnesses' description of the suspect closely described appellant and the witnesses were positive of their identifications both in the lineup and during the trial. Appellant argues that the lineup identification by witnesses was impermissively suggestive because of the differing hairstyles, footwear and demeanor of the individuals in the lineup. There were six dark-skinned individuals approximately 5 feet 10 inches to 5 feet 11 inches tall, with short afro type hairstyles or braided hair. All were dressed in detention uniforms, some wearing shower shoes and others wearing other types of footwear. All put on sunglasses for the lineup. We cannot see that this arrangement was suggestive enough to make appellant's identification inevitable. *See, Glover* v. *State, supra.* Rather, considering the factors listed above, we believe the lineup

to be reliable. Having so found, we need not decide whether the State met its burden in proving the in-court identifications to be independently based. "Reliability of the evidence is the linchpin in determining its admissibility." *Matthews* v. *State*, 275 Ark. 1, 627 S.W.2d 20 (1982). We find the identifications to be reliable and therefore admissible.

III.

Appellant argues that the trial court erred in failing to suppress appellant's custodial identification of his belongings. After being taken into custody, given his *Miranda* rights and signing a rights form, appellant identified a jacket and wallet found with the stolen money as his own. Appellant argues that he was not afforded the opportunity to remain silent. We note that the rights form signed by appellant contains no express language acknowledging his desire to waive his right to remain silent. In *Fleming* v. *State*, 284 Ark. 307, 681 S.W.2d 390 (1984), our Supreme Court expressed a preference for use of forms with such express language, but the accused's execution of such a form is not a prerequisite to a finding that a statement was voluntary. *Cagle* v. *State*, 267 Ark. 1145, 594 S.W.2d 573 (Ark. App. 1980). Our Supreme Court has found it to be sufficient if, looking at the totality of the circumstances, the accused voluntarily and intelligently waived his right to remain silent. *Cagle, supra.* In this case, appellant, who was familiar with the criminal justice system, was advised of his *Miranda* rights on more than one occasion. He signed a rights form stating that he understood his rights. He did not request an attorney and voluntarily answered questions from the police officers. Viewing the circumstances overall, we find appellant knowingly waived his right to remain silent.

IV.

Appellant contends that the court erred in allowing testimony by police officers of the description of the robber given by witnesses to the robbery. Appellant argues that such testimony was hearsay under Ark. Unif. R. Evid. Rule 801 and should have been excluded. The testimony was elicited in response to the directive "explain what information you had with regard to the robbery, just what action you took." The officer's testimony was given to show what information he had acted on, not for the truth

of the statements therein. Testimony of such a conversation not offered to prove the truth of the matter asserted is not hearsay under Rule 801. *Worring* v. *State*, 2 Ark. App. 27, 616 S.W.2d 23 (1981).

V.

[redacted] Appellant contends that the trial court erred in allowing Officer Womack to testify that Ruthie Mae Parks, appellant's alibi witness, had been drinking when he questioned her about appellant's whereabouts during the robbery. Appellant argues that the officer's conclusion was conjecture without proper foundation. It is clear under Ark. Unif. R. Evid. Rule 701 that a lay person can testify in the form of opinion or inference if that testimony is rationally based upon his perception and is helpful to a clear understanding of his testimony or the determination of a fact in issue. Officer Womack questioned Mrs. Parks for some period of time and had ample opportunity to develop an opinion as to her physical state. His perception of her physical state was helpful to the jury in assessing both his credibility and hers. Thus Officer Womack's testimony meets the requisites set out in Rule 701. We would also note that appellant failed to take advantage of his opportunity on cross-examination to question Officer Womack about the basis for his opinion. We find no error here.

VI.

[redacted] Appellant contends that the trial court erred in submitting the question of the accomplice status of witness Ricky Parks to the jury. Appellant raises this issue for the first time on appeal. A review of the record fails to reveal an objection by appellant to the jury instruction given on Parks' accomplice status or a request for an instruction that Parks was an accomplice as a matter of law. Issues raised for the first time on appeal cannot be addressed. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

VII.

[redacted] Appellant had been previously convicted of robbery and armed robbery in Missouri. Appellant argues that the trial court erred in failing to grant appellant's motion in limine which would have suppressed the use of these prior convictions for

impeachment purposes. It is clear under Ark. Unif. R. Evid. Rule 609(1)(a) that a prior conviction is admissible to attack the credibility of a witness if the conviction was for a crime punishable by death or more than one year's imprisonment and the court determines that the probative value of this evidence outweighs its prejudicial effect. *Bell* v. *State*, 6 Ark. App. 388, 644 S.W.2d 601 (1982). The trial court has considerable discretion in determining whether the probative value of the prior conviction outweighs its prejudicial effect and will not be reversed absent an abuse of discretion. *Bell, supra.*

Following, are some factors which should be considered by the trial court in determining whether the probative value of the evidence outweighs its prejudicial effect:

1. Impeachment value of the prior crime.
2. The date of the conviction and the witness's subsequent history.
3. The similarity between the prior conviction and the crime charged.
4. The importance of the defendant's testimony.
5. The centrality of the credibility issue.

Washington v. *State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982).

Appellant relies on *Jones* v. *State*, 274 Ark. 379, 625 S.W.2d 471 (1981). In *Jones, supra*, the Arkansas Supreme Court held that the prejudicial effect of a nolo contendre plea for sexual abuse of a small boy outweighed its probative value where the appellant was again charged with sexual abuse of a child. We believe *Jones* is distinguishable. There appellant also had two prior convictions for other felonies which would not have been suppressed had he testified. Because the other felony convictions could be used to impeach his credibility, the probative value of the sexual abuse conviction was greatly lessened. Also, sexual abuse of a child, being particularly loathsome, is one of those crimes for which a jury might be especially inclined to believe "if he did it once he'd do it again."

The case at bar falls in that category of cases where the credibility of the defendant is critical and the nature of the prior

convictions is such that the danger of extra prejudice does not attach to its admission as it does with particularly loathsome crimes like sexual abuse of children. *See, Smith* v. *State*, 277 Ark. 64, 639 S.W.2d 348 (1982); *Bell, supra*; *Washington, supra*. The appellant's credibility was critical in Harry Jones' case. His convictions are all dated within the last seven years, the most recent having occurred in 1982. The convictions are for similar crimes but the nature of the crime is such as to provoke no particular prejudice. Appellant's testimony would have been in direct conflict with that of other witnesses had he testified. Appellant's credibility would have been critical had he testified. These facts provide ample basis for the trial court's decision that the probative value of his prior convictions outweighed any possible prejudice.

We reverse on point one for a new trial.

Reversed and remanded.

CRACRAFT, C.J., and COOPER, J., agree.

Supplemental Opinion on Denial of Rehearing
August 28, 1985

695 S.W.2d 386

DONALD L. CORBIN, Judge. In our original opinion we did not consider appellant's argument that the trial court erred in submitting the issue of the accomplice status of witness Ricky Parks to the jury. Appellant correctly points out in his petition for rehearing that this issue was raised and should be considered.

Appellant offered AMCI 402 which would have instructed the jury that Parks was an accomplice as a matter of law and that his testimony required corroboration in order to convict appellant. The court refused this instruction and gave AMCI 403 which instructed the jury that if it found Parks to be an accomplice his testimony had to be corroborated in order to convict appellant.

Parks testified that he didn't know appellant was going to rob a store, that appellant often talked along those lines but never did anything, and that his knowledge of the robbery came only after it had been committed. This testimony was sufficient to put Parks' status as an accomplice in dispute. The standard instruction on corroboration when the accomplice status of a witness is in dispute must be given when the witness' status as an accomplice is in dispute. One's status as an accomplice is a mixed question of law and fact and the issue must be submitted to the jury where there is any evidence to support a jury's finding that the witness was an accomplice. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). The trial court should not instruct the jury that a witness is an accomplice as a matter of law if there is any dispute on that point. *See, Johnson & Keeling* v. *State*, 259 Ark. 773, 536 S.W.2d 704 (1976); *Odom* v. *State*, 259 Ark. 429, 533 S.W.2d 514 (1976). In the case at bar Parks' status as an accomplice was clearly disputed. Thus, the trial court correctly instructed the jury and we find no merit to this point.

Not knowing what evidence will be submitted on remand we will not anticipate what instructions may be proper if the case is retried.

CRACRAFT, C.J., and COOPER, J., agree.

Phillip E. LEOPOLD and Eddie Joe ECHOLS *v.* STATE of Arkansas

CA CR 84-215 692 S.W.2d 780

Court of Appeals of Arkansas
Division II
Opinion delivered July 3, 1985

[redacted]

Tapp Law Offices, by: *J. Sky Tapp*, for appellant Leopold.

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*, for appellant Echols.

Steve Clark, Att'y Gen., by: *Jack Gillean*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellants, Phillip E. Leopold and Eddie Joe Echols, were charged by felony information with possession of a controlled substance with intent to manufacture and deliver. Appellants were found guilty as charged by a Clark County Circuit jury and sentenced to four years in the Arkansas Department of Correction and fined $12,500. We reverse and remand.

We must agree with appellants' contention that the trial court erred in denying their motion to suppress. Appellants argued to the trial court and now on appeal that the stop and subsequent search of their vehicle by deputy sheriffs was unreasonable and that the evidence seized should have been suppressed. Prior to their trial, appellants filed a motion to suppress all the evidence seized pursuant to the search of their truck. A hearing was held on appellants' motion which motion was denied by the trial court on a finding that there was cause to stop the vehicle. The trial court relied upon *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982), in its decision.

Officer Mitch Pierce, a deputy sheriff with the Clark County Sheriff's Office, testified at the suppression hearing that while he and his partner were returning from investigating another matter at approximately 2:00 a.m., they spotted appellants' truck traveling on a gravel road owned by International Paper but open to the public. It was a remote area approximately four to six miles off the main highway and the officer estimated that appellants' truck was traveling at about ten miles an hour. The officers suspected that it could possibly be someone headlighting or spotlighting deer.

After the officers stopped appellants' truck, the driver, appellant Phillip E. Leopold, was unable to produce a driver's license and when asked by the officers why he was in the area, appellant Leopold stated that "they were just out riding around killing time." Officer Pierce then went around to the passenger's side of the truck and asked the passenger, appellant Eddie Joe

Echols, for identification. Appellant Echols handed the officer his driver's license. The officer stated that he had noticed earlier that appellant Echols was wearing leather chaps which aroused his suspicion. The passengers were again asked what they were doing out in that area to which they said they were just out killing time. The officer asked appellants to get out of the truck and the officers detained them at the front of the truck. Officer Pierce then looked inside the passenger compartment of the truck for a weapon. Using his flashlight, Officer Pierce found a four-inch square plastic freezer container under the passenger seat of the truck. Inside the container the officer discovered two rolled cigarettes composed of a green leafy substance. There was also green leafy substance in the bottom of the container, rice, one plastic bag of brown tobacco, an insulin syringe, an alcohol prep pad and a small plastic sandwich bag which contained white powder. The officer continued his search and found a .357 Rutger in the glove box which was unloaded. Ammunition for the weapon was discovered behind the driver's seat. The officer then searched the back of the pickup truck and found a backpack, bags of top soil and barnyard, a hoe, a military web belt with a canteen holder and an E-tool and fishing poles. Officer Pierce opened the backpack and looked inside. He found a can which he opened. It contained a Sucrets box and seeds were discovered inside. Transplant tone and a paper pie plate which contained writing on it were also found inside the backpack.

During cross-examination, Officer Pierce testified that there had been complaints in the area of people spotlighting or night hunting, complaints of vehicles being out at all times of the night, complaints of things being stolen and that people had been growing marijuana in the area. Officer Pierce stated that they stopped appellants' truck upon a suspicion that the occupants were spotlighting for deer, combined with the above reports of trouble in the area and the lateness of the hour.

At appellants' trial, a drug analyst with the Arkansas Crime Lab was called by the State as a witness. He testified that he had analyzed the contents of the plastic freezer container and determined that the material was marijuana seeds. He also stated that he germinated the seeds contained in the Sucrets box and found them to be marijuana.

Appellants argue in their brief that the facts of this case do not fit within any of the exceptions to the warrant requirement. Although appellants state that the only exception under which this case could conceivably fit is the "stop and frisk" exception, they contend that *Terry*, *supra*, is inapplicable to the facts. As noted previously, the trial court denied appellants' motion to suppress upon the finding that there was cause to stop appellants' truck, citing *Terry, supra*. The State asserts on appeal that the reasoning of *Terry, supra*, and subsequent cases does apply and that based on such reasoning, the stop was justified as an investigative stop. The State also contends that it was reasonable for the officers to suspect appellants might have a weapon in the truck and that the officers had sufficient cause to search for weapons.

[redacted] The Fourth Amendment protects the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. In *Terry, supra*, and subsequent cases, the courts have held that, consistent with the Fourth Amendment, police may stop persons in the absence of probable cause under limited circumstances. Although stopping a car and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment, the governmental interest in investigating an officer's reasonable suspicion, based on specific and articulable facts, indicating the person or vehicle may be involved in criminal activity, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion. *See, Delaware* v. *Prouse*, 440 U.S. 648 (1979). In *United States* v. *Hensley*, 105 S.Ct. 675 (1985), the U.S. Supreme Court gave the police wider latitude in the conduct of an investigatory stop by allowing such a stop on the basis of a flyer from another police department stating that an individual was wanted for questioning regarding a past crime. Previously, a *Terry* stop was limited to occasions when the police had reasonable suspicion that an individual was involved in ongoing or imminent criminal activity. As a result of this decision, police may conduct a *Terry* stop to investigate a crime that has already been completed.

[redacted] In *Terry, supra*, and *Sibron* v. *New York*, 392 U.S. 40 (1968), a companion case handed down on the same day, the United States Supreme Court dealt with the questions of "stop"

and "frisk" separately. A stop is a far lesser intrusion than a frisk, and the constitutional requirements for a stop are correspondingly less. Thus, a police officer may constitutionally stop a suspicious person although he has no justification to frisk him. Matters may then come to the officer's attention to justify a frisk. Once there is a reasonable stop under the Fourth Amendment, the governmental interest which permits the greater intrusion of the "frisk" is not "the prevention or detection of crime, but rather the protection of the officer making the stop." *Terry, supra*, at 23-24. A frisk is only justified when the officer has a reasonable suspicion that the detainee is armed. *See, Ybarra* v. *Illinois*, 444 U.S. 85 (1979). The frisk must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." *Terry, supra*, at 29. An officer has the right to frisk a detainee's possessions under *Terry* if there is a reasonable suspicion that there is a weapon located there. A weapon may not be on the person but still present a threat if it is in easy reach.

In *Michigan* v. *Long*, 103 S. Ct. 3469 (1983), the Supreme Court considered the question of the authority of a police officer to protect himself by conducting a Terry-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle. In holding that the search was valid, the Court noted that roadside encounters between police and suspects were especially hazardous, and that danger could arise from the possible presence of weapons in the area surrounding a suspect. It was stated by the Court that:

> These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. (cite omitted) "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (cite omitted) If a suspect is "dangerous," he is no less dangerous simply because he is not arrested. If,

> while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. (cites omitted)

It is clear that even if the detainee has been removed from the vehicle and is under the officer's control, it is possible that he could break away from police control and retrieve a weapon from his automobile or that he will be permitted to reenter his automobile and will then have access to any weapons inside. Removing the possession from the detainee's custody does not remove the threat to the officer. It is also clear that a valid frisk is strictly limited to the purpose of locating weapons within easy reach.

In denying appellants' motion to suppress in the case at bar, the trial court also relied upon *Hill, supra.* There, police officers had stopped Hill after receiving radio dispatches regarding an armed robbery and murder which included a description of the suspect and his vehicle. The suspect was described as being armed and extremely dangerous. The officers advised Hill to step out of his car and a frisk search of his person was conducted for weapons. Meanwhile, another officer searched the immediate area of the car where Hill had been sitting. A brown paper sack containing a loaded gun and a large quantity of coins was found under the front seat on the driver's side. Hill argued on appeal that the stop and search of his vehicle was unreasonable and that the pistol seized should have been suppressed. The Arkansas Supreme Court held that the search of Hill's car was reasonable under the circumstances. It also held that the limited search for weapons was reasonable, citing A.R.Cr.P. Rule 3.4. This rule provides as follows:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officers or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary

to ensure the safety of the officer or others.

In the instant case, we cannot say the trial court erred in finding that the officers had reasonable suspicion under the totality of the circumstances to make an investigative stop of appellants' truck. The trial court's inquiry should not have ended at this point, however, and we hold that the subsequent frisk or protective search allegedly conducted for weapons violated appellants' constitutional rights under the Fourth Amendment and was, therefore, invalid.

The State argues that since the officers suspected that appellants were engaged in spotlighting for deer, it was reasonable for the officers to expect that they might have had weapons in the truck. This bald assertion, unsupported by the testimony of the officer, is insufficient to pass muster under the test espoused by the United States Supreme Court.

The test in determining whether the frisk was reasonable is an objective one. While the officer need not be absolutely certain that the individual is armed, the basis for his acts must lie in a reasonable belief that his safety or that of others is at stake. *Terry, supra*, at 27. Essentially, the question is whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger. The officer's reasonable belief that the suspect is dangerous must be based on "specific and articulable facts." *Terry, supra*, at 21.

In the case at bar, the officer testified at the suppression hearing that he asked appellants to step out for the purpose of checking the vehicle for a weapon. At appellants' trial, the officer merely stated that he asked both the subjects to get out of the vehicle and that he started looking underneath the seat. It is impossible for this Court to conclude that the above constitutes specific and articulable facts by the officer to justify a frisk or protective search of appellants' truck. Any warrantless search of a vehicle is presumptively unconstitutional. *United States* v. *Ross*, 456 U.S. 798 (1982). The burden is on the State to show legal justification for it. *United States* v. *Matlock*, 415 U.S. 164 (1974).

The record reflects that following the investigative stop of

appellants' truck, appellant Leopold, the driver of the truck, was unable to produce a driver's license. Appellants were asked why they were in the area and they replied that they were just riding around killing time. Officer Pierce observed that appellant Echols wore leather chaps. It was at this point that appellants were asked to step out and the search began.

The State failed to show legal justification for a protective search. The officer (whose testimony was the only evidence presented) failed to articulate any objective factual basis for a reasonable belief that appellants were dangerous and might gain immediate control of weapons. In fact, Officer Pierce testified that appellants were cooperative and courteous at all times. We find that the facts show that the officers were not motivated by fear nor that the officers' behavior at the time of the stop supports a finding that they believed they were in danger. Accordingly, all evidence seized as a result of the unjustified protective search is inadmissible and the trial court erred in denying appellants' motion to suppress.

Since we have held that the officers' action in searching appellants was unjustified at its inception, we need not address the second issue which *Terry, supra*, would otherwise present—whether the police officers' further examination of the closed backpack in the back of the pickup was unconstitutional in that the search was more extensive than reasonably necessary.

Reversed and remanded.

COOPER, J., agrees.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I concur. In *Foster* v. *State*, 278 Ark. 473, 646 S.W.2d 699 (1983), our Supreme Court upheld the stop and arrest of defendant when the policemen took no action until after they observed, in plain view, the contents of the trunk of defendant's car. Like in *Foster*, in this cause, the officers had, as required under Arkansas Rule of Criminal Procedure 3.1, a reasonable suspicion that appellants were committing, had committed, or were about to commit a felony. The officers did not, however, have reason to suspect that appellants were armed and dangerous—a circumstance that would have permitted a limited search for weapons. *See* Arkansas

Rule of Criminal Procedure 3.4. The search conducted in this cause not only lacked justification, but also far exceeded the bounds laid out in *Terry* v. *Ohio*, 392 U.S. 1 (1968), and set forth in Rule 3.4, *supra.*

Further, unlike in *Tillman* v. *State*, 275 Ark. 275, 630 S.W.2d 5 (1982), a vehicular search under Arkansas Rule of Criminal Procedure 14.1(a) was not justified in this cause, as the officers had no reasonable cause to believe that the truck contained evidence subject to seizure. There was no report connecting this truck or its occupants to any particular criminal activity. The officers were merely suspicious by virtue of the manner and location in which the truck was traveling, the time of night, and the fact that the passenger was wearing chaps.

