Robert Matthew GREEN *v.* STATE of Arkansas

CA CR 96-1166 953 S.W.2d 60

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 1, 1997

David Mark Gunter, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Robert Matthew Green appeals from his conviction at a jury trial of robbery, for which he was sentenced to twenty years in the Arkansas Department of Correction. He does not challenge the sufficiency of the evidence to support his conviction. Instead, he argues only that the trial court erred in allowing the State to cross-examine him regarding his alleged commission of a separate robbery for which he had not been convicted. We agree, and reverse and remand for a new trial.

At trial, the State presented the testimony of one witness, Daniel Cox, concerning the circumstances of the robbery for which appellant was being tried. Mr. Cox testified that on April 29, 1996, he was at the E-Z Mart Store in Hope, Arkansas, visiting with the clerk on duty. He testified that appellant entered the store at around 3:00 a.m. and asked for ten packages of cigarettes, which the clerk collected and put into a bag. According to Mr. Cox, appellant picked up the bag and started to leave the store

without paying. Mr. Cox stated that he grabbed appellant in an effort to stop the theft, but appellant broke free of Mr. Cox's grip and left the store. The State also introduced a Tyson Foods employee identification card and a Social Security card issued to Robert Green, which Mr. Cox testified he removed from appellant's shirt during their struggle.

On cross-examination of appellant, the prosecuting attorney questioned him about a separate robbery of an E-Z Mart Store, for which appellant had been charged but not convicted. Appellant's objection was summarily overruled by the trial court on grounds that "credibility is an issue." On appeal, appellant contends that the trial court erred in allowing the prosecutor to so question him because robbery is unrelated to appellant's truthfulness or untruthfulness. We agree.

Rule 609 of the Arkansas Rules of Evidence provides for the impeachment of a witness's credibility by proof of prior criminal convictions. Rule 608(b) governs the admissibility of credibility evidence consisting of specific instances of a witness's conduct other than conviction of a crime. It provides in part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(Emphasis added.) The supreme court has adopted a three-part test that must be met in order for cross-examination to be undertaken pursuant to this rule: (1) the question must be asked in good faith; (2) the probative value of the evidence must outweigh its prejudicial effect; and (3) the prior conduct must relate to the witness's truthfulness. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996); *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983). The court has made it clear that cross-examination under Rule 608(b) is limited to specific instances of misconduct clearly probative of truthfulness or untruthfulness as distinguished from con-

duct probative of dishonesty. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982). In *Rhodes*, the court noted distinctions between conduct such as false swearing, fraud, and swindling (which do relate to truthfulness) and conduct such as shoplifting, drug crimes, and assault (which ordinarily do not).

Here, the conduct about which appellant was cross-examined was his alleged commission of a robbery subsequent to the one for which he was being tried. While an absence of respect for another's person and property is an undesirable trait, it does not directly indicate an impairment of the trait of truthfulness. *See id.* Thus, the trial court erred in allowing appellant to be cross-examined regarding a robbery for which there was no conviction.

The State does not contend that the trial court's action was correct. Rather, it argues only that the error should be treated as harmless in light of the "overwhelming" evidence of appellant's guilt. We cannot conclude that the error was harmless.

When an evidentiary error is slight and the remaining evidence of a defendant's guilt is overwhelming, the error may be declared harmless and the conviction affirmed. *Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996). In this case, however, we cannot conclude that the erroneous admission of evidence that appellant had been charged with having committed a similar offense was a slight error. Nor can we conclude that the testimony of Mr. Cox constitutes evidence that is overwhelming. Although the clerk of the E-Z Mart was also present at the time the robbery allegedly occurred, only Mr. Cox testified. *See Harris v. State*, 36 Ark. App. 120, 819 S.W.2d 30 (1991). Furthermore, there was no evidence linking appellant's identification cards to any criminal activity other than Mr. Cox's testimony. (Compare *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986), where a medical examination provided independent proof showing that a crime had been committed.) Given that the State's entire case rested on the testimony of Mr. Cox, and that the weight to be afforded Mr. Cox's testimony turns on his credibility, we cannot, on this record, say that the evidence against appellant was overwhelming. Consequently, we reverse appellant's conviction and remand the case for a new trial.

Reversed and remanded.

ROBBINS, C.J., and BIRD and ROAF, JJ., agree.

AREY and CRABTREE, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I dissent because in my opinion the evidence in this case was overwhelming and the error complained of by appellant was harmless. *See Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996). The eyewitness to the event stated that he could positively identify appellant as the one who took the cigarettes from the store and that he pulled the tags from appellant's shirt while trying to stop him. The identification tags consisted of a photograph identification card from Tyson's and a social security card. When considering the evidence in the light most favorable to appellee, *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997), it is difficult to think of a stronger case than that presented here. I would also point out that the appellant did not request an instruction for the jury to disregard the questions and answers that are claimed to be prejudicial in this case. For the foregoing reasons, I dissent.