EQUITY GENERAL AGENTS, INC. and JOSEPH M. DOLAN AGENCY *v.* James A. O'NEAL and ALLSTATE INSURANCE CO.

CA 84-144 692 S.W.2d 789

Court of Appeals of Arkansas
Division I
Opinion delivered July 3, 1985

Friday, Eldredge & Clark, by: *Elizabeth J. Rabben*, for

appellants.

Wright, Lindsey & Jennings, for appellees.

MELVIN MAYFIELD, Judge. This is an appeal from a declaratory judgment entered in the Pulaski County Chancery Court. The facts are not in dispute. For some years, James A. O'Neal had obtained his automobile insurance through the Joseph M. Dolan Agency. In January of 1981, the Dolan Agency cancelled O'Neal's insurance policy with one company and issued in its place a policy with Allstate Insurance Company. At that time, O'Neal owned two vehicles and both O'Neal and the Dolan Agency intended for the Allstate policy to provide coverage for both vehicles. However, through an admitted error of the Dolan Agency, one of the vehicles, a 1980 Chevrolet pickup truck, was omitted from the policy.

In May of 1981, O'Neal had an accident while driving the pickup truck and one of the persons involved in the accident brought suit in circuit court against O'Neal for personal injuries. O'Neal filed a third-party complaint against Allstate, seeking reformation of his insurance policy to provide coverage for the omitted vehicle. In turn, Allstate filed a third-party complaint against the Dolan Agency and against Equity General Agents, Inc., the Dolan Agency's errors and omissions carrier, seeking indemnity in the event of judgment against Allstate. The Dolan Agency filed an answer to Allstate's complaint and Equity General filed a motion to dismiss Allstate's complaint. The circuit court severed both third-party complaints from the original action and transferred them to chancery court because of the equitable nature of the subject matter.

After hearing the testimony, the chancellor entered a declaratory judgment finding that the Dolan Agency was negligent in omitting the pickup from O'Neal's policy and that Equity General's policy covered the agency's errors and omissions during the period involved. The judgment also ordered the Dolan Agency to defend O'Neal in the personal injury lawsuit pending against him in circuit court; O'Neal's complaint against Allstate was dismissed for want of equity; and Equity General's motion to dismiss Allstate's complaint was not granted.

[redacted] Equity General and the Dolan Agency have appealed.

It is first argued that the chancellor should have granted Equity General's motion to dismiss. *Greer* v. *Mid-West National Fire & Casualty Insurance Co.*, 305 F. Supp. 352, 355 (E.D. Ark. 1969), *aff'd*, 434 F.2d 215 (8th Cir. 1970), is cited for its statement that "Apart from statute an injured party has no right of direct action in Arkansas against the liability insurance carrier of the tortfeasor," and the argument is that there is no statutory authority that would allow Allstate to bring this direct action against Equity General. In response, Allstate argues that Equity General was properly made a party because Arkansas' Declaratory Judgment Act applies to this matter and one section of that act provides "When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. . . ." Ark. Stat. Ann. § 34-2510 (Repl. 1962). We agree with Allstate on this point.

In *Aetna Casualty & Surety Co.* v. *Hatridge*, 282 F.Supp. 604 (W.D. Ark. 1968), the court stated the criteria for the affirmative exercise of the trial court's discretion in favor of a declaratory judgment:

> [T]he Court must have concluded that its judgment will "terminate the uncertainty or controversy giving rise to the proceeding" and that it will serve a useful purpose in stabilizing legal relations. The wide discretion of the court in moulding the declaration to the needs of the occasion, unhampered by the issues joined or the claims of counsel, enables it to respond effectively to those practical requirements. . . . Attention [is] directed from form and formula to substance and policy so that we find convenience, expediency, need, desirability, public interest, or policy the common criteria of the grant of the declaration. Moreover, it may be well to repeat that a declaration may *not* be denied merely because another remedy could have been used or because of the pendency of another suit in which the rights of the parties would not necessarily be determined.

Id. at 606 (quoting Borchard, *Declaratory Judgments* 296-298 [2d ed. 1941]).

In the instant case, the chancellor's judgment is entitled "Declaratory Judgment," and we find he correctly determined

that the criteria for a declaratory judgment were met. Although neither O'Neal nor Allstate's third-party complaint used the words "declaratory judgment," the effect of their complaints was to request that the court "declare rights, status, and other legal relations" and that is the jurisdiction granted by the Declaratory Judgment Act. *See* Ark. Stat. Ann. § 34-2501 (Repl. 1962). We think it was a proper exercise of the trial court's discretion to enter a declaratory judgment in an attempt to "stabilize the legal relations" of the parties, and we hold that the court did not err in refusing to grant Equity General's motion to dismiss Allstate's third-party complaint. *See, Priddy* v. *Mayer Aviation, Inc.*, 260 Ark. 3, 537 S.W.2d 370 (1976) (direct action by the insured party against an insurer upheld in action for declaratory judgment); *Pennsylvania Casualty Co.* v. *Upchurch*, 139 F.2d 892 (5th Cir. 1943) (issue of whether or not an injured third party may directly sue the insurer found to be a remedial matter and thus immaterial in an action for declaratory judgment).

The appellants' second argument is that the trial court erred in refusing to reform the insurance contract between Allstate and O'Neal. We agree with the appellants on this point. In *American Casualty Co.* v. *Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961), the Arkansas Supreme Court approved the principle that a court of equity "may grant relief for a mutual mistake in the writing of an insurance contract that results in the written terms not expressing the clear intent and understanding of the parties. . . ." 233 Ark. at 945.

Many cases support the granting of reformation when an insurance policy is not reflective of the parties' agreement and intentions. For instance, in *Phoenix Assurance Co.* v. *Boyette*, 77 Ark. 41, 90 S.W. 284 (1905), it was undisputed that the insurance policy issued by the appellant insurance company to the appellee did not express the real agreement and intention of the appellee and the agent of the appellant insurance company. The Arkansas Supreme Court upheld the chancellor's order for reformation of the policy. *See also, Granite State Insurance Company* v. *Bacon*, 266 Ark. 842, 586 S.W.2d 254 (Ark. App. 1979) (reformation granted by the trial court and not an issue on appeal); *Pennsylvania Millers Mutual Insurance Company* v. *Walton*, 236 Ark. 336, 365 S.W.2d 859 (1963) (reformation granted by the trial court and not an issue on appeal); *Calvert Fire Insurance*

Company v. *Hardwicke*, 232 Ark. 466, 338 S.W.2d 329 (1960); and *Inter-Southern Life Insurance Company* v. *Holzhauer*, 177 Ark. 927, 9 S.W.2d 26 (1928).

In the instant case, it is undisputed that the written terms of O'Neal's insurance policy did not afford the coverage intended. Clearly, this was a situation in which reformation was the proper remedy. However, Allstate argues that O'Neal has not appealed from the chancellor's declaratory judgment and that the appellants, Dolan Agency and Equity General, do not have standing to seek reformation in privity with the original parties to the contract or in privity with the original parties. Allstate also points out that these appellants did not seek reformation at the trial court level and it is contended that they cannot complain about the trial court's decision for that reason. We find no merit in either contention.

The trial court's decision on reformation directly affected these appellants. On appeal, we try equity cases de novo and enter such judgment as should have been entered by the chancellor. *Pickens* v. *Stroud*, 9 Ark. App. 96, 653 S.W.2d 146 (1983). In *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979), the Arkansas Supreme Court stated:

> An appeal in a chancery case opens the whole case for review. All of the issues raised in the court below are before the appellate court for decision. . . . The appellate court reviews both law and fact and, acting as judges of both law and fact as if no decision had been made in the trial court, sifts the evidence to determine what the finding of the chancellor should have been and renders a decree upon the record made in the trial court. . . . The appellate court may always enter such judgment as the chancery court should have entered upon the undisputed facts in the record.

266 Ark. at 564 (citations omitted).

In the instant case, it is undisputed that (1) O'Neal and the Dolan Agency intended that O'Neal's policy would cover both of his vehicles, (2) coverage was provided for only one of the vehicles due to the admitted error of the Dolan Agency, (3) the Dolan Agency had the authority to bind Allstate, and (4) Allstate

would have accepted this risk. On these undisputed facts, the chancellor should have granted O'Neal's request for reformation. In this appeal by Dolan and Equity, we grant reformation to provide coverage for O'Neal's 1980 Chevrolet pickup truck.

The appellants' final argument is that the trial court erred in ordering the Dolan Agency to defend the suit filed against O'Neal in circuit court. We agree with the appellants since we find no legal basis for this order. Allstate thinks it is supported by *Priddy* v. *Mayer Aviation, Inc., supra.* In that case Mayer gave the insurance agent, Priddy, some premium money and asked him to obtain liability insurance coverage for Mayer from Pan American Fire & Casualty Company. Priddy failed to obtain the coverage through his own admitted negligence. Subsequently, two suits were filed against Mayer in circuit court and he in turn filed a petition for declaratory judgment in chancery court against Pan Am, Priddy, and Priddy's errors and omissions carrier. After hearing the evidence, the chancellor entered a declaratory judgment which declared that Priddy should defend Mayer in the two lawsuits. The *Priddy* case, however, is distinguishable from the instant case because there was no evidence in *Priddy* that the agent had the authority to bind Pan Am by issuing a policy to Mayer. In the instant case, the Dolan Agency clearly had full authority to issue the policy to O'Neal.

The facts in this case are in line with the holdings in *Granite State Insurance Company* v. *Bacon, supra,* and *Pennsylvania Millers Mutual Insurance Company* v. *Walton, supra.* In *Granite*, the insurance agent made a typographical error which resulted in the insured receiving less coverage than was intended. The trial court reformed the contract between the insured and the insurance company and held that the insurance company was not entitled to indemnity from the negligent insurance agent. The insurance company appealed and this court affirmed on the basis that the agent's negligence was not an issue. We said the issues were (1) whether or not the agent had authority to bind the insurance company and (2) whether or not the insurance company would have initially accepted the increased coverage. We quoted from the Arkansas Supreme Court's decision in *Pennsylvania Millers Mutual* to the effect that in the absence of bad faith or collusion the agent is not liable to his company for a loss on an insurance contract that he had "full power and expressed

authority to make." In the instant case, it is undisputed that the Dolan Agency had authority to bind Allstate to the type of policy issued to O'Neal. Clearly, the Dolan Agency should not be required to indemnify Allstate and should not be required to defend O'Neal.

In summary, we find the chancellor had the authority and was correct in entering a declaratory judgment in this case. However, he should have granted reformation of the O'Neal insurance policy and should not have required the Dolan Agency to defend the personal injury suit filed against O'Neal. Also, he should have held that neither the Dolan Agency nor Equity General was liable to indemnify Allstate for any loss on the O'Neal policy as reformed.

Affirmed in part and reversed in part.

CORBIN and GLAZE, JJ., agree.

Cody W. HALL *v.* STATE of Arkansas

CA CR 84-126 692 S.W.2d 769

Court of Appeals of Arkansas
Division I
Opinion delivered July 3, 1985

Dennis Hyslip, Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Jack Gillean*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. The appellant was convicted in a jury trial of two counts of sexual abuse in the first degree. He was sentenced to six years imprisonment on each count to run

consecutively.

Testimony was presented to the effect that the events for which the appellant was convicted took place while the appellant was babysitting for three young children, an eight-year-old boy, his six-year-old sister, and another girl who was nine years old. The defendant, who was 32 years old, was at the house where the brother and sister lived and was visiting with their mother when her cousin came over. The cousin and her husband left their little girl there while they went to a tavern where the husband performed as a musician. After they left, the appellant agreed to babysit the children while the boy and girl's mother went to the tavern also.

There was testimony from the children that while they were alone with the appellant, he played hide and seek with them, got them to smoke some marijuana, held the girls on his lap while he rubbed them between the legs and got them to touch his penis. The children all testified that they had known the appellant for some time and that he had authority over them. They also said he told them not to tell what had happened. The appellant denied any sexual molestation of the girls.

Several points are argued by the appellant for reversal of his conviction. We first discuss the testimony of an expert witness, Donna Van Kirk. This witness testified that she was a licensed psychologist with a bachelor's degree in sociology and a doctorate in counseling. She had completed a year of clinical training at Children's Medical Center in Tulsa, which is a psychiatric and pediatric unit for children. She had worked at Ozark Guidance Center evaluating children for intellectual and emotional handicaps and she had done family, group, and individual counseling. She also had tested a large number of children, some of whom had been sexually abused, and had testified as an expert witness in juvenile and circuit courts.

This witness's testimony dealt with what was termed some of the dynamics of child sexual abuse cases. Her testimony was that in 75 to 80 percent of such cases the perpetrator is known to the child ahead of time, is a relative or friend of the family, and has implied or explicit authority over the children, maybe as a teacher, grandparent or babysitter. The children are almost always told not to tell what has happened. Fifty percent of child

sexual abuse cases occur in the home of the child or the perpetrator.

Dr. Van Kirk testified that children typically do not have the vocabulary to discuss the sexual abuse they experience. They may not know names for genitals; they have not developed concepts of time and distance; and they tend to get things out of sequence. Based on her training and experience, the witness testified that children in sexual abuse cases suffer psychological damage. This is expressed in a number of ways. They may respond by bedwetting, loss of appetite, refusal to go to school. They may cling to the parent, be reluctant to go out of the house or yard, develop a tic.

The expert said that, in her opinion, an adult's abuse of a child is not sexually motivated, and not gratifying, but is an abuse of power; that the "psychological profile of a perpetrator" is usually heterosexual and they have an adult sexual partner; the first offense is virtually always committed before the age of 40; and alcohol or drugs is "often a dynamic."

This witness said she had not examined any of the children involved in this case. She did not know and had not examined the appellant. The information to which she testified was based mostly on national statistics. The only personal knowledge she had in regard to the case came from what the prosecuting attorney and deputy prosecuting attorney had told her from the police reports.

The appellant's first objection, during the course of the expert's testimony, was that her testimony should be confined to this specific case rather than to generalities. The court overruled the objection but told the prosecutor to narrow the testimony to "child sexual abuse" since "child abuse" covered a large range. Appellant's next objection was to testimony about the "dynamics of such cases" based on the expert's general knowledge since she had never seen either of the girls involved in this case. The court overruled that objection with an admonition to the jury that the testimony did not in and of itself relate to these particular girls. Next, the appellant objected to the witness' expressing an opinion as to the likelihood of children's fabricating stories about sexual abuse. This objection was sustained. Finally, appellant objected to the question of whether children had mental shortcomings that

would cause them trouble when relating a sexual abuse case to adults. This objection was overruled.

Appellant cites *Caldwell* v. *State*, 267 Ark. 1053, 594 S.W.2d 24 (Ark. App. 1980), where the court noted that the general test as to the admissibility of expert testimony is whether it can give the jury "appreciable help" and whether its probative value will exceed its prejudicial effect. The appellant argues that the testimony of Dr. Van Kirk fails to pass either prong of this general test. The appellee, however, calls our attention to the fact that the admissibility of expert testimony is largely within the proper discretion of the trial judge, and points to the fact that the trial judge had excluded the expert testimony in *Caldwell* whereas here the testimony was admitted. We are also told that a number of jurisdictions allow similar expert testimony in cases like the one before us. Four cases are cited in support of that statement.

In *United States* v. *Winters*, 729 F.2d 602 (9th Cir. 1984), the defendant was charged with kidnapping two women and transporting them in interstate commerce for immoral purposes. Testimony was introduced to the effect that he had beaten and raped both women during a journey across several states. The defendant directed the jury's attention to the fact that the women had failed to take advantage of opportunities to escape or call for help. In order "to assist the jury in understanding the women's conduct and to dispel any notion that they voluntarily submitted" to the defendant, the government called a psychiatrist as an expert witness. This witness was allowed to testify that the women had suffered from "post-traumatic stress disorder" described as a profound personality change following a period of severe psychological stress. The expert said this explained failure of the women to attempt escape or to cry out for help in a public place. Another expert was allowed to testify to the conditioning process that women subjected to forced prostitution go through and how eventually only subtle threats will maintain control over them. The court said the expert testimony concerned matters beyond the common knowledge of the average layman and that it would assist the jury to understand the evidence.

In *State* v. *Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978), a man was convicted of second-degree murder of his two-year-old

son. A medical doctor, who had performed an autopsy on the child, testified as to the injuries he found on the child's body and was allowed to state his opinion that the child was a "battered child" which he defined as one "who died as a result of multiple injuries of a non-accidental nature." He explained that "non-accidental" injuries were not those resulting from the everyday life and activities of a child but those often seen where children have been severely punished. The court held that this was permissible medical expert testimony and noted that the doctor did not express any opinion as to who caused the injuries he observed.

On the other hand, in *People* v. *Bledsoe*, 36 Cal. 3d 236, 203 Cal. Rptr. 450, 681 P.2d 291 (1984), the defendant was convicted of the forcible rape of a 14-year-old girl. Expert testimony of a rape counselor was admitted and she testified that the girl suffered from "rape trauma syndrome." The expert said this was "umbrella terminology for what a rape victim experiences" and she described in some detail various phases and reactions that she said "99.9 percent" of rape victims are going to experience. The appellate court said the "rape trauma syndrome" was a rather recent term, coined by the authors of an article in 131 *Am. J. Psychiatry* 981, and that evidence based on the concept had been admitted in some cases to rebut inferences arising from evidence suggesting an inconsistency with the claim of rape. The court added:

> In the present case, however, the evidence was not admitted for any such purpose. Here, the victim promptly reported the attack, immediately exhibited the type of severe emotional reaction that the normal lay juror would associate with rape and suffered bruises and other physical injuries that corroborated her claim that she had been violently assaulted. As far as our review of the record reveals, defendant made no claim that Melanie's conduct or demeanor after the incident provided any basis for the jury to infer that she had not been raped.
>
> Thus, in this case, the prosecution introduced the rape trauma syndrome testimony, not to rebut misconceptions about the presumed behavior of rape victims, but rather as a means of proving—from the alleged victim's post-

> incident trauma—that a rape in the legal sense had, in fact, occurred.

The fourth case cited by the appellee is *State* v. *McGee*, 324 N.W.2d 232 (Minn. 1982), which is a brief opinion reversing a conviction because of the "rape trauma syndrome" evidence of an expert witness. Without any discussion, the opinion simply cites *State* v. *Saldana*, 324 N.W.2d 227 (Minn. 1982). In *Saldana*, the defendant admitted that sexual intercourse had occurred but claimed it was consensual. The opinion states that in an attempt to rebut that claim, the state presented an expert witness who "described the typical post-rape symptoms and behavior of rape victims, and gave her opinion that the complainant was a victim of rape and had not fabricated her allegations. The appellate court reversed and held that the expert's opinions were inadmissible. In regard to "rape trauma syndrome" the court said, at best, it "describes only symptoms that occur with some frequency, but makes no pretense of describing every single case." And the court observed:

> The jury must not decide this case on the basis of how most people react to rape or on whether Fuller's reactions were the typical reactions of a person who has been a victim of rape. Rather, the jury must decide what happened in *this case*, and whether the elements of the alleged crime have been proved beyond a reasonable doubt. (Emphasis in the original).

In the instant case, we think the court erred in allowing some of the testimony given by the state's expert witness, Dr. Van Kirk. Three of the four cases cited by the appellee in support of the admissibility of the state's expert witness aptly demonstrate what is involved.

Wilkerson involved the testimony of a medical doctor who examined injuries inflicted upon a child and stated that in his opinion this was not the type of injuries that results from the everyday life and activities of a child but was the type of injuries often seen in children who have been severely punished. We lay aside questions concerning physical injury to "battered children" as not germane to the consideration of the case before us. The other three cases, however, are in point.

In *Winters*, the evidence concerned "post-traumatic stress disorder" and the conditioning process that the women there were subjected to through beatings and forced prostitution. This evidence was offered to explain why the women did not attempt to escape, and the court found it concerned matters beyond the common knowledge of the average layman and would be of proper assistance to the jury. On the other hand, *Bledsoe* and *Saldana* involved testimony concerning "rape trauma syndrome" which was described as "umbrella terminology" for what a rape victim experiences. In *Bledsoe*, the court said this testimony was introduced "not to rebut misconceptions about the presumed behavior of rape victims, but rather as a means of proving—from the alleged victim's post-incident trauma—that a rape in the legal sense had, in fact, occurred." In *Saldana*, the court said that the "rape trauma syndrome" evidence was not admissible because it tended to cause the jury to decide the case on the basis of how most people react to rape or on whether the reactions of the victim in *Saldana* were the typical reactions of a victim of rape, when the jury's obligation was to decide whether the elements of the crime had been proved in the case at hand.