AREY, J., agrees.

Leslie N. DeMoss LEONARD *v.* Gregory L. STIDHAM

952 S.W.2d 189

Court of Appeals of Arkansas
Division II
Opinion delivered October 1, 1997

[redacted]

Clark Law Firm, by: *Greg Clark*, for appellant.

Xollie Duncan, for appellee.

JOHN MAUZY PITTMAN, Judge. The parties are the parents of J.D., a minor child. When J.D. was approximately one year of age, an order was entered establishing appellee's paternity and vesting custody of J.D. in appellant. This custody order was made subject to detailed provisions setting out the specific time, date, and manner in which appellee's visitation would be exercised. Shortly after J.D.'s second birthday, an order was entered altering the visitation schedule to conform with the chancellor's opinion "that each parent is entitled [to] up to one-half of the child's free time." This appeal followed.

For reversal, appellant contends that the chancellor erred in ordering a modification of visitation absent a finding that there had been a material change of circumstances since the entry of the prior order. We agree, and we reverse and remand.

[redacted] Modification of visitation rights is not permitted unless there is a sufficient change in circumstances pertinent to visitation. *Harris v. Tarvin*, 246 Ark. 690, 439 S.W.2d 653 (1969). In the case at bar, the chancellor candidly stated that no such change in

circumstances had taken place. Instead, stating that he was clarifying his earlier decree by defining the meaning of a clause allowing for visitation at "other reasonable times arranged by the parties," the chancellor radically altered the visitation schedule to allow each parent one-half of the child's free time.

Although disagreements between the parties concerning the extent of visitation authorized by an indefinite decree may be resolved by setting out definite visitation rights, *Haller v. Haller*, 234 Ark. 984, 356 S.W.2d 9 (1962), the original decree in the case at bar was neither indefinite nor ambiguous. To the contrary, the visitation provisions of the prior order, consisting of over two typewritten pages, were much more definite and clear than were the provisions contained in the order appealed from.

We are not bound by the terminology used by the chancellor to describe his order. *See Kennedy v. Kennedy*, 19 Ark. App. 1, 715 S.W.2d 460 (1986). Although characterized as a clarification of the prior order, the order appealed from is clearly a significant modification of visitation rights in the absence of a material change in circumstances. Consequently, we reverse and remand with directions to reinstate the original decree.

Reversed and remanded.

STROUD and NEAL, JJ., agree.

Jane RODRIGUEZ *v.* DIRECTOR, Arkansas Employment Security Department

E 95-40 952 S.W.2d 186

Court of Appeals of Arkansas
Division IV
Opinion delivered October 1, 1997

Jeffrey E. Levin, for appellant.

Phyllis Edwards, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Board of Review's decision denying appellant, Jane Rodriguez, unemployment benefits. On appeal, appellant argues that there is no sub-

stantial evidence to support the Board's decision and that the case should be remanded for further investigation. We disagree and affirm.

The record indicates that, since 1989, appellant had worked for Shinn's Orchards planting, thinning, and harvesting peaches. She filed a claim for unemployment benefits in 1994. However, Shinn's Orchards did not pay unemployment-insurance taxes at the time that appellant filed her claim. A district tax field representative was sent by the Employment Security Department (ESD) to investigate whether or not Shinn's Orchards was an agricultural employer and whether it was required to pay insurance benefits. It was determined that Shinn's Orchards was an agricultural business employing agricultural labor. The field representative investigated the employer's checking account and determined, however, that Shinn's Orchards was not a covered employer as defined under Ark. Code Ann. § 11-10-210(a)(5)(A) (Repl. 1996) and was thus not required to pay unemployment insurance. A hearing was held before the Appeal Tribunal during which the field representative and three people who had worked for Shinn's Orchards testified. The Appeal Tribunal found that Shinn's Orchards was a covered employer and that appellant was entitled to unemployment benefits. The Board of Review disagreed and reversed the Appeal Tribunal, finding that appellant had failed to prove that Shinn's Orchard had employed ten or more employees for at least twenty weeks or that Shinn's Orchard had paid $20,000 in remuneration during any quarter in question.

On appeal, the findings of fact of the Board of Review are conclusive if supported by substantial evidence. *White v. Director*, 54 Ark. App. 197, 924 S.W.2d 823 (1996). Our review is limited to determining whether the Board could reasonably reach its decision upon the evidence before it; we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Brown v. Director*, 54 Ark. App. 205, 924 S.W.2d 492 (1996).

Appellant argues that there is no substantial evidence to support the Board's finding that Shinn's Orchard had not employed ten or more employees for at least twenty weeks. We disagree.