It is our conclusion from the record in the case before us that the evidence of the expert, Dr. Van Kirk, tended to focus the attention of the jury upon whether the evidence against the defendant matched the evidence in the usual case involving sexual abuse of a young child. Much of the expert's testimony highlighted details that were parallel to the details in the case at hand. For example, the defendant here was known to the children involved. The expert testified that in 75% to 80% of such cases the perpetrator is known to the children involved. The children here were told not to tell what happened. The expert said the children are almost always told not to tell what happened. The crime here is alleged to have occurred in the home of the children. The expert testified that 50% of child sexual abuse cases occur in either the home of the child or the perpetrator. The defendant here was 32 years of age. The expert testified that in child abuse cases the first offense is virtually always committed before the age of 40. The defendant here had had trouble with alcohol. The expert testified alcohol or drugs is "often a dynamic." Other details could be recited but it is enough to say that we feel this type evidence was not of proper benefit to the jury in this case and that, as in *Bledsoe*,

it was not introduced to rebut a misconception about the presumed behavior of a rape victim but to prove, as in *Saldana*, that the circumstances and details in this case match the circumstances and details usually found in child abuse cases. Of course, some of the expert's testimony in this case could be of benefit to the jury. Her testimony regarding the vocabulary that young children have to express their experience in sexual abuse cases is legitimate and beneficial evidence for the jury. But, overall, we find much of the expert's testimony distractive and prejudicial.

Because of the admission of the evidence discussed above, over objections to testimonial generalities concerning the "dynamics" of child abuse, the conviction in this case must be reversed and the matter remanded for a new trial. Therefore, we discuss the other issues raised by appellant.

Appellant argues that the trial court erred in allowing one of the state's witnesses, aged six, to testify because she did not have the capacity to retain and transmit accurately to the fact finder what was seen, felt or heard, and was unable to directly answer certain questions as a competent witness must. *See Chambers* v. *State*, 275 Ark. 177, 628 S.W.2d 306 (1982). Appellant recognizes that this is a matter within the sound discretion of the trial court and that we will not overturn the trial court's decision without a showing of clear abuse of discretion. *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982); *Hamblin* v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980). We find no error in the court's ruling on this point.

Appellant's next argument is that the court erred in allowing a witness in the courtroom after the rule, requiring that all witnesses be excluded from the courtroom except when testifying, had been invoked by both sides. When one of the young girls was called to testify, the prosecution requested that the court allow her mother, who had completed her testimony, to remain in the courtroom. Defense counsel's objection was overruled and the child's mother stayed in the courtroom during her daughter's testimony. Appellant argues that sequestering the witnesses is mandatory when requested and that allowing this witness to remain in the courtroom, even under the circumstances, was reversible error. In *Breeden* v. *State*, 270 Ark. 90, 603 S.W.2d

459 (1980), the Arkansas Supreme Court held that unless a party is shown to be essential to the prosecution of a case, he must be excluded from the courtroom upon request. The rule is mandatory and we agree with appellant that the girl's mother should have been excluded from the courtroom. The 1985 legislature may have enacted legislation in this regard. Otherwise, this witness should not be excused from the rule in the event of a retrial.

We do not agree with appellant's argument that the court erred in its refusal to instruct the jury as to the lesser included offense of indecent exposure. Appellant requested the following instruction:

> A person commits indecent exposure if, with the purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs: (a) In a public place or public view; or (b) Under circumstances in which he knows his conduct is likely to cause affront or alarm.

To constitute a lesser included offense, an offense must be "established by proof of the same or less than all the elements required to establish the commission of the offense charged." Ark. Stat. Ann. § 41-105(2)(a)(Repl. 1977). The crime with which appellant was charged, sexual abuse in the first degree, required proof that appellant, being over the age of eighteen years, engaged in *sexual contact* with a person less than fourteen years of age while indecent exposure required proof that the defendant *exposed his sex organs with the purpose of arousing or gratifying sexual desire*. Each offense requires an element that the other does not. Sexual abuse requires proof of a touching. Indecent exposure requires proof of exposure. Therefore, the two crimes do not meet the statutory definition of a lesser included offense since indecent exposure is not established by proof of the same or less than the elements required to prove sexual abuse. *See Henderson* v. *State*, 286 Ark. 4, 688 S.W.2d 734 (1985). The trial court did not err in refusing to give the requested instruction.

Finally, appellant argues that the court erred in refusing to instruct the jury that a minor, once qualified, is to be held to the same criteria of credibility as an adult witness. Appellant cites no authority in support of this contention and the

rule is that we do not consider an unsupported argument on appeal unless it is apparent without further research that it is well taken. *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977). We note, however, that the court had given the jury the AMCI instruction on credibility of witnesses in general and we see no reason why this instruction did not adequately cover the issue of witness credibility. The Arkansas Supreme Court has consistently held that it is not error to refuse to give a requested instruction where the subject matter is fully covered by other instructions. *Wallace* v. *State*, 270 Ark. 17, 603 S.W.2d 399 (1980).

Reversed and remanded.

CORBIN and GLAZE, JJ., agree.

OSAGE OIL COMPANY *v.* Harold ROGERS and SECOND INJURY FUND

CA 84-307 692 S.W.2d 786

Court of Appeals of Arkansas
Division II
Opinion delivered July 3, 1985

[redacted]

Odom, Elliott & Martin, by: *Bobby L. Odom*, for appellant.

Steve Clark, Att'y Gen., by: *David S. Mitchell*, Asst. Att'y Gen.

MELVIN MAYFIELD, Judge. This is an appeal from a Workers' Compensation Commission decision holding that the claimant, Harold Rogers, was totally and permanently disabled and that the Second Injury Fund had no liability in the case.

Claimant, a sixty-six-year-old retired carpenter, was drawing social security and working for Osage Oil Company to supplement his income. On August 10, 1981, he was on a scaffolding repairing a canopy over some gasoline pumps when a car struck the scaffolding and threw him to the concrete eight feet below. He was knocked unconscious, sustained a broken right elbow, and received an injury to his hip.

The record shows that claimant, who was right-handed, had worked steadily in construction since 1945 and had taken only one vacation during that time. As a result of this injury, he is now unable to use his right hand, cannot walk or sit for any length of time, and has dizzy spells. The doctor's report indicates that claimant's medical condition is deteriorating. He cannot perform any work requiring repetitive or heavy use of his right elbow; progressive changes in his hip indicate he will eventually have to have it replaced by a prosthesis; and he is developing arthritis.

The administrative law judge held that while the claimant was, in fact, totally disabled from his compensible injury, it was unfair for the employer to be required to pay total disability to someone 64 years old who was already drawing social security. Therefore, he awarded claimant 25% disability to the body as a whole. Claimant appealed to the full Commission which held that the law judge had erred and awarded claimant total disability. Although claimant had been awarded a 10% disability rating by the Veterans Administration for frostbite to his feet suffered while in military service in Germany in 1944, both the law judge and the Commission found that he had no disability prior to the fall from the scaffolding which would make the Second Injury Fund liable for any portion of his compensation. The employer now appeals to this court contending (1) that there was no

substantial evidence to uphold the decision of the Commission that the claimant was totally and permanently disabled and, (2) that the employer's liability should not exceed the 35% permanent partial disability to the right elbow, and 15% permanent partial disability to the body as a whole, assessed by the claimant's treating physician.

On the first point we need merely to point out that on appellate review the evidence and all inferences deducible therefrom must be viewed in the light most favorable to the finding of the Commission. We give the testimony its strongest probative force in favor of the action of the Commission, whether it favored the claimant or the employer. *Roberts* v. *Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). We must affirm if the Commission's finding is supported by substantial evidence; even when a preponderance of the evidence might indicate a contrary result, we affirm if reasonable minds could reach the Commission's conclusion. Questions of credibility and the weight and sufficiency of the evidence are matters for determination by the Commission. The Workers' Compensation Commission is better equipped, by specialization and experience, to analyze and translate evidence into findings of fact than we are. *Bemberg Iron Work* v. *Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984). We believe the record contains substantial evidence to support the Commission's finding that the claimant was totally disabled.

On the next point the appellant argues that it is uncontested that the claimant has a preexisting 10% disability for which he receives compensation from the Veterans Administration and that consequently the Commission erred in holding that the Second Injury Fund did not apply. The first two sentences of Ark. Stat. Ann. § 81-1313(i)(1)(Supp. 1983) provide:

> The Second Injury Fund established herein is a special fund designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment. The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from

all disabilities or impairments combined.

Appellant takes the position that the term "disability" used in the statute means incapacity to earn money and that "impairment" means the loss of physical function. It is pointed out that the second paragraph states "where there has been previous disability or impairment," and appellant argues that by using "disability or impairment" in the disjunctive, the legislature intended for the Second Injury Fund to be liable regardless of whether a claimant's loss of physical function resulted in a loss of earning capacity.

The Second Injury Fund is an appellee here and it responds to the appellant's argument by pointing out that prior to 1979, Ark. Stat. Ann. § 81-1313(f)(2)(iii)(Repl. 1976) provided that payments from the Fund were to be made under very limited circumstances, but that the scope of the Fund's liability has been expanded by legislative action in 1979 and 1981 so that all employees with a preexisting disability who receive a second injury on the job are now covered. The Fund also points out that one of the changes made by Section 4 of Act 290 of 1981 was to amend the previous statutory provision by adding the words "or impairment" after the word "disability" in several places where the word "disability" appeared. The Fund does not agree that the purpose of this was to broaden the exposure of the Fund to any case where the prior condition only manifested itself in anatomical loss without independently producing some degree of disability. The explanation for adding the words "or impairment," as we understand the Fund's argument, starts with the case of *Chicago Mill & Lbr. Co.* v. *Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980), where the Arkansas Supreme Court held that the Second Injury Fund was responsible for the additional compensation due where the employer at the time of the last injury was only liable for the degree of disability caused by the last injury. The court said it did not agree that the first injury had to be one that would have been compensable under the Workers' Compensation Act. The court said, "Larson has discussed this matter in § 59-32:"

> Another attempt at narrowing the range of prior injuries covered has been the contention that only cases involving prior compensable disabilities were affected. This contention was based on a rather mechanical inter-

> pretation, arrived at by lifting the words 'prior disability' out of the second injury statute and applying to them the definition of 'disability' which appears elsewhere in the act. The Supreme Court of the United States rejected this artificial and technical reading of the provision, in the light of the well-known general purpose of the act, observing that 'From the attitude of experts in the field, one would not expect Congress to distinguish between two types of handicapped workers.'
>
> However, the prior impairment, although not actually a compensable disability, must have been of a physical quality capable of supporting an award if the other elements of compensability were present.

The *Greer* case was handed down in October of 1980 and in March of the next year the legislature passed Act 290 of 1981 and added the words "or impairment" after the word "disability" to make it clear that the first injury did not have to be one that would be compensable under the Compensation Act, but that payments could be made from the Second Injury Fund where there had been a previous "disability or impairment." We agree with the Fund's argument that "impairment" in Ark. Stat. Ann. § 81-1313(i) means loss of earning capacity due to a non-work related condition. This was made clear by *Harrison Furniture* v. *Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981), and *Craighead Memorial Hospital* v. *Honeycutt*, 5 Ark. App. 90, 633 S.W.2d 53 (1982), which relied upon *Greer* and its language from Larson's *Workmen's Compensation Law*. In *Craighead Memorial*, we said:

> While we said in *Harrison* that apportionment did not depend upon the preexisting disability being job related, we also said that it is clear that apportionment does not apply unless the prior impairment was independently causing disability prior to the second injury and continued to do so after that injury.

The appellant says the purpose of the Second Injury Fund is to encourage the hiring of the handicapped and if the Commission's decision in this case is allowed to stand, then the intent of the legislature will be frustrated. The Fund, however, says that the purpose of the Act is to encourage the employment

of handicapped workers by providing that in the event of injury to those workers the employer will not have to pay for any more disability than actually occurred in his employment, and that the purpose of the Act is not to give a windfall or subsidy to those employers. We agree.

Applying the law stated above, we find there is substantial evidence to support the Commission's finding that claimant's disability resulted solely from his fall from the scaffolding while in the course and scope of his employment by the appellant, and that the Second Injury Fund has no liability for any portion of the compensation due claimant.

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

Carl Steven KETRON *v.* Doris Ann KETRON (AGUIRRE)

CA 85-37 692 S.W.2d 261

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1985

Matthews, Campbell & Stephens, by: *David R. Matthews*, for appellant.

James G. Lingle, for appellee.

TOM GLAZE, Judge. The parties to this suit were divorced on June 25, 1979, at which time appellee was awarded custody of their eight-year-old son, Chad. Nearly four years later, appellant filed this action, seeking custody of Chad. The trial court denied appellant's request, but increased his summertime visitation. On appeal, appellant contends the trial court's decision is against the preponderance of the evidence.

Appellant argues appellee has not provided a proper home atmosphere for Chad and has failed to set a good moral example for him. To support his argument, appellant relates the following events. Soon after the parties divorced, in June 1979, appellee began living with a man, Ray Aguirre. In October 1979, appellant petitioned to modify the parties' divorce decree, and during the same month, appellee married Aguirre. The parties temporarily resolved their differences, agreeing to a January 1980 order that modified appellant's visitation with Chad. No further litigation occurred until after the appellee and Ray Aguirre divorced in October of 1983. Appellee and Aguirre had one son, Toby, born of their marriage. Soon after this divorce, appellee began dating David Cravens, a married man who was separated from his wife. Appellee and Cravens began living

together, and it was this living arrangement that prompted appellant to file this custody proceeding in April of 1984. Appellant argues that appellee's immoral and improper conduct has provided an unstable, impermanent home life for Chad, and that Chad's best interests are no longer served by leaving him with appellee.

In reaching his decision, the chancellor cited the applicable case law and detailed his findings of fact in a memorandum opinion. The chancellor determined that appellee's living arrangement with Cravens was wrong and failed to set a good example for Chad. The judge further concluded:

> Having accepted that a spouse's immorality may so relate to the best interests of the child that it may form the basis for a change in custody, it must also be recognized that it is not appropriate to change custody to punish a divorced spouse for immoral conduct. From all of the testimony in this case I am not persuaded that a change in primary custody is in the best interests of this child. The child has been in the mother's primary custody since the divorce and their relationship is close. I am reluctant to radically alter the custody situation when the child is doing as well as this one appears to be physically, emotionally, and in his school work. The fact that a change in primary custody would separate this child from his younger brother is also of great importance.

The chancellor held it was not in the child's best interests to remove him from appellee's custody, but he did order appellee to terminate her living arrangement with Cravens and to have no man (to whom she is not married) spend the night while the children are present. We believe the chancellor's decision was consistent with case law, and his findings concerning the facts and circumstances in this case are not clearly against the evidence.

Clearly, the Supreme Court and this Court have never condoned a parent's promiscuous conduct or lifestyle when such conduct has been in the presence of the child. *See Digby* v. *Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978); *Walker* v. *Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978); *Harmon* v. *Harmon*, 253 Ark. 428, 486 S.W.2d 522 (1972); *Northcutt* v. *Northcutt*, 249 Ark. 228, 458 S.W.2d 746 (1970); *Scherm* v. *Scherm*, 12 Ark.

App. 207, 671 S.W.2d 224 (1984); and *Bone* v. *Bone*, 12 Ark. App. 163, 671 S.W.2d 217 (1984). Even so, we pointed out in *Bone* that the primary consideration in awarding custody of children is the welfare and best interests of the children involved, and the chancellor's findings will not be reversed unless they are clearly contrary to the preponderance of the evidence. Our Supreme Court has also held the child's welfare is the controlling consideration and custody is not awarded as a reward to, or punishment of, either parent. *Johnson* v. *Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975).

Here the chancellor found that appellee, while unmarried, had lived with two different men, Aguirre and Cravens. Although she eventually married Aguirre, appellant testified that she had no plans to marry Cravens even if he later divorced his wife. Neither appellee nor Cravens believed their living arrangement was wrong nor did appellee believe that such arrangement adversely affected Chad. Nevertheless, she stated that she would terminate her living arrangement with Cravens if so directed by the trial court. The trial court further found that appellant had remarried, that he had conscientiously supported Chad, and that he could adequately care for his son. In sum, the court determined Chad had a good relationship with both his parents and was doing well physically, emotionally, and in his school work.

In view of the evidence concerning appellee's illicit relationships, appellant argues we should reverse the chancellor's refusal to change custody as was done—under similar circumstances—in the *Digby, Scherm* and *Bone* cases cited hereinabove. These cases are factually distinguishable from the instant case, and while we believe the decision on whether we should reverse is a close one, we are not convinced that the chancellor's decision is against Chad's best interests. For example, one compelling reason given by the trial court for continuing custody in appellee was its reluctance to separate Chad from his younger half-brother, Toby. On this point, the trial court's reasoning is consistent with settled case law reflecting that, unless exceptional circumstances are involved, young children should not be separated from each other by dividing their custody. *Johnston* v. *Johnston*, 225 Ark. 453, 283 S.W.2d 151 (1955) and *Vilas* v. *Vilas*, 184 Ark. 352, 42 S.W.2d 379 (1931).

Next, we note that the courts in *Digby, Scherm* and *Bone* relied on facts that indicated that the parent denied custody had failed to care properly for the children. Here, the trial court found no such facts, nor have we from our review of the record. In the instant case, Chad has lived all of his eight years with his mother, he has had liberal visitation with his father, he (by appellant's own terms) is a well-adjusted, young boy who is doing well in all respects, including school. As appellant testified, the primary reason he filed for custody of Chad was that appellee did not think Chad "ought to be living with his mother when she is living in sin." Given the distinguishing facts of this case, we are unable to say the chancellor was clearly erroneous in leaving custody of Chad with appellee.

We note appellant's doubts that the chancellor's order (prohibiting men from spending the night when the children are present) can be enforced. While the difficulty of enforcement of a court's order is a factor to consider when determining the custody issue, it is not conclusive. The chancellor has the right to retain control of this case, and he is in a superior position to ensure that Chad's welfare and best interests are protected. If appellee fails to heed the chancellor's admonitions, the chancellor may choose to take more drastic steps to ensure that Chad is raised in a proper custodial environment. *See Sweat* v. *Sweat*, 9 Ark. App. 326, 659 S.W.2d 516 (1983).

Affirmed.

CLONINGER, J., dissents.

LAWSON CLONINGER, Judge, dissenting. I respectfully dissent from the majority because I do not believe it is in the best interests of the child to remain in the appellee's custody.

The chancellor found that appellant has remarried and appears to have a very stable marriage; that appellant attends church regularly and takes Chad with him; that he has conscientiously supported Chad in the past; that he loves Chad and treats him well; and that he could adequately care for Chad. Although the chancellor also found that appellee loves and treats Chad well, he stated that he thought her living arrangements were "wrong", that they failed to set a good example for Chad and that society in general would find them to be "immoral". Based on these

findings, it seems apparent that appellee has not been providing a stable home environment or a sense of moral values for Chad and that appellant can do so immediately. Therefore, I think the court's decision is clearly contrary to the preponderance of the evidence.

Furthermore, I feel that the majority's decision is inconsistent with existing case law. Less than one year ago, this court decided *Scherm* v. *Scherm*, 12 Ark. App. 207, 671 S.W.2d 224 (1984). In that case, the evidence tended to show that the mother, who was the custodial parent, had had relationships with three men since her divorce, that the children had had contact with at least two of these men, and that she entertained overnight male visitors when her children were at home. The chancellor found that the evidence was not sufficient to warrant a change of custody, but this court reversed. We stated:

> [T]he chancellor recognized the precarious situation in which the children have been placed. Aside from any moral argument, appellee has had a relationship with three men since her divorce, and the children have experienced contact with at least two of them. Appellee's amenability to having men in the house on a regular, overnight basis provides the children with an impermanent, unstable situation. Appellee's actions during the two years preceding this action have been neither wholesome nor in the best interests of her children.

Id. at 210.