Arkansas Code Annotated § 11-10-210(a)(5) provides that "employment" means:

> (5) Service performed by an individual in agricultural labor as defined in subdivision (f)(1) of this section when:
>
> (A) The service is performed for a person who:
>
> (i) During any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of twenty thousand dollars ($20,000) or more to individuals employed in agricultural labor; or
>
> (ii) For some portion of a day in each of twenty (20) different calendar weeks, whether or not the weeks were consecutive, in either the current or preceding calendar year, employed in agricultural labor ten (10) or more individuals, regardless of whether they were employed at the same moment of time.

At the hearing, three people who had worked for Shinn's Orchard testified concerning the number of people that had also worked for Shinn's Orchard. Appellant's husband testified that he worked three days in 1993 during the thinning season, which would have been at the end of May or June. He said that he saw nine other people working at that time. He also testified that he and several of the other workers had been paid in cash. Tobby Allen, a laborer, testified that he worked five weeks from June 25 through July 30, 1993. He also said that he saw about nine people working during that time. Appellant testified that she worked basically year round. She said that the thinning season lasted for two weeks and that picking season lasted from the first of June through the middle of August. The workers revealed that Mr. Shinn was essentially using Mexican laborers during the busy parts of the peach season and paying several of them by cash. When specifically questioned by the referee why Mr. Shinn could not recall any of the Mexicans that prior witnesses had testified worked for him, Mr. Shinn stated, "No comment."

After reviewing the evidence, we are reluctantly unable to say that there is no substantial evidence to support the Board's finding that appellant failed to prove that ten or more people worked twenty or more weeks. We are bound by our standard of review to affirm this point.

Appellant also argues that this case should be remanded for further investigation by the ESD with regard to the cash payments made by Shinn's Orchards. Appellant contends that it was the ESD's responsibility to provide her with a thorough and competent investigation so that she could establish her burden of proof. Appellant fails to cite to any authority in support of her argument that it was ESD's duty to aid her in proving her claim. Where appellant fails to cite any authority or present any convincing argument, and it is not apparent without further research that appellant's position is well taken, we will affirm. *Equity Fire & Cas. Co. v. Needham*, 323 Ark. 22, 912 S.W.2d 926 (1996).

Without reaching appellant's argument, we feel compelled to comment that Ark. Code Ann. § 11-10-307 (Repl. 1996) gives the Director of the Arkansas Employment Security Department the authority to set up and maintain an enforcement unit. The unit has the power to conduct investigations "in connection with the enforcement of this chapter to the end that fraudulent claims on the part of the claimants and the violation of this chapter on the part of employers may be curtailed to the minimum possible." Ark. Code Ann. § 11-10-307(g)(1) (Repl. 1996). Even though it is not the duty of the ESD to aid appellant in proving her claim, it is legislatively mandated that an investigation by the ESD, if undertaken, be performed to curtail violations by employers. In this case, it is clear that the ESD investigated Shinn's Orchard; however, from a review of the record it would appear that the investigation was wholly inadequate to achieve the purpose set forth in Ark. Code Ann. § 11-10-307.

Affirmed.

BIRD and ROAF, JJ., agree.

Debbie WHITE *v.* FROLIC FOOTWEAR

CA 96-1533 952 S.W.2d 190

Court of Appeals of Arkansas
En Banc
Opinion delivered October 1, 1997

Anthony W. Bartels, for appellant.

Robert H. Montgomery, for appellees.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that appellant failed to prove that she sustained a compensable injury identifiable by time and place of occurrence. On appeal, appellant argues that there is no substantial evidence to support the Commission's decision. We disagree and affirm.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996). Where the Commission denies a claim because of the claimant's failure to meet her burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992).

The record indicates that appellant worked for appellee in July of 1993 as a spotter on a heel cover line. Appellant testified that she injured her foot in July of 1993, when she tripped over a rug and her foot bent back. She said that she reported the incident to her supervisor, and that she was seen by the company nurse who told her that it was not broken. Appellant also testified that she filled out an accident report.

However, there was no record that appellant had reported an injury or filled out an accident report. The company nurse testified that she did not remember seeing appellant in July of 1993. She said that there were no records, accident reports, or notations in appellant's entire medical history that relate to an injury in July 1993.

On October 26, 1993, appellant visited Dr. K.A. Carpenter. His notes reveal that appellant had swelling in her foot, and it was attributed to standing for eight hours. Also, Dr. Carpenter noted that appellant could not recall any recent trauma to her ankle. Dr. Carpenter attributed appellant's edema on her ankle to her chronic standing. On November 12, 1993, Dr. Carpenter recorded that appellant had fallen on Halloween night. He noted that she twisted and fell and now "[her ankle] bothers her again." On November 19, 1993, Dr. Carpenter was at a loss to explain why appellant was having problems, but concluded that appellant's fall on Halloween could be the cause of her problems. Also, the medical evidence reveals that appellant's five x-rays performed from October to the first of December did not reveal any deformities or fractures in relation to appellant's foot. On December 20, 1993, however, an x-ray revealed a healing fracture.