In the instant case, the chancellor recognized and the evidence showed that appellee is providing essentially the same type of unstable atmosphere for Chad which was the basis for our reversal in *Scherm*. The majority attempts to factually distinguish *Scherm* because there, allegations were also made that the mother failed to properly clothe and care for her children. Here, there were no such allegations made. I fail to see the validity of this distinction. We clearly based our reversal of the chancellor in *Scherm* on the ground that the mother's "romantic" lifestyle was not in the best interests of the children.

In any event, while I would agree that a child's physical well-being is vitally important, it is my opinion that the development of

his moral values is equally important. If this area of a child's upbringing is neglected, then he is not being "cared for properly." I think the evidence indicates that appellant's home environment would not only serve Chad's physical needs but is better suited to give him a sense of moral values.

Finally, I agree with appellant that the court's order is one which will be difficult, if not impossible, to enforce. The trial judge in *Scherm, supra*, ordered the mother not to permit any man romantically involved with her to stay overnight at her residence while the children were there. This court disapproved of the order, stating that "such an order places the court and the appellant in a position to continuously monitor appellee's conduct. . . ." *Id.* at 210. The same is true of the order in the instant case.

I would reverse the chancellor's decision and award custody to appellant.

Sim MITCHELL, Jr. *v.* CITY OF NORTH LITTLE ROCK

CA CR 85-36 692 S.W.2d 624

Court of Appeals of Arkansas
Division I
Opinion delivered July 10, 1985

William H. Craig, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this non-jury criminal case, the appellant was convicted in Pulaski County Circuit court of driving while intoxicated. He was fined $250.00 plus costs, sentenced to serve 24 hours in jail, ordered to attend an alcohol abuse program, and his driver's license was suspended for 90 days. From that decision, comes this appeal.

On September 30, 1983, the appellant was arrested by North Little Rock police officers Bush and Griffo. Officer Bush (the only witness for the appellee) testified that he and Officer Griffo had followed the appellant's car for approximately one-quarter mile as it weaved in its traffic lane. Officer Bush stated that he and Officer Griffo stopped the appellant and observed that he was unsteady on his feet, had slurred speech, and that his eyes were bloodshot. Officer Bush testified that he observed Officer Griffo administer two field sobriety tests which he, Officer Bush, thought the appellant failed. Based on the officers' observation of the appellant, they arrested him for DWI.

Officer Bush testified that, on the way to the jail, he informed the appellant of the implied-consent law and of his right to have an independent chemical analysis administered to test for the presence of alcohol. He stated that he gave the appellant a statement of rights form, containing both the *Miranda* warnings and the DWI provisions. He testified that the appellant indicated that he understood the form and then signed it. The breathalyzer test was subsequently administered.

Officer Bush was asked whether the machine had been calibrated within twenty-four hours of the time the test was administered. The appellant objected to this testimony, alleging that it was hearsay, and the trial court sustained the objection. Officer Bush was asked to state the results of the test, and again the appellant objected. The court overruled this objection and Officer Bush testified that the appellant registered 0.20%. The officer testified that, in his opinion, the appellant was intoxicated.

On cross-examination, Officer Bush testified that the appellant was informed that he could have an additional test of his blood or urine, but that he was not informed that he could have an additional test of his breath. Officer Bush testified that the appellant did not request an additional test. However, the statement of rights form shows that the appellant requested an additional test when he signed the form. When the city rested its case the appellant renewed his objection to the breathalyzer test results, not only because of the failure to show that the machine had been properly calibrated, but also because he had not been informed of his right to have an independent test of his breath, coupling this with a motion for a directed verdict. These motions

were denied. The appellant presented no evidence. The trial court found the appellant guilty of DWI, specifically noting that his finding of guilt was not based on Ark. Stat. Ann. Section 75-2503(b) (Supp. 1983), which makes the presence of a blood-alcohol level exceeding 0.10% the basis for a mandatory conviction, but was instead based on Section 75-2503(a), which makes it unlawful for an intoxicated person to operate or be in actual control of a motor vehicle.

The appellant contends on appeal that there was insufficient evidence to sustain his conviction and that the blood alcohol test results were erroneously admitted into evidence. The appellee concedes that the test results were improperly admitted into evidence, but contends on appeal that the error was harmless because the appellant was not convicted under Section 75-2503(b). The appellee further argues that there is substantial evidence present to support the conviction. We agree that the evidence is sufficient to support the conviction, but we hold that the admission of the breath test results was prejudicial error. Therefore we reverse and remand.

In *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), the Arkansas Supreme Court determined that we are required to review the sufficiency of the evidence *prior* to considering any alleged trial errors. In reviewing the evidence, says *Harris*, we must consider all the evidence, including that which was inadmissible. 284 Ark. at 251. We review the evidence in the light most favorable to the appellee, and we affirm if there is substantial evidence to support the verdict. *Wilson* v. *State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983). Substantial evidence must do more than merely create a suspicion, and must be of sufficient force and character so as to force the mind beyond conjecture and compel a conclusion one way or the other with reasonable certainty. *Harris*, 284 Ark. at 252.

Turning to the evidence adduced in the case at bar, the testimony revealed that the appellant was unsteady on his feet, his speech was slurred, and his eyes were bloodshot. He failed to satisfactorily complete two field sobriety tests as well as the breathalyzer test. The officer who made these observations, and who administered the breath test, opined that the appellant was intoxicated. Similar evidence has been held sufficient to sustain a

conviction for DWI under Section 75-2503(a). *See Oliver* v. *State*, 284 Ark. 413, 682 S.W.2d 745 (1985). Therefore, considering all the evidence which was before the trier of fact, we find substantial evidence to support the appellant's conviction.

As to the question regarding the correctness of the trial court's ruling on the admissibility of the breathalyzer test results, we note that the appellant was not advised of the full range of tests available to him. The appellant requested an additional test; this test was not given, nor was the appellant aided in obtaining another test. The breathalyzer test results were inadmissible. Ark. Stat. Ann. Section 75-1045 (c)(3) (Supp. 1983); *Whaley* v. *State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

While there is a presumption that a trial judge will only consider competent evidence, this presumption can be overcome when there is an indication that the judge gave some consideration to inadmissible evidence. *Clinkscale* v. *State*, 269 Ark. 324, 602 S.W.2d 618 (1980); *Summerlin* v. *State*, 7 Ark. App. 10, 643 S.W.2d 582 (1984). When a sufficient objection has been made, and the judge has not sustained it and has not said that he would not consider it, there is an indication that he has considered the inadmissible evidence. *See Summerlin*, 7 Ark. App. at 14-15. In the case at bar, the judge overruled the appellant's objection and, while he did say that he was not convicting the appellant under Section 75-2503(b), he did not say that he did not consider the test results. We fail to see how inadmissible evidence that the appellant's blood-alcohol level was 0.20% could be anything other than prejudicial to a determination that the appellant was intoxicated. Therefore, we reverse and remand for a new trial.

Reversed and remanded.

CRACRAFT, C.J., and CORBIN, J., agree.

Tom W. WALLER, Jr. *v.* Judy C. WALLER

CA 84-379 693 S.W.2d 61

Court of Appeals of Arkansas
Division II
Opinion delivered July 10, 1985

Bell, Bilheimer & Associates, P.A., by: *Stephen P. Bilheimer*, for appellant.

Hilburn, Calhoon, Forster, Harper & Pruniski, Ltd., for appellee.

JAMES R. COOPER, Judge. This case involves the ownership of a residence located in North Little Rock, Arkansas. The parties were divorced in 1974, but purchased the property in 1976, taking title as husband and wife. In May, 1983, the appellee filed a petition in Pulaski chancery court for a declaratory judgment declaring her to be the sole owner. The appellant filed a suit for partition. The cases were consolidated and the chancellor found that the appellant held legal title to a one-half interest in the property as trustee for the appellee and that the appellee held sole equitable title to the property. The chancellor held that the appellee was entitled to enforcement of the constructive and resulting trusts of which she was the beneficiary and the appellant the trustee. From that decision, comes this appeal.

The appellee testified that she sought her ex-husband's help in purchasing the residence because she had insufficient credit history to enable her to purchase the residence alone. She testified

that he promised to convey his interest to her. The appellant denied promising to convey the property to her and he contended that the parties purchased the property as partners. He also testified that, in lieu of making payments on the house note, he allowed the appellee to occupy the property rent free and, when the house was converted to rental property, he allowed her to retain all the rentals. The record shows that the appellee made all the payments on the house and made various repairs and improvements and that she paid the taxes.

The record also shows that, despite their divorce, the parties remained on very friendly terms and had discussed the possibility of remarrying. Subsequent to the divorce the appellant acted as bookkeeper for the appellee's business, and he helped her complete her income tax returns. The appellant was a realtor and, although the property at issue was the first real property purchase by the parties in both names, they subsequently participated in land transactions together, with the appellant acting either as a broker, an uncompensated agent, or as a purchasing partner with the appellee.

Based on the testimony and exhibits, the chancellor found that the appellee was the beneficiary of constructive and resulting trusts which arose as a result of the actions and agreements between the parties. The chancellor detailed his findings, noting that the parties, though divorced, maintained a confidential relationship through 1976; that the appellant paid no part of the consideration for the real property; that the appellant signed the contract to purchase and the note solely as a surety; that the appellant expressly promised to convey his interest to the appellee; that the appellee's testimony was the more credible concerning the facts surrounding the execution of the documents necessary to purchase the residence; that the appellant refused to convey the property to the appellee when requested to do so in 1976 but that he continued to recognize her as the sole owner; that by virtue of the appellant's actions in failing to pay for any improvements or maintenance, or to otherwise exercise any rights of ownership, the appellee reasonably relied on those omissions as his admission of her sole ownership. As a result of the appellant's actions, the chancellor found that the appellee's claims were not barred by laches or the statute of limitations, and that a resulting or constructive trust arose.

The burden of proof was on the appellee to establish the existence of the trust. In *Nelson* v. *Wood*, 199 Ark. 1019, 137 S.W.2d 929 (1940), the Arkansas Supreme Court stated:

> The general rule, as well as the established rule in this state, seems to be well settled that in order for one to establish by parol either a resulting or constructive trust, the evidence must be "full, clear and convincing," "full, clear and conclusive," "of so positive a character as to leave no doubt of the fact," and "of such clearness and certainty of purpose as to leave no well founded doubt upon the subject." These requirements run through a long line of cases from this court.

We hold that the chancellor was correct in determining that a constructive trust arose. As we stated in *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981):

> Constructive trusts are said to arise and be imposed in favor of persons entitled to a beneficial interest against one who secured legal title either by an intentional false oral promise to hold title for a specified purpose, and having thus obtained title, claims the property as his own, or who violates a confidential or fiduciary duty or is guilty of any other unconscionable conduct which amounts to constructive fraud. [citations omitted]

In the case at bar the evidence supports a finding that the appellant secured a one-half interest in the property by either intentionally promising falsely to reconvey at a later date, or by violating a confidential or fiduciary duty to reconvey.

The evidence also supports the finding that a resulting trust arose. In *Andres, id.*, we said:

> In general a resulting trust is said to arise when property is bought by one person with money or assets of another and title is taken in the name of the purchaser rather than of the person furnishing the consideration.

In the case at bar the chancellor believed the appellee's version of the facts surrounding the execution of the purchase documents. She testified that the residence was to be hers alone and that the appellant was only acting as a surety because she had insufficient

credit to purchase the residence on her own. She testified that she alone furnished the consideration for the purchase. We cannot say that the chancellor's decision regarding the constructive trust and resulting trust is clearly erroneous or against the preponderance of the evidence, and therefore we affirm on this point. *Andres, supra*; ARCP, Rule 52(a).

The appellant also argues that the chancellor erred in finding that the appellee's claim was not barred by laches or the statute of limitations. We disagree. In *Harbour* v. *Harbour*, 207 Ark. 551, 181 S.W.2d 805 (1944), the Arkansas Supreme Court quoted with approval from 34 Am.Jur. 143 as follows:

> It is generally held, however, that the rule [limitations] does not apply to a resulting trust which has every element that operates to take an express trust out of the statute and prevent it from running against the trust until after it has been effectually repudiated; and it has been declared that as long as there is a continuing and subsisting equitable trust acknowledged or acted upon by the parties, the statute of limitations does not apply, but if the trustee denies the right of his cestui que trust, and the possession becomes adverse, lapse of time from that period may constitute a bar in equity. Thus, when a resulting trust arises from the purchase by a husband in his own name with his wife's money, it has been held that the statute of limitations begins to run in favor of the husband, and against the wife, at the time of the conveyance, if there is no recognition of the wife's rights; but if her rights are recognized, the statute of limitations begins to run in favor of the husband and against the wife at the time when the husband begins to hold adversely.

And to the same effect see 37 C.J. 908 where it is said:

> . . . and the statute of limitations does not run in favor of the trustee of a resulting trust, which most frequently arises where one person pays the consideration for a purchase and title is taken in the name of another, until the trustee disavows the trust or asserts some right to the property inconsistent with it, and the cestui que trust has knowledge of such disavowal or assertion, or, from the circumstances, ought to have learned of it.

We hold that, on the facts of the case at bar, the chancellor correctly decided that the appellee's claim was not barred by the statute of limitations.

On the question of laches, we reach the same result. Again in *Harbour, id.*, the Supreme Court said, quoting from 26 R.C.L. 1365:

> Laches cannot be imputed to one who seeks to enforce a resulting trust in real property, where his right to use and possess the same has never been questioned, since his possession is notice to the world of all his rights.

Further, the Court, quoted 65 C.J. 1027-28 as follows:

> . . . Time does not commence to run against the beneficiary of a resulting trust, so as to render the doctrine of laches applicable, until the trustee disavows or repudiates the trust and such disavowal or repudiation is fully and unequivocally made known to the beneficiary.

In the case at bar the appellant has never questioned the appellee's right to use and possess the property; nor has he unequivocally repudiated the trust since he has never, in any way, attempted to assert any of the incidents of ownership.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

Bobby Gene CROSSNO *v.* STATE of Arkansas

CA CR 85-32 692 S.W.2d 626

Court of Appeals of Arkansas
En Banc
Opinion delivered July 10, 1985

John W. Settle, for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant raises two points for reversal of his conviction on charges of possession of marijuana with intent to deliver and delivery of marijuana. We find no merit in his arguments, and we accordingly affirm the judgment of the lower court.

Testimony at appellant's trial disclosed that after an undercover police officer purchased marijuana from appellant, police obtained a search warrant and seized more marijuana from appellant's residence. A chemist from the State Crime Lab testified that he analyzed the contents of four bags out of nine submitted by the Fort Smith police department and determined that the vegetable matter within was marijuana. Over appellant's objection, all the bags taken from his house were introduced into evidence. Appellant, testifying in his own behalf, admitted possessing and selling the marijuana. The jury found him guilty under Ark. Stat. Ann. § 82-2617(a) (Supp. 1983) of two separate offenses (mentioned above) and sentenced him to four years imprisonment. Following the jury's recommendation, the judge suspended three of the four years.

In his first argument, appellant contends that his verdict and sentence was illegal and excessive as the statute under which he was charged does not specify that possession with intent to deliver and delivery of marijuana is a felony. Marijuana is classified as a Schedule VI controlled substance under Ark. Stat. Ann. § 82-2614.2 (Supp. 1983). While the manufacture, delivery, or posses-

sion with intent to manufacture or deliver controlled substances listed in Schedules I-V entails upon conviction class Y, B, or C felony liability, prison terms and fines are graded according to the amount of Schedule VI controlled substances involved under § 82-2617, and no single class of felony is indicated. According to appellant, who cites *Bennett* v. *State*, 252 Ark. 128, 477 S.W.2d 497 (1972), the absence of a felony classification automatically reduces the offenses of which he was convicted to misdemeanors.

Appellant failed to address this issue at trial. The same argument was made under the same circumstances in *Toland* v. *State*, 285 Ark. 415, 688 S.W.2d 718 (1985). There, the Supreme Court said, "We do not find in the abstract or record that this argument was presented to the trial court. Therefore, it cannot be raised for the first time on appeal."

Although appellant acknowledges that this point was not argued at the trial level, he contends that under *White* v. *State*, 260 Ark. 361, 538 S.W.2d 550 (1976), the error is jurisdictional and, in the words of that case, "can be raised at any time, even after a guilty plea, by certiorari." We would note, however, that appellant has raised the matter on direct appeal rather than by certiorari.

Moreover, the Arkansas Supreme Court, in *Harrod* v. *State*, 286 Ark. 277, 691 S.W.2d 172 (1985), dismissed Harrod's reliance on *White* in the following language:

> [I]n oral argument appellant conceded the trial court would be without subject matter jurisdiction *only* if the offenses were neither felonies nor misdemeanors, and while we do not decide the felony issue, we reject the argument that these offenses are neither. It follows the appellant should have preserved the point for appellate review by first presenting it to the trial court. *Wickes* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Appellant in the instant case has not argued that the offense of which he was convicted is *neither* a felony nor a misdemeanor. Rather, he contends that the trial court exceeded the bounds of its authority in imposing a felony sentence for what he insists is a misdemeanor. On the basis of both *Toland, supra*, and *Harrod, supra*, we must reject his argument because it was not preserved

for appeal.

Appellant's second point for reversal is that the trial court erred in allowing into evidence the bags that had not been tested by the Crime Lab's chemist. He asserts that the untested substances were irrelevant evidence under URE Rule 401, or, in the alternative, prejudicial, confusing, and misleading under URE 403. The bags sent to the Crime Lab, however, were all seized at the same place and the same time. Defense counsel did not object to the chain of custody, and nothing in the record suggests that anyone substituted something other than marijuana in the untested bags. Hence, the trial judge could conclude from the representative sampling and testing that the remaining bags also consisted of marijuana. *See Mullins* v. *State*, 277 Ark. 93, 639 S.W.2d 594 (1982). The evidence was therefore admissible.

Affirmed.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. The majority opinion recognizes that the appellant "contends that the trial court exceeded the bounds of its authority in imposing a felony sentence for what he insists is a misdemeanor." In response to appellant's argument that this is a jurisdictional issue that can be raised for the first time on appeal, the majority cites the recent case of *Harrod* v. *State*, 286 Ark. 277, 691 S.W.2d 172 (1985). In that case the appellant contended his convictions for manufacturing and possessing marijuana should be reversed because, when the alleged offenses occurred, they were neither felonies nor misdemeanors. The Arkansas Supreme Court held this issue could not be raised for the first time on appeal since the appellant conceded that the trial court would have been without jurisdiction *only* if the offenses were neither felonies nor misdemeanors and the appellate court rejected the argument that they were neither.

However, the appellant's argument in the instant case is that the trial court did not have the authority to sentence him to the Arkansas Department of Correction for what he contends is a misdemeanor. This is not an unreasonable position in light of Ark. Stat. Ann. § 41-902 (Repl. 1977) which provides that a defendant convicted of a *felony* and sentenced to imprisonment "shall be

committed to the custody of the Department of Correction" and a defendant convicted of a *misdemeanor* and sentenced to imprisonment "shall be committed to the county jail or other authorized institution designated by the court."

The answer seems to be that the lack of "authority" is not the same as lack of "jurisdiction" and it is only lack of "jurisdiction" that can be raised on direct appeal for the first time. This, I think, explains the cases cited by appellant.

Thus in *Haskins* v. *State*, 264 Ark. 454, 572 S.W.2d 411 (1978), the statutory requirement that a revocation hearing shall be conducted within 60 days after the defendant's arrest was not a jurisdictional limitation, and, therefore, the failure to have a hearing within that period could not be questioned for the first time on appeal. So, in the instant case, the appellant was convicted of an offense and the court had the jurisdiction to sentence him. Therefore, he could not, for the first time on appeal, question the sentence imposed.

In *White* v. *State*, 260 Ark. 361, 538 S.W.2d 550 (1976), the defendant was found guilty of a misdemeanor offense—possession of marijuana—and in a direct appeal he made, for the first time, the argument that mere possession of marijuana was not a misdemeanor. The Arkansas Supreme Court agreed possession was not a misdemeanor and said, "We find no merit to the contention that the issue was not properly raised in the trial court." Thus, in that case, the direct appeal was allowed because the defendant was simply not charged with an offense and, therefore, the court had no jurisdiction to convict him.

White also cited *Switzer* v. *Golden*, 224 Ark. 543, 274 S.W.2d 769 (1955), which is somewhat like the case at bar. There the trial court had "exceeded its jurisdiction in sentencing the defendant to the penitentiary on a plea of guilty to a felony when he was only charged with a misdemeanor." However, unlike the case at bar, *Switzer* was not a direct appeal but was before the Arkansas Supreme Court on writ of certiorari. This also explains *Robinson* v. *State*, 279 Ark. 61, 648 S.W.2d 446 (1983), where a defendant had been sentenced in violation of the statutory law but did not raise the issue on appeal. Nevertheless, in a petition for postconviction relief under A.R.Cr.P. Rule 37, the court set aside the improper portion of the sentence. *See also Rowe* v. *State*, 275 Ark. 37, 627 S.W.2d 16 (1982). It should be noted, however, that

the instant case is a direct appeal and not governed by the same rule as governed *Switzer, Robinson*, and *Rowe*.

The case of *Griffin* v. *State*, 2 Ark. App. 145, 617 S.W.2d 21 (1981), cited by appellant stands on a different footing. The appellant says that case was remanded for resentencing even though the appellant there was raising the point for the first time. But the opinion in that case points out that the appellant did make objections to the sufficiency of the evidence to support the crime for which the appellate court held he had been erroneously sentenced, and this was found to be enough to raise the issue on appeal.

A case not cited by appellant, but worth noting, is *Walton* v. *State*, 279 Ark. 193, 650 S.W.2d 231 (1983), where the appellate court held the trial court was wrong on a point the opinion specifically states was raised on appeal for the first time. In that case, however, the court had already said the case had to be reversed for a new trial and, apparently, the court simply passed upon the point raised because the case was being reversed anyway.

I concur in the result of the majority opinion but submit the above in an attempt to reconcile the cases that have been cited to us in this case, as well as in other cases, as authority for appellate review of points raised for the first time on appeal.

Myrtle McDONALD *v.* STATE FARM MUTUAL AUTOMOBILE INS. CO.

CA 84-285 692 S.W.2d 274

Court of Appeals of Arkansas
Division I
Opinion delivered July 10, 1985

Eugene Hunt, for appellant.

Boswell, Smith & Clardy, by: *Floyd Clardy*, for appellee.

MELVIN MAYFIELD, Judge. Appellant appeals a summary judgment granted appellee State Farm. We reverse and remand.

In October of 1980 appellee issued separate policies to appellant and her husband, insuring a 1977 Monte Carlo automobile and a 1969 Ford pickup truck for a period of six months. Renewal notices for the next six-month period of April 6, 1981, to October 6, 1981, were sent to appellant on each of the vehicles. The notice covering the Monte Carlo plainly stated: "Payment of premium by date due insures your 1977 M Carlo until Oct-06-81." The date due is stated "Apr-06-81" and the amount due is stated to be "$153.22."

Both parties agree that appellant paid the premium on the Monte Carlo by April 6, 1981, but that the coverage on the pickup was allowed to lapse. In mid-May, State Farm sent appellant a notice of balance due of $17.84. The notice contained no explanation of the increase in premium but appellant later learned it was for loss of multicar discount which had applied when both vehicles were insured. When appellant failed to pay this balance, State Farm sent appellant a cancellation notice, dated September 4, 1981, which informed her that if the balance due remained unpaid the insurance coverage on the Monte Carlo would expire on September 18, 1981. The payment was not made

and on October 10, 1981, the Monte Carlo was involved in an accident which resulted in the death of appellant's husband.

On October 13, 1981, appellant visited the office of her local State Farm agent, and paid the secretary in the office the amount of $188.30, representing the $17.84 unpaid balance from the previous six months and $170.56 as the renewable premium for the six-month period of October 6, 1981, to April 6, 1982. Appellant told the secretary that the car had been wrecked (the secretary already knew appellant's husband had been killed) and appellant asked that the agent contact her.

The insurance policy covering the Monte Carlo also provided that appellant would be paid $5000.00 if her husband's death was caused by a motor vehicle accident. Upon being contacted by State Farm's agent, she was advised that the policy was not in force at the time of her husband's death. Appellant then filed suit to collect the $5000.00. State Farm filed an answer alleging that the policy on the Monte Carlo had lapsed on September 18, 1981, was reinstated on October 13, and that no coverage existed between those dates. Subsequently, State Farm mailed appellant a check of $23.12 as a refund for the period it claims there was no coverage. Both parties filed motions for summary judgment. State Farm's motion was granted on the basis that the insurance policy was not in force on October 10, 1981, when the death of appellant's husband occurred.

Appellant argues that the court erred in holding that the policy had expired at the time of the accident. It is appellant's contention that when originally issued, the policy covered the period from October 6, 1980, to April 6, 1981; that the policy provided for successive periods of coverage of six months each if renewal premiums were paid; that the renewal premium for the next renewal period was paid in the amount and for the period stated in the renewal notice; that the company had a policy that allowed a 22-day grace period within which the premium could be paid for the next six months and thereby maintain continuous coverage; and that by paying the premium on October 13, 1981, which was within 22 days of the renewal date of October 6, 1981, the appellant acquired this continuous coverage. We agree.

The premium notice received by appellant provided that payment of premium by date due would insure appellant's 1977

Monte Carlo until October 6, 1981. The stated amount due was $153.22, and it is undisputed that appellant paid this amount. Neither side has referred us to an Arkansas case that decides this precise point, but appellant cites *Howard* v. *American Southern Ins. Co.*, 148 Ga. App. 25, 251 S.E.2d 7 (1978). In that case the appellant had been issued a policy giving coverage for one year at a stated premium to be paid in monthly installments. After two payments had been made the insurance company advised appellant his premium would be increased by $254.00 because he had denied on his application any traffic violations during the preceding 36 months whereas the state's driving records showed to the contrary. He did not pay the increased premium and when he was involved in an accident the company claimed the policy had been cancelled for nonpayment of premiums. The trial court found for the insurance company, but the appellate court reversed, saying:

> The increase in premium was a material modification of the policy terms to which plaintiff did not agree and it was not supported by any consideration, both of which would be necessary to effect a valid modification of the insurance contract. . . . The plaintiff under the time payment plan was current at the time of cancellation on payment of the agreed premium. The cancellation for the reason cited in the notice was therefore not authorized.

Another case holding the same way is *Anderson* v. *Pennsylvania National Mutual Ins. Co.*, 306 S.E.2d 597 (S.C. 1983), which also involved an increase in premiums for traffic violations. The insurance company in that case also attempted to collect an additional premium, termed a surcharge, which the insured would not pay. It was his contention that the surcharge was a modification of his contract and that he did not owe it. The trial court agreed with the insured. Relying upon *Howard* v. *American Southern, supra*, the Supreme Court of South Carolina affirmed the trial court with the following explanation:

> In light of the record, we conclude that the trial court was correct in treating appellant's surcharge as an attempted modification. The testimony abundantly supports the conclusion that the respondent rejected the modification and incurred no obligation to pay the surcharge. Appellant had no ground to cancel the contract, and

judgment was thus properly awarded to the respondent.

[redacted] We find the caselaw discussed above persuasive that appellant, by paying the stated premium in full, obtained insurance coverage for the full six-month term from April 6, 1981, to October 6, 1981. The next question is whether, by tendering a renewal premium payment on October 13, 1981, appellant effectively maintained continuous coverage on the Monte Carlo. In that regard, in a deposition of the local State Farm agent, he was asked about a grace period within which a renewal payment could be made. He testified that:

> There is a grace period—if a premium—if a policy is paid to the end of its normal expiration period, as in this particular case the normal expiration period would have been October 6th, if a full premium were paid that would continue the policy until October the 6th, there would be a 22-day grace period given by the company, if the loss occurs after the October 6 date, assuming that the policy was paid to that date and within the 22 days subsequent to that.

The local agent's secretary was also asked about this matter and she testified that there is a 22-day grace period after the expiration date of the policy within which to pay the premium for the next six-month renewal period. Not only that, but there was introduced into evidence a page from the "State Farm Major Service Auto Book" that gives directions about accepting premium renewal payments made within 22 days of the expiration date of the last six-month coverage period. And even more importantly, an affidavit of a service superintendent of the appellee State Farm, filed in support of appellee's motion for summary judgment, states:

> State Farm does have a policy of allowing its policyholders to pay renewal premiums within twenty-two (22) days following the due date. If persons make the payment within twenty-two (22) days of the renewal due date, then the policy would be continued with no lapse of coverage. This policy of State Farm does not apply to this case because the $17.84 due on the premium was not a renewal but a balance due notice.

The last sentence of the above affidavit sets out the appellee's only defense in this case. It is, of course, based upon a premise with which we do not agree. Very simply, as we have discussed, we hold that the appellee did not have the right to charge appellant this extra $17.84 for the coverage already agreed to and paid for. Appellee, however, does also suggest that appellant's payment of the renewal premium for the next six-month period was "an attempt to trick the insurance company into accepting coverage for a time when the policy was out of force."

We do not agree that any "trick" was attempted. "Grace periods" within which insurance premiums may be paid are neither new nor unusual. In *Millers Cas. Ins. Co.* v. *Murphy*, 254 Ark. 956, 497 S.W.2d 15 (1973), a renewal premium was paid after the policy period had lapsed and after an accident had occurred, but within a 20-day grace period, and coverage was upheld. The question there was whether the premium had been paid during the grace period, but the company conceded liability if payment was paid during the period. In *Central States Life Ins. Co.* v. *Hale*, 186 Ark. 890, 56 S.W.2d 583 (1933), the court held the company liable where the insured was injured during the grace period but did not die until after the period had lapsed. And in *Smith* v. *John Hancock Mutual Life Ins. Co.*, 195 Ark. 699, 114 S.W.2d 15 (1938), the court said "during the period of grace the policy could not be cancelled or converted because of failure to pay the premium. . . ."

Although the appellant also filed a motion for summary judgment, there could be some factual issue left to determine. Therefore, we reverse and remand for further proceedings consistent with this opinion. *See Fausett Co.* v. *Rand*, 2 Ark. App. 216, 619 S.W.2d 683 (1981).

Reversed and remanded.

CRACRAFT, C.J. and CLONINGER, J., agree.

Johnny STEPHENS and Kenneth BEATTY *v.* STATE of Arkansas

CA CR 85-8 693 S.W.2d 64

Court of Appeals of Arkansas
Division II
Opinion delivered July 10, 1985

Smith, Smith & Hubbell, by: *Mark D. Drake*, for appellant Johnny Stephens.

Gibson Law Office, by: *Charles S. Gibson*, for appellant Kenneth Beatty.

Steve Clark, Att'y Gen., by: *Alice Ann Burns*, Deputy Att'y Gen., for appellee.

TOM GLAZE, Judge. Appellants, Johnny Stephens and Kenneth Beatty, appeal from their convictions for aggravated robbery and manslaughter. Both were sentenced as habitual offenders.

On 23 November 1983, five men were involved in an armed robbery, during which one of the robbers was killed. Two defendants pled guilty, and later testified for the State at appellants' joint trial by jury. Appellants were both charged with acting as lookouts during the robbery. In this appeal, Stephens contends that the trial court erred in allowing the introduction of evidence of three prior convictions under the habitual offender statute and in allowing into evidence a photograph of him. Appellants Stephens and Beatty both contend that the trial court erred in not directing a verdict of acquittal. We will consider the points in order.

The habitual offender provision in effect at the time the crimes were committed, Ark. Stat. Ann. § 41-1001 (Supp. 1983), provides: (1) a defendant who is convicted of a felony committed after June 30, 1983, and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than four (4) felonies, may be sentenced to an extended term of imprisonment . . ."

Stephens argues that the State, which offered evidence of three prior felony convictions, should have been limited to

proving only two previous convictions because, in its amended information, the State charged Stephens with having been previously convicted of *two (2)* or more felonies (emphasis ours). In support of his contention, Stephens cites *Clinkscale* v. *State*, 269 Ark. 324, 602 S.W.2d 618 (1980). We believe, however, that *Reed* v. *State*, 282 Ark. 492, 669 S.W.2d 192 (1984) is controlling. In *Reed*, the defendant was charged with being previously convicted of more than two felonies. The court held that, where the habitual offender statute provided for an enhanced term of imprisonment when there were more than two previous felonies, the State, in using the language "more than two," clearly expressed its intent to show at least three previous convictions. The court went on to say that the phrase "two or more" implies that the State intends to introduce a minimum of two convictions.

Stephens alleged no surprise nor did he request a bill of particulars on the habitual offender charge. We believe the amended information, alleging two or more previous felony convictions, put Stephens on notice that he would have to defend at least two convictions, and the State properly was permitted to introduce evidence of three convictions.

Although Stephens did not object below, and made only a passing reference to it in his appeal, the trial judge did give an erroneous instruction as to the range of punishment for manslaughter, a Class C felony. The proper range is six to twenty rather than eight to twenty years as the judge stated. Stephens was sentenced to eight years on the manslaughter conviction, and twenty years on the aggravated robbery charge, sentences to run concurrently. Because the sentences are concurrent and are both within the statutory range, we find no prejudicial error. *See Hensley* v. *United States*, 156 F.2d 675 (8th Cir. 1946) (prison sentence of ten years was made to run concurrently with twenty-five year sentence imposed under another indictment; fact that ten-year sentence was excessive was not prejudicial to defendant if twenty-five year sentence was not void).

Appellant Stephens' second point for reversal is that the trial court erred in admitting into evidence, over his objection, a photograph. The photograph was taken after Stephens' arrest in California, which occurred about three weeks after the crime. On appeal, Stephens contends the photograph is irrelevant. We

disagree.

At trial, the State introduced testimony of Anthony King who lives near the Birch residence, where the robbery took place. King testified that soon after hearing a shot, he saw three people run down the street and jump into a car. He described one of the persons as tall and having long hair. The mug shot showed Stephens with long hair, a mustache, and a beard.

Appellant Stephens argues not only that the photograph was irrelevant, but also that it was highly prejudicial because of his unsightly condition. However, even inflammatory photographs are admissible if they tend to shed light on any issue, provide the jury with a better understanding of the testimony, or corroborate testimony. *Perry* v. *State*, 255 Ark. 378, 500 S.W.2d 387 (1973). The introduction of photographic evidence is a matter within the discretion of the trial judge, *Perry, id.*, and we will not reverse a trial court's ruling with respect to relevance absent an abuse of discretion. *James* v. *State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984).

Stephens' last point, and appellant Beatty's sole point for reversal, is that the trial court erred in not directing a verdict of acquittal. They contend that the State's evidence was insufficient to corroborate the testimony of the accomplices.

A conviction cannot be had in any case of felony upon the testimony of an accomplice unless it is corroborated by other evidence tending to connect the defendant with the commission of the offense. Ark. Stat. Ann. § 43-2116 (Repl. 1977). Our Court in *Paladino* v. *State*, 2 Ark. App. 234, 236, 619 S.W.2d 693, 694 (1981), stated the standard as follows:

> By its own language, the statute only requires that there be corroboration by evidence *tending* to connect the defendant with the commission of the offense and that this evidence go *beyond* a showing that the crime was committed and the circumstances thereof. We have, therefore, consistently held that the corroborating evidence need not be sufficient in and of itself to sustain a conviction, but it need only, independently of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the crime. (quoting *King* v. *State*, 254

Ark. 509, 494 S.W.2d 476 (1973), and *Dunn & Whisenhunt* v. *State*, 256 Ark. 508, 508 S.W.2d 555 (1974)).

At trial, evidence regarding the criminal episode was supplied by accomplices Bill McCarty and Sammy White, both testifying for the State. McCarty testified that he told Beatty that the Birches, the robbery victims, might have some money and jewelry at their house. McCarty had previously worked for Mr. Birch. McCarty and Beatty discussed the Birches again at Beatty's house in Pine Bluff. Two or three weeks later, Beatty, White, Stephens and Williams (the deceased) showed up at McCarty's house and planned the robbery for that night. McCarty testified that they all had a part to play: Williams and White were to enter the house, Beatty was supposed to be at the front door, and Stephens was to be at the back door. McCarty was to drive the get-away car. McCarty stated that the group left his home in two cars, drove out to the country where they left one car, and drove back in McCarty's car. McCarty parked the car about a block and a half from the Birches, and everyone except McCarty got out. McCarty testified that, after he had been waiting for about ten minutes, he heard a shot. He started the car, and as he drove down the street, Beatty, Stephens and White got in and they drove to the place where the other car was parked.

Sammy White, the other accomplice, testified that, on the day of the crime, Beatty and Stephens approached him about needing a gun. He learned from them that a robbery in McGehee, Arkansas was planned. They waited for Williams, and then the three went to McCarty's house where they all planned the crime. According to White, he and Williams were to go in the house through the front door, Beatty was to be a lookout at the front door, Stephens was to be let in the back door, and McCarty was to drive the car. White further testified that there were more people inside the house than they anticipated and that they spent five to ten minutes looking for a floor safe that McCarty had told them was there. He testified that Stephens failed to show up at the back door and that he had trouble getting Williams, who was carrying an unloaded gun, to leave. As White was leaving, he stated he met Stephens at the back door and told him to get Williams. As he stepped out and Stephens stepped in, White said he heard a shot and proceeded to run to the car. He and McCarty were joined by Beatty and Stephens.

When they got to the other car, White testified that he, Beatty and Stephens drove to Monroe, Louisiana and, on the way, split up the money and jewelry taken during the robbery. The next morning, they went to the bus station and purchased tickets to Pine Bluff. White and Stephens, though, became nervous because the bus went through McGehee, and decided to drive the car back to Pine Bluff. White testified that Beatty did, however, get on the bus.

As was stated previously, evidence that establishes the crimes and tends to connect the appellants with the commission of those crimes, other than the testimonies of the two accomplices, White and McCarty, is necessary in order to sustain the convictions of Beatty and Stephens. We find the following corroborating evidence sufficient to sustain both convictions.

Concerning Stephens, the record shows that he was arrested in Ontario, California on December 3, 1983. The arresting officer, Robert Bernhard, testified that, while getting Stephens' wallet and cigarettes out of his truck at Stephens' request, he found some jewelry. He also found a piece of jewelry on Stephens' person and later found another item of jewelry in the back seat of the police car in which Stephens had been riding.

After being advised of his rights, Stephens gave a statement in which he said he had been given the recovered jewelry by the suspects in the robbery. He also stated he was with persons who had been discussing a robbery, that he went with them and that his role was to enter the rear of the house. Stephens further stated that he decided not to participate and ran to the car when he heard the gun shot. He drew a map for Officer Bernhard to illustrate the robbery scene and admitted that, in addition to the jewelry, he had received $200 in cash and a diamond ring which he had pawned.

The jewelry recovered from Stephens at the time of his arrest was identified as items taken in the robbery. Appellant Stephens' statement to the California police follows, in significant detail, the testimony of the accomplices regarding the events leading up to and during the robbery. In *Rhodes* v. *State*, 280 Ark. 156, 655 S.W.2d 421 (1983), where appellant admitted being at the scene of the crime, sufficient corroboration was found.

Appellant Beatty also admitted to others his participation in the crimes. A witness for the State, John Collins, testified that on 24 November 1983, he gave Beatty a ride from McGehee to Pine Bluff. Collins testified that a bus from Monroe had broken down and that Beatty told him he had come on a bus from Monroe. This coincides with accomplice White's testimony regarding Beatty getting on a bus in Monroe.

In addition, Officer Sheffield of the McGehee Police Department testified that, while riding together to a bond hearing, Beatty asked him about the statements made by the other parties involved in the case. Beatty told Sheffield he would be able to make a better decision on his plea if he knew what the others had said. Beatty also told the officer that on the night of the robbery he was so strung out that he could not really remember what had happened. Additionally Sheffield said Beatty told him Williams was so high on drugs that he (Beatty) was afraid to load the gun for fear Williams would hurt someone. Beatty also expressed anger when Sheffield told him the others had made statements, saying "It will be a lot different when we get to Cummins . . . [i]t wouldn't be but another year or so for killing an inmate . . ."

A directed verdict is proper only where there is no issue of fact for the jury to decide. In resolving the issue, an appellate court views the evidence in the light most favorable to the appellee and affirms where there is substantial evidence to support the verdict. *Mooring* v. *State*, 11 Ark. App. 119, 666 S.W.2d 720 (1984). Following the standard set out in *Paladino, supra*, we believe the evidence offered was clearly sufficient to present a question to the jury as to whether the accomplices' testimonies were adequately corroborated. We cannot say that the trial court erred in submitting this issue to the jury.

Affirmed.

CLONINGER and MAYFIELD, JJ., agree.

SOUTHLAND CORP., d/b/a SEVEN-ELEVEN STORES, et al. *v.* Connie Diane MAGERS

CA 85-51 695 S.W.2d 380

Court of Appeals of Arkansas
Division II
Opinion delivered August 28, 1985

Walter A. Murray, for appellants.

Davidson Law Firm, Ltd., by: *Charles Phillip Boyd, Jr.*, for appellee.

LAWSON CLONINGER, Judge. The issue in this appeal is

whether the Workers' Compensation Commission erred in holding that appellee was entitled to an evidentiary hearing to determine whether she was entitled to additional benefits for a compensable injury as well as a change of physician. We conclude that the Commission ruled correctly, and we affirm its decision.

Appellee was employed by appellant Southland Corporation as manager of the accounting department for the Little Rock district on June 25, 1980, when she injured her back while lifting a bottle of carbon dioxide used by a soft drink vendor at a company picnic. Appellants accepted her claim as compensable and paid medical and disability benefits. Because of the nature of her injury, appellee was unable to continue working for appellant and was terminated on July 9, 1980. She held several other related jobs under different employers and underwent physical and psychological therapy.

On July 10, 1982, appellee fell down a flight of steps in her house. She sought workers' compensation benefits, claiming that the fall was attributable to her prior injury. At a hearing on the matter, an administrative law judge found that appellee had failed to prove a relation between the two injuries. The Workers' Compensation Commission affirmed the law judge's ruling in August, 1983, and appellee elected not to bring an appeal to this court.

Appellee subsequently petitioned the Commission for a change of physician and requested a hearing to determine whether she was entitled to additional medical benefits. The administrative law judge denied appellee's request, holding that her failure to appeal the Commission's decision in 1983 denying her additional medical benefits barred her from relitigating the matter under the doctrine of res judicata. The Commission, in an opinion dated November 21, 1984, reversed and remanded for a hearing on the issue. From that decision, appellants bring this appeal.

Appellants contend that the opinion of the Commission is contrary to the facts of the case, that the decision is not supported by substantial evidence, and is contrary to the law. They insist that the additional medical benefits and change of physician sought by appellee had reference to the July, 1982, fall rather than the compensable June, 1980, injury. In appellants' view,

appellee was merely engaging in "doctor-shopping" when she petitioned for a change of physician following her unsuccessful effort to secure compensation for her fall.

Further, say appellants, appellee is barred from seeking a new evidentiary hearing on the basis of res judicata; and that, because appellee did not appeal the Commission's 1983 decision affirming the law judge's determination that she was not eligible for benefits for the 1982 fall, the Commission's decision became the law of the case. They cite *Cooper Industrial Products* v. *Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982), for the principle that neither the administrative law judge nor the Commission is empowered to waive or otherwise extend the thirty day appeal periods provided for at Ark. Stat. Ann. § 81-1325(a) and (b) (Supp. 1983). It is appellants' contention that, by ordering an evidentiary hearing, the Commission violated the doctrine of res judicata and contravened Arkansas statutory and case law.

This argument might carry some weight were it not for the fact that the Commission spelled out as clearly as possible in its opinion of November 21, 1984, that "[t]he only matter foreclosed by [its decision of August 31, 1983] was the question of whether claimant's fall down stairs on July 10, 1982, was a compensable consequence of her admittedly compensable injury of June 25, 1980." The Commission went on to say, in a passage that deserves to be quoted at length:

> We held that [the fall] was not a compensable consequence [of the earlier injury], *but we did not intend to bar claimant from asking for additional medical benefits upon a showing that such care is 'reasonable and necessary' and causally related to her original compensable injury*. Such additional medical care may or may not be at the hands of a different physician, but this along with other matters relating to claimant's request for additional medical benefits *all involve issues of fact subject to evidentiary development*. [Emphasis added]

Moreover, the Commission acknowledged that "any claim for medical benefits or any other form of compensation attributable solely to the noncompensable incident of July 10, 1982, would be barred by the principle of res judicata." The opinion emphasized

the duty of appellants to provide "reasonably necessary medical attention" for symptoms that appellee could show were causally related to her 1980 compensable injury.

It is of primary importance to carry out the humane purpose of the Workers' Compensation Act. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). Hence, it is the duty of the Commission to follow a liberal approach and to draw all reasonable inferences in favor of the claimant. *City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). On appeal, our inquiry is limited to a determination of whether the decision of the Workers' Compensation Commission is supported by substantial evidence, and in reaching that conclusion, we are required to view the evidence in the light most favorable to the Commission's decision. *Bunny Bread* v. *Shipman*, 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1980). We must affirm the Commission's decision if it is supported by substantial evidence, even though a preponderance of the evidence might indicate a contrary result, provided that reasonable minds could have reached the Commission's conclusion. *Young* v. *Heekin Canning Co.*, 13 Ark. App. 199, 681 S.W.2d 419 (1984).

In the instant case, appellants are actually objecting to a factual determination made by the Commission that serves as a logical predicate upon which the order of November 21, 1984, rests. The Commission had to decide whether appellee was requesting a hearing and change of physician in connection with her compensable or noncompensable injury before it could frame an appropriate response. It determined from the records before it that appellant was seeking additional medical benefits for the 1980 compensable injury.

Appellants note that in her original petition for change of physician appellee stated her dissatisfaction with the diagnosis and ratings given her by previous doctors. They contend that, although she later changed the basis of her request, the original petition should be considered as a declaration against a party in interest. While the timing of appellee's petition, coming so soon after the denial of her claim for the 1982 fall, may strike one as rather suspicious, we must not forget that the Commission had access to the complete case history and were in a superior position to view the matter in proper perspective. Questions of credibility

are within the sole province of the Commission. *Osceola Foods, Inc.* v. *Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985).

Because, as the Commission said in its opinion, this case involves "issues of fact subject to evidentiary development," we agree that the purposes of the Workers' Compensation Act would be furthered by conducting a hearing. The Commission did not abuse its discretion.

Affirmed.

CORBIN and COOPER, JJ., agree.

Roy Dean BLANN and Wade BLANN *v.* STATE of Arkansas

CA CR 85-40 695 S.W.2d 382

Court of Appeals of Arkansas
Division I
Opinion delivered August 28, 1985

[redacted]

Honey & Rodgers, by: *Danny P. Rodgers*, for appellants.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. On January 2, 1984, Mike Nowlin was stabbed twice by Wade Blann. On January 12, 1984, both Wade Blann and his father, Roy Dean Blann, were charged in connection with the stabbing: Roy Blann with the crime of accomplice to battery in the first degree, under Ark. Stat. Ann. § 41-1601 (Repl.

1977), and Wade Blann with the crime of battery in the first degree, under the same statute. After a consolidated jury trial on August 13, 1984, Roy Blann was found guilty of accomplice to battery in the second degree, and Wade Blann was found guilty of battery in the first degree. The jury had been instructed, without objection, as to battery in both the first and second degrees. On appeal Roy Blann contends that there was insufficient evidence to support his conviction. In addition, both appellants contend that the verdicts were inconsistent and contrary to the law and the evidence, and that the trial court erred in failing to grant their motion for new trial. We will consider these points in order.

[redacted] Roy Blann argues that there was no substantial evidence to support the verdict entered against him. He claims that the verdict was based entirely on circumstantial evidence which failed to exclude every other reasonable hypothesis other than guilt. Upon appeal, we view the evidence in the light most favorable to the appellee, affirming the judgment if there is substantial evidence to support the verdict. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The evidence is sufficient if, even though primarily circumstantial, it is of such force and character that it induces an average person to pass beyond suspicion and conjecture; it must support a finding of reasonable and material certainty and compel a conclusion one way or another. *Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 (1983). In determining the sufficiency of the evidence, it is necessary only to look at that evidence which is favorable to the appellee and which supports the verdict of guilt. *Brown* v. *State*, 278 Ark. 604, 648 S.W.2d 67 (1983). While circumstantial evidence, when it is the only evidence relied on, must indicate the accused's guilt and exclude every other reasonable hypothesis, whether it does so is usually a question for the jury. *Murry* v. *State*, 276 Ark. 372, 635 S.W.2d 237 (1982).

[redacted] In the instant case, Mike Nowlin testified that Roy Blann came up to him and told him that "him and Wade was going to whip me so bad" and that all Roy Blann did was to come over and "ag [sic] it on." While Roy Blann testified that he was trying to prevent a fight between Nowlin and his son, the jury is not required to believe his testimony. *Henry*, 278 Ark. at 486. It is the jury's duty to judge the credibility and weight of the evidence and resolve any conflict; we cannot disturb or disregard those

findings. *Brown*, 278 Ark. at 605, 607. It is undisputed that Nowlin and Wade Blann were meeting at the church for a fight. Both Nowlin and his stepfather, P. O. Oliver, testified that Roy Blann drove Wade Blann to the church for the fight and participated in it. Both testified that Wade Blann stabbed Nowlin twice with a knife. The expert medical testimony, as stipulated to by both sides, showed that the stab wounds were considered by the doctors, in their expert opinions, to constitute a serious physical injury.

An accomplice is a person who:

> with the purpose of promoting or facilitating the commission of an offense, he: (a) solicits, advises, encourages or coerces the other person to commit it; or (b) aids, agrees to aid, or attempts to aid the other person in committing it; or (c) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

Ark. Stat. Ann. § 41-303(1) (Repl. 1977). A person commits the offense of battery in the second degree if, among other things, "with the purpose of causing physical injury to another person, he causes serious physical injury to any person." Ark. Stat. Ann. § 41-1602(1)(a) (Supp. 1983). Under this section of the statute, it is not necessary to determine whether Roy Blann knew about the knife. We believe substantial evidence was presented from which the jury could find that Roy Blann aided or encouraged Wade Blann to fight Nowlin, with the purpose of causing physical injury to Nowlin, and that actual serious physical injury was inflicted upon Nowlin.

Both appellants contend that their verdicts are inconsistent and contrary to the evidence and law, and therefore, must be overturned. They argue that, because Wade Blann was convicted of battery in the first degree, Roy Blann could not be convicted of being an accomplice to a battery in the second degree and conversely, because Roy Blann was convicted of being an accomplice to a battery in the second degree, Wade Blann could not therefore be convicted of battery in the first degree. We find no merit in this contention. Ark. Stat. Ann. § 41-306 (Repl. 1977) provides that "[w]hen two or more persons are found criminally liable for an offense of which there are different degrees, each person shall be liable only for the degree of the offense that is

consistent with his own mental culpability or with his own accountability for an aggravating fact or circumstance." *See also Bosnick* v. *State*, 248 Ark. 846, 454 S.W.2d 311 (1970) (holding that a jury may assign degrees of guilt among the conspirators in accordance with their individual culpability). No longer is it even necessary that a principal be found guilty before an accomplice can be found guilty. *See Roleson* v. *State*, 277 Ark. 148, 640 S.W.2d 113 (1982). "If the crime actually committed is a greater inclusive offense of the offense planned, accomplice liability respecting the intended lesser included offense attaches in connection with the aider or advisor." § 41-303, commentary. Because battery in the second degree is a lesser included offense of battery in the first degree, we find no inconsistency in holding Roy Blann guilty of being an accomplice to the former while holding Wade Blann guilty of the latter.

Appellants' final contention is that the trial court erred in denying a motion for a new trial based on the alleged bias of one of the jurors. There are two types of bias, implied bias, under Ark. Stat. Ann. § 43-1920 (Repl. 1977), and actual bias, as defined in Ark. Stat. Ann. § 43-1919 (Repl. 1977). Implied bias, which arises by implication of law, is not at issue here; rather the question is whether actual bias existed. In this case, the juror Charles E. Ritchie was accused of having made statements, some seven months prior to the trial and shortly after the stabbing, indicating bias. One witness, John Ricker, said that Charles Ritchie had told him that he had had "lots of trouble with Roy Dean's [Blann's] brother back some years ago" and that "both of the Blanns ought to be sent to the pen." Ricker acknowledged that he had known Roy Blann for approximately twenty years and that, at that time, everyone in the county was talking of the stabbing. Marzelle and Jim Ritchie, cousins of Charles Ritchie, testified that they heard Charles say that the Blanns "ought to be under the goddamn jail." Both of the Ritchies also knew Roy Blann. Charles Ritchie testified that he could not remember making such statements. He informed the judge that he had not decided the guilt or innocence of either appellant prior to his selection as a juror. He said several times that he had not formed an opinion in the case before hearing the evidence and further testified that, if he had felt that they were guilty prior to trial, he would have stood up and told the court so when asked. Don Miller,

who was with Charles Ritchie at the time of the alleged statements in front of Marzelle and Jim Ritchie, also testified that he could not remember Charles Ritchie making such statements on the date in question.

The court found the alleged statements were made approximately seven months prior to the trial, at a time when the stabbing was a major topic of conversation; that the testimony indicated that no one was quite sure what, if anything, Charles Ritchie may have said; and that, when selected on August 13, 1984, Charles Ritchie assured the court he could be fair and impartial and had formed no opinion as to the guilt or innocence of the Blanns. The court further found that the verdict, giving Wade Blann a minimum sentence and Roy Blann a suspended sentence, showed mercy and compassion, rather than bias or prejudice, and that, although Charles Ritchie indicated at trial he had heard something of the case prior to trial, the appellants had failed to question him or use a peremptory challenge against him and had failed to exhaust their peremptory challenges. Based on the above, the trial court concluded that Ritchie was not biased against the appellants and that the appellants received a fair trial. Therefore he denied the motion for new trial.

Jurors are assumed to be unbiased and the petitioner has the burden of proving actual bias. *Jeffers* v. *State*, 280 Ark. 458, 658 S.W.2d 869 (1983). As our Supreme Court stated in *Cooper* v. *State*, 215 Ark. 732, 223 S.W.2d 507 (1949) (a case very similar in relevant part to the one at bar):

> Courts properly examine very carefully into assertions made by witnesses who, after a defendant has been convicted, come forward with what they insist were beliefs expressed in circumstances from which bias or prejudice against the accused may be inferred. Weeks and months sometimes lapse between trial and what such witnesses say were remarks made at a time when the accused's status was being discussed. Because of the personal interest a volunteer may have in serving a defendant, and because the exact words used at a remote period, or the general import of a conversation, may later be purposely or unintentionally exaggerated, courts are given a broad discretion in determining (a) whether the evidence has

> been inspired through friendship for the defendant, (b) whether prejudice against the State's representatives has induced the course of conduct, (c) whether memory of those testifying is at fault, and (d) whether, if true, the attributed declarations were anything more than random comment. If the latter, and the proffered juror convinces the Court that, as in the case at bar, he *has* tried the issues fairly and treated the facts with reasonable consideration, the motion to quash should be denied. Judges are not compelled to accept *all* testimony as true, even though it is not *expressly* traversed. The manner in which a witness acts on the stand, his general demeanor, the apparent presence of interest or an effort to serve some one,—these may deprive sworn statements of substantial characteristics; and in the exercise of a sound discretion the Judge who listens to such witnesses must resolve conflicting inferences and act as he conscientiously believes the circumstances warrant. We are not willing, in the instant case, to say that this discretion was abused.

215 Ark. at 748-9. *See also Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984); *Vowell* v. *State*, 72 Ark. 158, 78 S.W. 762 (1904). Here, the trial judge has indicated that he found Charles Ritchie's comments, if made, to have been random comments and that Ritchie had convinced him he had tried the case fairly and impartially. Therefore, like the court in *Cooper*, we are unwilling to say the trial court abused its discretion.

Having found no merit in the appellants' contention, we therefore affirm their convictions.

Affirmed.

CRACRAFT, C.J., and MAYFIELD, J., agree.

Earl Edward PHILLIPS *v.* STATE of Arkansas

CA CR 85-37 695 S.W.2d 388

Court of Appeals of Arkansas
Division I
Opinion delivered September 4, 1985

[redacted]

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Theodore Holder*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant was convicted of

aggravated robbery and sentenced to 20 years in the Arkansas Department of Correction. He argues on appeal (1) that the trial court erred in refusing to grant his motion to dismiss since the state did not comply with the provisions of the Interstate Agreement on Detainers and, (2) that the trial court erred in admitting into evidence certain statements made by appellant to an officer of the Federal Bureau of Investigation. We do not agree with either contention.

By an information filed on September 23, 1982, appellant was charged with the June 6, 1982, robbery of a Little Rock convenience store, and a bench warrant was issued for his arrest. At the time the warrant was issued, the appellant was in custody in Indiana on other charges. Extradition proceedings were begun, and on October 12, 1982, the Pulaski County Sheriff's Office was notified that appellant had signed a waiver of extradition. Preparations were made to take him into Arkansas custody but Indiana would not release him from a reception center so it was necessary for the Arkansas authorities to wait until appellant was placed in a permanent facility.

In February of 1983, Arkansas authorities located the unit of the Indiana prison system where appellant was confined and arranged a pickup date of April 18, 1983, but after getting to within 100 miles of the facility, they were notified that appellant had filed a writ of habeas corpus and that the Indiana authorities would not release him until 30 days after the habeas corpus hearing. On June 13, 1983, Arkansas authorities were once again stymied in their effort to take appellant into Arkansas custody. This appears to have resulted from problems raised by an attorney plus difficulty in determining what had occurred in the habeas corpus hearing. Appellant was finally paroled to the Arkansas detainer on December 21, 1983, but he fought extradition and new proceedings were necessary. He was returned to Arkansas on May 19, 1984, and was tried on October 8, 1984.

In December of 1982, appellant prepared a motion for speedy trial and sent it to the office of the Pulaski County Circuit Clerk. It bore the correct circuit court number but was styled for municipal court and was therefore forwarded to municipal court. It was not until September 20, 1983, that it was finally filed in the Pulaski Circuit Clerk's office.

After being returned to Arkansas, but prior to trial, appellant sought dismissal of the charges on the grounds that he had not been tried within 180 days of his motion for a speedy trial pursuant to the Interstate Agreement on Detainers (IAD), Ark. Stat. Ann. §§ 43-3201 through 3208 (Repl. 1977). Article III of the IAD provides:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; . . . . The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.
>
> (b) The written notice and request for final disposition referred to in Paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

[redacted] We note that in order to activate the provisions of the above statute a prisoner is required to give a written request for final disposition of an outstanding detainer to the "warden, commissioner of corrections or other official having custody of him." In *McCallum* v. *State*, 407 So. 2d 865, 869 (Ala. Cr. App. 1981), the court considered a case similar to the one at bar and stated:

> A prisoner seeking to benefit from the statutory provisions must first meet the burden of compliance with the agreement. *Williams* v. *State of Maryland*, 445 F. Supp. 1216 (D.Md. 1978). . . .
>
> When a prisoner chooses to bypass the simple procedure provided in art. III(b), and attempts to deal directly with officials in the receiving state, he must satisfy the additional requirements of the agreement which would normally be executed by officials in the sending state. . . .
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> . . . .
>
> . . . It has generally been held that strict compliance with the agreement is not required, but rather "a good faith, diligent effort by a prisoner to invoke the statute" by giving "written notice to the official having custody of him." . . . However, once an inmate bypasses the statutory procedure, the burden is on the prisoner to demonstrate strict compliance with the notification and certificate requirements of Sections (a) and (b) of art. III.

Article IX of the IAD directs that the agreement shall be "liberally construed." However, this does not mean that courts are free to "bend the legislation out of shape or to remold it to some other form." *Isaacs* v. *State*, 31 Md. App. 604, 358 A.2d 273 (1976). It has been held that the 180-day time limitation contained in Article III(a) is triggered only when a prisoner has complied with the requirements of the article. *McCallum* v. *State*, *supra*.

Appellant contends that he substantially complied with the IAD requirements although he concedes that his motion was improperly addressed and consequently was not filed with the proper court until September, 1983, and that he fought extradition when he was paroled in Indiana in December, 1983. Furthermore, the record discloses numerous other instances of failure to comply with IAD requirements. For example, appellant bypassed the warden at his prison and attempted to activate the IAD himself. The pleading he sent to Arkansas was improperly designated a motion for speedy trial rather than a request for final disposition of an outstanding detainer; it was not sent by certified mail; and it was not accompanied by a certificate from appellant's

custodial official. In order to activate the statutory protections contained in the IAD, the appellant should have given the official in charge of his prison a written request for final disposition of the Arkansas case. However, by choosing to circumvent the prison official, appellant placed the burden of meeting the requirements of the statute on himself. We think he failed to substantially meet the necessary requirements of the IAD and, therefore, its 180-day time limitation was never activated. Certainly the limitation could not have started until his motion was filed in the proper court on September 20, 1983. After that his own resistance to extradition kept the limitation from starting until he was returned to Arkansas on May 19, 1984, and he was tried within 180 days after that date.

Appellant also argues that after his return to Arkansas he was not tried within *120* days as required by Article IV of the IAD. That article does provide that trial shall be commenced within 120 days after the "arrival of the prisoner in the receiving state." But Article IV also provides that "for good cause shown in open court" the court may grant any necessary or reasonable continuance. The record shows that at the conclusion of the hearing on appellant's motion to dismiss, the court set the case for trial on a date requested by the state. Although this date was more than 120 days after appellant's arrival in Arkansas, the date was set after the prosecutor had told the court the amount of time needed for preparation for trial and had outlined the reasons he needed it. We think the court extended the 120-day period for "good cause shown in open court" and we cannot say that the continuance granted was not reasonable or necessary. Moreover, no objection to that action is shown in appellant's abstract of the record.

Appellant also argues there was error in admitting into evidence certain statements he made to an F.B.I. officer. While appellant was in jail in Indiana, the F.B.I. became involved in assisting with his extradition. A copy of a photograph taken by the security camera at the convenience store while the robbery was being committed was forwarded to F.B.I. agents in Indiana, along with other information concerning the identity of the robber. An F.B.I. agent went to the county jail to verify that the Earl Phillips being held there was the same one wanted for the robbery in Arkansas. As appellant was talking to the agent, he

saw the photograph in the file and identified himself as the man in the photograph. He contends that his self-incriminating statement should have been excluded from evidence because he had not been read his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). He argues that in *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), the United States Supreme Court held that when the words and actions of the police are such that they could reasonably elicit an incriminating response from a suspect, they must first read the suspect his rights. However, we think the record shows that appellant's identification of himself in the photograph was a voluntary admission. He was not shown the picture nor asked to identify the person in it. It was not error for the trial court to refuse to exclude this evidence.

Affirmed.

CRACRAFT, C.J., and GLAZE, J., agree.

Ewell HENDRICKS *v.* STATE of Arkansas

CA CR 85-56 695 S.W.2d 843

Court of Appeals of Arkansas
Division II
Opinion delivered September 11, 1985

Paul K. Lancaster, for appellant.

Steve Clark, Att'y Gen., by: *Alice Ann Burns*, Deputy Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was charged with two counts of rape for allegedly engaging in deviate sexual activity with two young boys. After a jury trial, the appellant was convicted on both counts and sentenced to serve two concurrent terms of ten years in the Arkansas Department of Correction. From that decision, comes this appeal.

On appeal, the appellant raises two points for reversal (1) the trial court erred in failing to suppress a videotaped deposition because of the witness' age and qualification; and (2) the trial court's failure to suppress evidence seized pursuant to an allegedly defective search warrant. For the reasons stated below, we affirm on the first point, but we reverse and remand for a new trial on the second.

The appellant asked that the videotaped deposition of the two children's testimony, taken pursuant to Ark. Stat. Ann. Section 43-2036 (Supp. 1983) be suppressed, as it contains no evidence that the children were qualified as to their competency to testify. While it is true that the videotaped deposition, *as presented to the jury*, contained no questions pertaining to the children's competency to testify, the record clearly indicates that such questions were asked and answered, but were inadvertently left off the videotape. The judge was required by Section 43-2036 to be present at the taking of the deposition. Stating that he had already ruled that the witnesses, who were then ages seven and five, were competent to testify, the judge denied the appellant's motion to suppress the deposition. It is for the trial court to determine if a child has the ability to observe, remember, and relate the truth of the matter being litigated, and whether the child has a moral awareness of the duty to tell the truth; such a determination lies within the trial court's sound discretion and it will not be overturned on appeal in the absence of abuse of that discretion. *See Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982). The trial court's opportunity to observe the witness, his manner, capacity, intelligence and understanding of the obligations of the oath are important factors in deciding the question of competency. *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980). The record in the case at bar indicates that the trial court had such an opportunity, and we find no abuse of discretion.

The appellant contends that the boys' testimony clearly indicates that they were incompetent to testify, as the seven-year-old testified as to foot races with the appellant, who suffers from emphysema, and to attacking the appellant and knocking him down, while the five-year-old described an incident with a gun and a knife, pointing out where he had been stabbed. However, the children were questioned separately and both were responsive and consistent with respect to their answers to questions concern-

ing the sexual misconduct. The Arkansas Supreme Court, in *Hoggard, supra*, held that the trial court's finding that a six-year-old victim was competent to testify was not erroneous, even though there were "contradictions in the child's testimony, as well as some odd remarks about being chased by panthers and guns . . . on the essential elements the child's testimony was generally responsive and consistent." 277 Ark. at 123.

We also note that the record provided us does not include the questions which were asked to qualify the children as to their competency. We further note that the appellant raised no question concerning their competency when the deposition was taken. It is the appellant's duty to bring up an adequate record on appeal by either supplying a transcript or by reconstructing the proceeding below if a transcript is unavailable. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980). In the case at bar, the appellant has made no effort to provide the missing questions and answers, and therefore, he is not entitled to any relief. *See Wicks, supra*. In light of the fact that questions were obviously asked, but not provided to this Court, in light of the trial court's finding of competency, and in view of the boys' consistent statements concerning the essential elements of the case, we find no error in the trial court's decision denying the appellant's motion to suppress the videotaped deposition.

The appellant also alleged that the trial court erred in failing to suppress two pictures of the boys which the appellant took, as well as a camera. The appellant contends that the search warrant authorizing these seizures was defective. We find merit in this argument. The affidavit presented to the municipal judge was unsigned. No written summary of the proceedings in front of the municipal judge was made, nor was there a record made of those proceedings. Further, there is no evidence that the witnesses were sworn. Judge Gibson did listen to tapes of the children's statements, which were made before the police and which were transcribed by a court reporter. Based on these exhibits the judge issued the search warrant, and it appears that he did not base the issuance of the search warrant on the unsigned affidavit. There is no evidence that they were placed under oath prior to giving their statements. Arkansas Rules of Criminal Procedure, Rule 13.1(b) requires an affidavit, or recorded testimony taken under oath, before a search warrant can issue. The state has the burden of

proving that the warrant was made in compliance with the law. *State* v. *Anderson*, 286 Ark. 58, 688 S.W.2d 947 (1985); *Lunsford* v. *State*, 262 Ark. 1, 552 S.W.2d 646 (1977). The statutory requirement of an affidavit or recorded testimony under oath goes to basic procedural safeguards. *Anderson*, 286 Ark. at 61. Such basic procedural safeguards are threshold questions, which must be resolved prior to considering questions of good faith in the execution of the warrant. *Id.* However, even under the good faith doctrine, failure to provide an affidavit is such a deviation from normal procedure that the appellate court cannot consider it a defect falling within the scope of good faith error. *Id.* Since there is no evidence in this record showing a valid affidavit, nor any recorded testimony, the warrant is invalid. The trial court erred in admitting into evidence the pictures and the camera. Since we cannot say that the admission of those exhibits was harmless error, *Hall* v. *State*, 15 Ark. App. 235, 691 S.W.2d 884 (1985), we reverse on this point for a new trial.

Reversed and remanded.

CLONINGER and CORBIN, JJ., agree.

David M. HONEA *v.* STATE of Arkansas

CA CR 85-57 695 S.W.2d 391

Court of Appeals of Arkansas
Division II
Opinion delivered September 11, 1985

Clark & Crabtree, by: *Terry L. Crabtree* and *Jim Clark*, for appellant.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. In this appeal of his criminal conviction, appellant raises two points for reversal. We are of the opinion that the trial court committed no reversible error, and we therefore affirm its judgment.

Testimony at trial revealed that on August 9, 1983, Officer Pete Adams of the Green Forest Police Department heard on a citizen's band radio appellant's voice asking whether any listener had some "smoking dope" they wished to trade for some "road

dope." No one responded; Officer Adams answered the second call, indicating that he would prefer to buy some "good pills." Appellant replied that he had about thirty to forty "good pills" to sell or, preferably, trade. The two men arranged to meet at the Tyson plant where appellant was employed as a truck driver. Appellant identified his truck by its tractor number, H85, and said he would be sitting in the parking lot by scales facing a road. He then asked Officer Adams if he were a police officer. Adams evaded the question by asking whether the pills for sale were "good pills." Appellant said that he had "good pills" to sell if Adams was not a police officer and told him he would be waiting at the Tyson plant. Once again he identified his tractor number as H85.

When Officer Adams arrived at the rendezvous, he parked his patrol car and approached appellant's truck on foot. Appellant got out of the vehicle and produced, upon request, his driver's license, saying, "I thought you said you weren't a police officer." After searching, handcuffing, and placing appellant in the patrol car, Officer Adams read him his Miranda rights. Appellant then said, "I guess when you find the dope in the truck I'll be going back to the cotton patch." Officer Adams asked him for what he had been imprisoned, and appellant responded that he had been involved in "some activities" in Fort Smith. Adams radioed a request for information on appellant's criminal record.

As the truck was the property of Tyson Foods, Officer Adams sought permission from the assistant manager at the plant, Bill Webb, to search the vehicle. Upon obtaining consent, Adams went into the truck and found in the cab "a black plastic briefcase that was unlocked, not closed totally, and in that briefcase I found a white, small plastic bottle that contained some pills." Appellant was subsequently charged with possession of a counterfeit substance which purported to be amphetamines with intent to deliver and with being an habitual criminal. A jury found him guilty on both charges and he was sentenced to fifteen years imprisonment with five years suspended. From that conviction, this appeal arises.

In his first point for reversal, appellant contends that the trial court commented on a matter of fact in violation of Article 7, § 23 of the Arkansas Constitution. After the jury had begun its

deliberations, the members returned to the courtroom seeking, on behalf of one of their number, clarification of the term "counterfeit substance." The judge offered the following explanation:

> [T]his law makes it a violation of the law, makes it a crime to sell what is not a controlled substance and to sell it under circumstances where you allege or you represent that it is a controlled substance, and so that's what this man is charged with, selling a substance that's not amphetamine and representing it to the people he is selling it to, that it was amphetamine. The Legislature has made that against the law, and that's the reason why that this charge was brought and is being tried, is to determine whether he is guilty or not guilty of exactly that. Now, that's what it is about. Another way of putting it in terms of what the trial was about here is whether this, whether the Defendant represented what he sold to the officer as road dope and whether it was not, and if he did represent it and it was not, then the next question is whether he had it in order, for the purpose of selling it or delivering it and if he did then those are the elements that have to be proven.

Appellant argues that the judge commented on the evidence by equating "road dope," the meaning of which was at issue during the trial, with "amphetamine," a controlled substance. Moreover, appellant urges, the judge assumed the jury's fact-finding function by determining the question of intent to deliver through his incorrect statement that appellant had "sold" a substance to Officer Adams.

We have quoted the judge's remarks at length because it is our opinion that, when viewed in the broader context, the challenged language amounts merely to harmless error. *See Smith* v. *State*, 268 Ark. 282, 595 S.W.2d 671 (1980).

Appellant did not object to the court's remarks at the time they were made. We believe that if an objection had been made, an explanation and admonition to the jury would have removed any possible misconception. In *Bradley* v. *State*, 8 Ark. App. 300, 651 S.W.2d 113 (1983), we held that the failure of the appellant to object to the judge's comment on the evidence precluded our consideration of the matter as a basis for reversal on appeal. We now reaffirm that ruling.

Appellant's second point is that the trial court erred in overruling his motion to suppress evidence obtained in the search of the truck cab. He asserts that the Tyson plant's assistant manager was not entitled to consent to the search. Bill Webb's duties entailed overseeing the general operations of the plant. Appellant insists that because the assistant manager's responsibilities did not specifically include tractors (although they did trailers) he was without authority to grant permission for a search of the cab.

Webb testified that he sought advice from his immediate supervisor on the question of authorizing a search and that a dispatcher relayed the message that he was empowered to sign a release form. We are persuaded that Webb was clothed with adequate authority. Rule 11.2 of the Arkansas Rules of Criminal Procedure provides:

> The consent justifying a search and seizure can only be given, in the case of: . . .
>
> (b) search of a vehicle, by a person registered as its owner or in apparent control of its operation or contents at the time consent is given. . .

As assistant manager of the plant, and the highest-ranking person on the scene, Webb was the truck owner's agent, and as such, was clearly acting within the bounds of his delegated authority in consenting to the search.

And, in the alternative, the search here is justified as a search incidental to a valid arrest. The Supreme Court of the United States discussed this exception to the requirement of a search warrant in *New York* v. *Belton*, 453 U.S. 454 (1981).

In *Belton*, a policeman stopped a car for speeding and in the course of checking the drivers license, smelled burned marijuana. The policeman had the occupants of the car get out at which time he arrested them for possession of marijuana. Following that arrest, the policeman searched the passenger compartment of the car. He found a leather jacket inside the pockets where he found cocaine.

The Supreme Court held that a policeman who had made a lawful custodial arrest of the occupant of an automobile

may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and may examine the contents of any containers found within the passenger compartment.

Relying on the facts as already presented, the officer here had placed appellant under custodial arrest, which on appeal is presumed to have been legal. *See Thorne* v. *State*, 274 Ark. 102, 622 S.W.2d 178 (1981). Shortly thereafter, the officer conducted the search. As pointed out in *Belton*, the officer was justified in searching the entire passenger compartment of the truck, including any containers found therein. The officer had probable cause both for appellant's arrest and for the search of his automobile. The search was thus not violative of the constitution.

Appellant's final argument is that the evidence upon which he was convicted was insufficient. In resolving the issue of sufficiency of the evidence in a criminal case, we review the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the verdict. *Mooring* v. *State*, 11 Ark. App. 119, 666 S.W.2d 720 (1984). Substantial evidence is evidence that is of sufficient force and character that it will compel a reasonable mind to reach a conclusion one way or the other, but it must force the mind to pass beyond suspicion or conjecture. *Jimenez* v. *State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984).

Our review of the record convinces us that the jury had before it sufficient evidence to warrant a conviction. As the outline of the testimony above indicates, the State was able to show that appellant was attempting to barter or sell pills that he referred to as "road dope" and "good pills." Of the twenty to forty pills found in his possession, some were identical in appearance to pharmaceutical amphetamines, but chemical analysis proved them to contain no controlled substance. Appellant's statements indicating his concern that his contact might be a police officer and his certainty that he would return to prison when the pills were found point to his awareness of the illegal nature of the transaction. Finally, testimony at trial revealed that "road dope" is street jargon for amphetamines. These instances were of sufficient force and character to compel the jurors to the conclusion that appellant was representing his counterfeit substances to

be amphetamines.

Affirmed.

CORBIN and COOPER, JJ., agree.

Michael REICHERT *v.* STATE of Arkansas

CA CR 85-51 695 S.W.2d 845

Court of Appeals of Arkansas
Division II
Opinion delivered September 11, 1985

William R. Simpson, Jr., Public Defender, by: *Arthur L. Allen*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

LAWSON CLONINGER, Judge. Michael Andrew Reichert was found guilty by a jury of murder in the first degree in violation of Ark. Stat. Ann. § 41-1502 (Repl. 1977), and was sentenced to fifteen (15) years imprisonment. He appeals, arguing that he was denied his right to counsel at the time he made an inculpatory statement to the police and thus that his motion to suppress the

statement should have been granted and the statement excluded from evidence. We think the court correctly denied appellant's motion to suppress and we affirm.

The victim of the murder for which appellant was convicted was his mother, Mary Ann Murry, who died of gunshot wounds on the afternoon of January 27,1984. After discovering that Mrs. Murry had been killed, the police took appellant and other family members and friends of the family to the police station for questioning. Lieutenant Keith Rounsavall testified that he transported appellant from the crime scene to the police station where they arrived at about twelve o'clock midnight. At that time, Rounsavall said, appellant was not a suspect and was not under arrest but was just needed to answer some questions.

Detective Dwight McBrayer testified that he and Detective Ronnie Smith advised appellant of his constitutional rights and that they witnessed appellant signing a standard rights form. McBrayer said that appellant appeared calm, cool and collected, that he did not appear intoxicated, that he indicated that he could read and write, and that he understood his rights and the rights form. The form was signed at 1:00 a.m., according to McBrayer, and he testified that neither he nor Detective Smith used threats or violence to induce appellant to sign the rights form. A half-hour discussion then ensued between appellant and the detectives after which Detective Smith began writing out the first statement made by the appellant. McBrayer said that Smith finished writing the statement at 2:25 a.m.

Detective McBrayer's testimony concerning the meeting between him and appellant was corroborated by Detective Smith's testimony. Smith further testified that after appellant signed the first statement, he (Smith) left the room and met with a Detective Ivan Jones and Detective Richard Fulks and that they discussed certain inconsistencies in the statement for approximately fifteen to twenty minutes. He stated that Detective Jones then went back into the room where appellant was at about 2:45 a.m.

Detective Fulks testified that he and Detective Jones went in to talk to appellant at about 2:35 a.m. He also testified that appellant did not appear to be intoxicated at that time, that appellant indicated that he still understood his rights and that no

violence or threats were used against appellant. Fulks stated that after Detective Jones pointed out the inconsistencies in appellant's statement, appellant began talking about various problems he had, some of which concerned his mother. According to Fulks, they readvised appellant of his rights and began taking a second statement at 3:15 a.m. in which appellant admitted that he killed his mother. They finished taking the statement at about 3:30 a.m. and the statement was then signed by appellant.

Detective Fulks' testimony was corroborated by Detective Jones' testimony as to the events that occurred when he and Fulks took appellant's second statement. Jones also testified that Detective Rounsavall advised him and appellant at about 4:00 a.m. that an attorney was there to see appellant but that appellant indicated that he did not want to talk to anyone.

Detective Rounsavall took the stand again and testified about his contact with Faber Jenkins, the attorney who asked to see appellant. Rounsavall testified that he first saw Jenkins at 3:40 a.m. when Jenkins approached him at the police station and said he had been hired to represent appellant by a friend of the family. Rounsavall testified that the Little Rock Police Department has an unwritten policy not to allow an attorney to see a prisoner unless the prisoner or a member of his family has requested it. He explained this policy to Jenkins and later he received a telephone call from appellant's sisters asking that Jenkins be allowed to see appellant. Rounsavall said this occurred at 4:00 a.m. and he then informed appellant that Jenkins was at the station but appellant refused to see him.

Much of the testimony presented by the defense is in direct conflict with the testimony of the police officers. Several of appellant's friends and acquaintances testified that they witnessed appellant drinking heavily on the night of January 27. Other persons testified that they saw appellant on that night and that he smelled of alcohol and appeared to be intoxicated.

Faber Jenkins testified that he was called by appellant's neighbor to go to the station at about 2:00 a.m. He stated that he arrived at the station and first spoke to Rounsavall sometime between 2:00 a.m. and 3:00 a.m. After being told that he could not see appellant, Jenkins talked to the caller who had contacted him and asked for the names of appellant's two sisters. He said he then

called the chief of police who expressed his confidence in the judgment of his officers and advised Jenkins to go talk to Rounsavall again. This conversation took place about 3:45 a.m., according to Jenkins. He said Rounsavall again denied him access to appellant but finally he left at 4:20 a.m. and returned to say that appellant did not want a lawyer. Jenkins said that he then requested that a breath alcohol test be done on appellant.

Appellant testified that he had been drinking heavily on January 27 and was definitely intoxicated. He stated that at the time he signed the rights form, he had not been threatened but that he signed the second statement because he had been threatened by a police officer who was questioning him. Appellant said he would have talked to Jenkins if he had known Jenkins was available before he began talking to Detective Jones. He admitted that he did not request to speak to an attorney that night.

On appeal, appellant argues that the trial court erred in finding that his waiver of counsel was voluntary, because he had not been informed of Jenkins' availability. He states that in order to maintain his constitutional rights, the police should have had a procedure to ensure that Jenkins could have communicated with appellant without unreasonable delay. Appellant cites cases from other jurisdictions which support his argument because he points out that this issue is one of first impression in Arkansas. *See Massachusetts* v. *McKenna*, 355 Mass. 313, 244 N.E.2d 560 (1969); *Lewis* v. *Oklahoma*, 695 P.2d 528 (Okla. Crim. App. 1984); *Oregon* v. *Haynes*, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980).

The State argues that appellant knowingly and voluntarily waived his rights under the totality of the circumstances in this case. The State points out that appellant had ample opportunity to request an attorney and yet did not do so.

We agree with the State. Several police officers testified that appellant did not appear intoxicated and that he was advised and readvised of his rights. Appellant agreed that he did not request an attorney. The only testimony that threats were used against appellant was given by appellant himself.

Mr. Jenkins appeared at appellant's plea and arraignment in municipal court, but was subsequently informed by appellant

that he did not want Mr. Jenkins to represent him. Mr. Jenkins was not paid a fee by anyone. The facts do not support a finding of an attorney-client relationship between appellant and Jenkins.

In the cases cited by appellant the general rule was stated that a person being interrogated must be advised that his attorney has requested to see him. In all those cases, however, the attorney had been requested by the person being interrogated or by a member of his family. In *Oregon* v. *Haynes, supra*, the attorney was obtained by the suspect's wife. In *Massachusetts* v. *McKenna, supra*, the suspect, in the presence of a police officer, asked his aunt to call his attorney, who was also his uncle. There was also evidence that the attorney had been directed to the wrong police station. In *Lewis* v. *Oklahoma, supra*, the police officers failed to admit counsel retained by the suspect's parents and failed to inform the suspect that his attorney was endeavoring to see him.

In the instant case, the evidence supports a finding that appellant was told of Mr. Jenkins' presence as soon as Officer Rounsavall was aware of appellant's sisters' consent. Appellant's inculpatory statement was begun at 3:15 a.m. and concluded at approximately 3:30 a.m. Officer Rounsavall testified that he first saw Mr. Jenkins at 3:40 a.m. and that he then had a call from appellant's sisters, whereupon appellant declined to see Mr. Jenkins. There is no evidence of deceit or misconduct upon the part of the police officers, and their conduct was reasonable under the circumstances. While it is true that Jenkins testified that he spoke to Rounsavall earlier than 3:40, we must leave the resolution of these conflicts in testimony to the trial court. *Marbley* v. *State*, 9 Ark. App. 190, 656 S.W.2d 717 (1983); *Neal* v. *State*, 4 Ark. App. 357, 631 S.W.2d 313 (1982).

We have examined all of the testimony in the light most favorable to the State and have resolved all conflicts in favor of the State as is the standard of review in this court. As a result, we find that under the totality of the circumstances, the trial court's finding of voluntariness is not clearly against the preponderance of the evidence or clearly erroneous.

Affirmed.

COOPER and CORBIN, JJ., agree.

Marlen D. CLARK *v.* STATE of Arkansas

CA CR 84-178 695 S.W.2d 396

Court of Appeals of Arkansas
Division II
Opinion delivered September 11, 1985
[Rehearing denied October 23, 1985.]

Fred M. Pickens, Jr. and *Edward Boyce*, for appellant.

Steve Clark, Att'y Gen., by: *Connie Griffin*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Marlen D. Clark, appeals from an Independence County Circuit Jury verdict which found him guilty of manslaughter and fixed his punishment at five years in the Arkansas Department of Correction plus a fine of

$6,000.00. We affirm.

Evidence was presented at the trial that appellant went to the home of the decedent, J. N. Maples, in order to obtain his assistance in repairing appellant's car. The two men ended up at appellant's mobile home and thereafter apparently consumed a large quantity of wine. Appellant's brother stopped by the mobile home around 4:30 or 5:00 p.m. and testified that during the ten or fifteen minutes he was there, the atmosphere and conversation between appellant and the decedent was friendly. Appellant Clark testified that he either passed out or fell asleep in his kitchen. He awoke upon hearing a noise outside. Appellant stated that the trailer door was open and he observed someone in his yard about 35 or 40 feet away heading towards his door. He testified that the mobile home did not have an outside light and that his vision was further hampered by the fact that he was not wearing glasses. Appellant Clark stated that he asked the intruder for identification in a loud voice and received no response. He testified further that he called out again and did not receive a response. Appellant Clark stated that he thought the person intended to rob him and he retrieved his handgun from the bedroom, went back to the door and called out a third time. Upon receiving no response, he stated that he became more apprehensive, ordered the intruder to stop which he did not do and then aimed his gun at the bulk of the intruder's body and shot him. Appellant Clark testified that it was at this point that he realized the intruder might have been his friend, J. N. Maples, and he began to yell for help and attempted to wave down a car on the road. Appellant also testified that he had lived in the area for approximately ten months, that he did not have a telephone, that he had known the decedent for four months, and they were "drinking buddies."

Appellant admittedly shot and killed the decedent as he approached the mobile home. The decedent did not threaten appellant nor did he carry a weapon but approached the trailer in what was apparently a slow walk. The decedent did not reach the door of appellant's mobile home and was shot by appellant within nine feet of it. The State presented evidence that appellant registered .21 on a breath test administered after the shooting. Evidence was also presented on the impact of alcohol on a person's vision.

In his first assignment of error, appellant contends the trial court erred in refusing to give his requested instruction on the use of deadly force in defense of premises (AMCI 4106). In the alternative, appellant argues error of the trial court in refusing to give his requested instruction based upon Ark. Stat. Ann. § 41-507.1 (Supp. 1983). This section provides a legal presumption that force used to defend oneself and the lives of persons or property in one's home is justified unless overcome by clear and convincing evidence.

The record reflects that the jury was instructed on deadly physical force in defense of a person (AMCI 4105). The trial court refused to instruct the jury on defense of premises (AMCI 4106) due to lack of evidence of arson or burglary.

It is well settled that where the evidence does not support an instruction, it should be refused. *Robinson* v. *State*, 11 Ark. App. 18, 665 S.W.2d 890 (1984). Even if an instruction contains a correct statement of the law, it does not mean it is error for the trial judge to refuse to give it if there is no basis in the evidence for it. *Wilson* v. *State*, 9 Ark. App. 213, 657 S.W.2d 558 (1983).

AMCI 4106, which the trial court refused, permits the use of deadly physical force to defend premises if: (a) a person reasonably believes it is necessary to prevent arson or burglary or (b) a person reasonably believes that another person is committing or about to commit a felony with unlawful deadly force.

We find no error in the trial court's refusal to give an instruction on defense of premises. The evidence reflects that appellant feared the decedent might rob or harm him. The testimony of appellant established that the decedent approached from the front yard at a normal pace. Appellant observed no weapons on the decedent nor any threatening movements. The crimes mentioned in subsection (a) of appellant's proffered instruction relating to defense of premises consist of burglary or arson and the evidence did not support the giving of this instruction. Subsection (b) of appellant's proffered instruction was a duplication of that already given the jury on the use of deadly physical force in defense of one's person. It is not necessary to give a requested instruction if it is sufficiently covered by another instruction. *Cobb* v. *State*, 265 Ark. 527, 579 S.W.2d 612

(1979). Accordingly, we find no merit to the first half of appellant's assignment of error.

Appellant contends in the alternative that the trial court erred in refusing to give his proffered instruction based upon Ark. Stat.Ann. § 41-507.1. As previously noted, this statute provides a legal presumption that force used to defend oneself and the lives of persons or property in one's home is justified unless overcome by clear and convincing evidence.

We find the commentary following AMCI 4106 to be pertinent which provides as follows:

> The Committee believes that the presumption set forth in Ark. Stat. Ann. § 41-507.1 in favor of a person defending himself in his home has no effect. If evidence is introduced to trigger the presumption, that same evidence supports the existence of the defense. Under Ark. Stat. Ann. § 41-110(1)(a) and (3) and § 41-115(c) the prosecution has the burden to prove as an element of its case the negation of any defense beyond a reasonable doubt. A presumption running in the defendant's favor which may be defeated by clear and convincing evidence by the state, but which also supports a defense which ultimately must be overcome by the state by evidence beyond a reasonable doubt, is of no effect.

Inasmuch as the jury was instructed pursuant to AMCI 4105 which required the State to overcome appellant's reliance on self-defense of his person by a standard of beyond a reasonable doubt, we cannot say the trial court erred in refusing to instruct the jury upon Ark. Stat. Ann. § 41-507.1.

Appellant in his final point for reversal alleges that the evidence was insufficient to support a conviction of manslaughter. The record reflects that the jury was instructed on second degree murder, manslaughter and negligent homicide. Appellant moved unsuccessfully for a directed verdict of acquittal at the conclusion of all of the evidence on the basis that the State had failed to introduce sufficient evidence to overcome appellant's justification defense. Appellant argues on appeal that the trial court erred in overruling his motion for directed verdict.

A motion for a directed verdict is a challenge to the

sufficiency of the evidence. *Glick* v. *State*, 275 Ark. 34, 627 S.W.2d 14 (1982). It is proper only where there are no factual issues to be determined by the jury. *Ward* v. *State*, 6 Ark. App. 349, 642 S.W.2d 328 (1982). In determining the sufficiency of the evidence, the test is whether there is substantial evidence to support the verdict. Substantial evidence must be forceful enough to compel a conclusion one way or another beyond suspicion and conjecture. *Harris* v. *State*, 9 Ark. App. 253, 657 S.W.2d 566 (1983). On appeal it is only necessary to view that evidence which is most favorable to the appellee and if there is substantial evidence to support the verdict, the finding must be affirmed. *Fountain* v. *State*, 273 Ark. 457, 620 S.W.2d 936 (1981).

In order to convict appellant on a charge of manslaughter, the State had to prove beyond a reasonable doubt that appellant recklessly caused the death of decedent J. N. Maples. Ark. Stat. Ann. § 41-1504(1)(c) (Repl. 1977). "Recklessly" is defined in Ark. Stat. Ann. § 41-203(3) (Repl. 1977), as follows:

> (3) "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Reckless conduct involves a conscious disregard of a perceived risk. *Smith* v. *State*, 3 Ark. App. 224, 623 S.W.2d 862 (1981).

In the instant case appellant contends that the State gave no rebuttal testimony or evidence to overcome the justification issues established by appellant. Whether the killing was justified was a jury question. *Doles* v. *State*, 280 Ark. 299, 657 S.W.2d 538 (1983). The State had the burden to prove as an element of its case the negation of appellant's justification defense beyond a reasonable doubt. It undoubtedly convinced the jury with evidence which met its burden of proof. The only evidence adduced by appellant on justification was his testimony that he was afraid of being robbed or harmed. The jury found the killing unjustified and we cannot say that there is not substantial evidence to support its conclusion. Furthermore, we believe the evidence is without doubt substantial that appellant's conduct

was reckless and exhibited a conscious disregard of a perceived risk.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Michael REDDIN and Doris REDDIN *v.* STATE of Arkansas

CA CR 85-53 695 S.W.2d 394

Court of Appeals of Arkansas
Division II
Opinion delivered September 11, 1985

Vickery & Jones, P.A., for appellants.

Steve Clark, Att'y Gen., by: *Mary Beth Sudduth*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. The question raised by this appeal is whether the trial court erred in holding that appellants, Michael and Doris Reddin, failed to rebut the presumption that

money found in close proximity to a large amount of marijuana and to records of distribution of controlled substances was forfeitable under the provisions of Ark. Stat. Ann. § 82-2629(a)(6) (Supp. 1983). Appellants appeal from the trial court's judgment of forfeiture. We affirm.

Appellant, Michael Reddin, was arrested on July 17, 1984, after a lawful search of his bedroom. His bedroom was located in a separate building next to the home of his mother, appellant Doris Reddin. Approximately four and a half pounds of marijuana was seized together with $6,380 in cash. The cash was found by officer Allan Smith in a metal box in the second drawer on the left side of the desk. The officer testified that he discovered small quantities of marijuana in bags in the top drawer of the desk. Along with the money in the metal box, a small book was discovered containing names of individuals known to the police to be drug dealers. The bulk of the marijuana was found in the bedroom area. Appellant Michael Reddin testified that the small book contained names of people who owed him money for drug transactions. Appellant Michael Reddin testified that $6,000 of the money seized was actually money that he had taken without his mother's permission from her bedroom in the main house approximately 28 to 30 hours before he was arrested. Both appellants testified that the $6,000 belonged to appellant Doris Reddin and that it was the residue of some insurance money she had received in earlier years. Appellants each testified that appellant Michael Reddin took the money from appellant Doris Reddin's bedroom without permission and that she had no knowledge that the money was taken or that it would be used to deal in illegal drugs. Appellant Michael Reddin testified that he intended to use the money to buy marijuana and hoped to return the money before his mother discovered that it was missing.

Ark. Stat. Ann. § 82-2629(a)(6) provides:

> (a) The following are subject to forfeiture:
>
> (6) everything of value furnished or intended to be furnished, in exchange for a controlled substance or counterfeit substance in violation of this Act, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this Act; except that no property

> shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or ommission [sic] established by him to have been committed or omitted without his knowledge or consent.
>
> Rebuttable Presumptions. All moneys, coin and currency found in close proximity to forfeitable controlled substances, to counterfeit substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of controlled substances or counterfeit substances are presumed to be forfeitable under this paragraph. The burden of proof is upon claimants of the property to rebut these presumptions.

Appellants contend in the case at bar that once they adduced any evidence to rebut the statutory presumption, the burden shifted to the State to offer evidence that the $6,000 was in the possession of appellant Michael Reddin with the consent or knowledge of appellant Doris Reddin. We find no merit to this argument. The question is limited to whether appellants overcame the presumption. As noted in *Limon* v. *State*, 285 Ark. 166, 685 S.W.2d 515 (1985), a forfeiture is an *in rem* civil proceeding, independent of the criminal charge and to be decided by a preponderance of the evidence. This Court will set aside the trial judge's findings if they are clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. ARCP Rule 52(a).

We are convinced that the preponderance of the evidence clearly shows that the $6,380 was subject to forfeiture and the trial court's decision is affirmed.

Affirmed.

COOPER and CLONINGER, JJ., agree.

Larry Edwin WEDDLE *v.* STATE of Arkansas

CA CR 85-38 695 S.W.2d 840

Court of Appeals of Arkansas
Division I
Opinion delivered September 11, 1985

William R. Simpson, Jr., Public Defender, and *Deborah R. Sallings*, Deputy Public Defender, by: *Carolyn P. Baker*, Deputy Public Defender.

Steve Clark, Att'y Gen., by: *Joel O. Huggins*, Asst. Att'y Gen., for appellee.

TOM GLAZE, Judge. In a jury trial in Perry County Circuit Court, appellant was found guilty of attempted first degree murder, in violation of Ark. Stat. Ann. § 41-701 (Repl. 1977), and sentenced to thirty years in the Department of Correction. On appeal, he contends the trial court erred in failing to grant a mistrial for remarks made by the prosecutor in his closing argument. We affirm.

It is undisputed that appellant shot his girlfriend, Carolyn Shamblin, six times, at a deserted area in Perry County on the night of 18 June 1984. Later that night, appellant was arrested for public intoxication in Little Rock. The next morning, he told a policeman that he thought he had done something terrible and needed to talk to someone about it. When another officer questioned him about being upset, appellant responded, "Upset, hell, I killed her." Appellant led law enforcement officers to the area where he left Shamblin. The officers found Shamblin alive, but seriously wounded. In a statement to the police, appellant said that he remembered having the gun in his hand and pointing it at Shamblin, but then remembered nothing else. At trial, appellant did not deny shooting Shamblin, but denied possessing the premeditation and deliberation necessary to prove him guilty of attempted first degree murder.

Appellant's sole point for reversal is based upon the prosecutor's following remarks made in his closing argument:

> For instance, in criminal attempt it says you have to have a premeditated or deliberated purpose to take someone's life. And then you look over here on premeditation and deliberation and it's about two paragraphs, a weighing of the consequences, you know, and a course of conduct as opposed to sudden impulse. But you look down here and it says it's not necessary that the state might have existed for any length of time. It's just necessary it's formed before the homicidal act. It can be formed in an instant. And the thing about premeditation and purpose of causing, it says you have to have premeditation and a purpose of causing the death of another person. Now purposeful conduct is kind of a new phrase and it's something that Arkansas law didn't have before '75 or so. For all those years we had common law. It means the same thing. It's a—you have a conscious object to do something. Your purpose says I have a conscious object to take that gun and pull that hammer back and point it and fire it knowing that projectile is going to strike and kill that person. You know, how do you show purpose. Not many of us walk around and have some way of telling people. We don't put a red "A" on a forehead to mark us. We don't usually tell what we're doing unless you're teaching a child or something. You generally tell a person's purpose by what they've done. *You know, that old phrase, a person is presumed to have intended a natural consequences (sic) of his acts, well, if I'm standing here and I go over here and pick up these sunglasses, what's your assumption that you're going to make, just everyday assumption. That I intend to go over and pick up the glasses.* Now what we make from the assumption and this is—(Emphasis supplied)

Appellant contends the prosecutor's remarks effectively shifted the burden of persuasion on the question of intent to appellant. He rests his argument on rationale found in two United States Supreme Court cases, *Francis* v. *Franklin*, ___ U.S. ___, 37 Crim.L.Rep. 3019 (April 29, 1985) and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the defendant argued that, although he killed the victim, he did not do so "purposely or knowingly," and therefore was not guilty of deliberate homicide. Accordingly, he objected to the trial court instructing the jury

that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," arguing such instruction had the effect of shifting the burden of proof on the issue of purpose or knowledge. The Supreme Court held the instruction unconstitutional because the jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption or a conclusive presumption—either interpretation depriving the defendant of his right to due process of law. In *Francis* v. *Franklin, supra*, the Supreme Court, considering similar language to that given the jury in *Sandstrom*, held such instructions unconstitutional, even though they differed from those in *Sandstrom* in that the jury was explicitly informed that the presumption "may be rebutted." In so holding, the Court stated, "[A] mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding." 37 Crim.L.Rep. at 3022.

Neither *Sandstrom* nor *Francis* control the situation at hand. First, the language or remarks giving rise to the legal issue here ensue from the prosecutor's closing statement, not as a result of a trial court's instruction. In fact, the trial court in this cause instructed the jury that the State must prove each element of the crime beyond a reasonable doubt, that the defendant is presumed innocent, and that the attorneys' arguments are not evidence, but are made only to help the jury understand the evidence and applicable law. Second, while the prosecutor argued the appellant (Weddle) was presumed to have intended the natural consequences of his acts, we believe his remark, taken in context with the evidence presented and instructions given the jury, was merely a permissive inference suggesting to, not requiring of, the jury a possible conclusion to be drawn if the State proved predicate facts.[1] In this respect, the trial court instructed

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[1] See *Francis* at p. 3021 where the Supreme Court states: "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Such inferences do not necessarily implicate the concerns of *Sandstrom*. A permissive inference violates the Due Process Clause only if the suggested conclusion is

the jury that the State, in proving appellant committed attempted first degree murder, must show (1) he intended to commit the offense, (2) he purposely engaged in conduct . . . intended to culminate in the offense and (3) his conduct was strongly corroborative of the criminal purpose. The court further instructed that the State must show appellant acted with conscious object in committing such crime and that he formed that intention before acting as a result of a weighing in the mind of the consequences of a course of conduct, as distinguished from acting upon sudden impulse without the exercise of reasoning powers. After the trial court gave these and other instructions to the jury, the prosecutor reviewed the evidence which reflected that the appellant placed his single-action weapon to the back of Shamblin's head and fired it six separate times. In sum, the prosecutor based his remarks upon the evidence in the record and suggested to the jury how it might infer from appellant's actions that he acted with premeditation and deliberation. It is also of no small moment that Shamblin survived this living nightmare to testify that appellant had not been drinking and was not drunk when the shooting occurred—another reason the jury could infer that appellant acted with the required mental culpability to commit the crime with which he was charged.

We hold the trial court correctly denied appellant's motion for mistrial and therefore affirm.

Affirmed.

CRACRAFT, C.J., and MAYFIELD, J., agree.

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not one that reason and common sense justify in light of the proven facts before the jury."