The Commission found that there was "simply insufficient proof in this record to say that claimant proved by a preponderance of the credible evidence that she sustained an injury that is identifiable by time and place." The Commission further opined:

> The claimant's testimony and that of her husband is not sufficient to prove this claim. Claimant is unable to identify a specific time, date, place of occurrence or provide any credible evidence of the alleged specific incident. If an incident did occur, one would suspect that the claimant could at least say where it occurred. Thus, in our opinion, there is simply insufficient evidence that claimant's foot difficulties are causally related to any work-related injury. Additionally, there is testimony that claimant's injury could have occurred on another occasion. Although it is not respondent's burden to prove how claimant injured herself, there is plausible evidence that claimant injured her foot in October of 1993.
>
> Even if we were to give the claimant the benefit of the doubt and find that she sustained a specific incident in July of 1993, which we do not find, the claimant has failed to prove by a preponderance of the evidence objective medical findings establishing a compensable injury. Dr. Carpenter obviously felt that she injured herself on Halloween when she fell in a ditch. Claimant

> did not offer even one medical opinion linking her foot problems to her alleged work-related incident.

The weight and credibility of the evidence is exclusively within the province of the Commission. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Southern Steel & Wire v. Kahler*, 54 Ark. App. 376, 927 S.W.2d 822 (1996). It is clear from the Commission's opinion that it simply did not believe appellant's version of the events. We cannot say that there is no substantial basis to support the Commission's decision.

Affirmed.

PITTMAN, AREY, and NEAL, JJ., agree.

GRIFFEN and CRABTREE, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I dissent from the result announced in the majority opinion because I believe that the Workers' Compensation Commission's decision denying benefits in this case should be reversed and remanded. The Commission misapplied the temporal element of the accidental-injury standard of proof when it adopted the employer's contention that appellant failed to prove a specific incident identifiable by time and place of occurrence, because she could not specify the precise date and time that the injury occurred.

The Commission's construction of the temporal element of the accidental-injury burden of proof is inconsistent with past decisions, and it is unnecessarily restrictive. It has long been the law in Arkansas that injured workers are not required to make inescapable proof that an accidental injury occurred on a date certain. A reasonably definite time is all that is required. *W. Shanhouse & Sons, Inc. v. Sims*, 224 Ark. 86, 272 S.W.2d 68 (1954); *Murich-Jarvis Company, Inc. v. Townsend*, 209 Ark. 956, 193 S.W.2d 310 (1946); *Marcoe v. Bell International*, 48 Ark. App. 33, 888 S.W.2d 663 (1994). Appellant testified about where she was when injured, and she testified that her injury occurred during the

first two weeks of July 1993, before the plant took its vacation. That testimony was sufficient to establish "a certain fixed and definite event or occurrence from which time can be calculated." *Murich-Jarvis Co., Inc.*, 209 Ark. at 962. Judging from the fact that the employer paid for appellant's initial medical treatment based on her supervisor's referral in October, the employer appears to have reached the same conclusion in the first instance, but changed its position and denied appellant's claim after appellant's bone scan revealed that she had a fracture.

The statutory definition of an "accidental injury" found at Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 1996), does require a worker to prove a specific incident and identify the incident by time and place of occurrence in order to establish a compensable accidental injury. I agree that whether appellant met her burden of proof based upon the correct standard was an issue for the Commission to determine as trier of fact. However, the Commission construed the requirement contained in § 11-9-102(5)(A)(i) to require evidence to the minute and hour on a date certain concerning appellant's injury. Both the language of the statute and the case law that existed long before its enactment do not support this interpretation. Therefore, I respectfully dissent.

CRABTREE, J., joins in this dissent.

Claudia Kay PRINCE *v.* R & T MOTORS, INC.

CA 97-76 953 S.W.2d 62

Court of Appeals of Arkansas
Division IV
Opinion delivered October 1, 1997

[redacted]

Lightle, Beebe, Raney & Bell, by: *James A. Simpson, Jr.*, for appellant.

John Patterson, P.A., for appellee.

ANDREE LAYTON ROAF, Judge. Claudia Prince has appealed from a deficiency judgment awarded to the appellee, R&T Motors, Inc., by the White County Circuit Court, following the resale of a repossessed automobile. We find no error in the court's entry of summary judgment for appellee and affirm.

Prince purchased a 1991 Chevrolet Blazer from R & T Motors and defaulted on the loan that financed the purchase. After R & T Motors repossessed the Blazer, it sent notice, dated August 16, 1993, by certified mail, with restricted delivery, to

Prince in Plano, Texas, that it would sell the Blazer at a public sale at 3004 Hawkins Drive, Searcy, Arkansas, at 10:00 a.m. on September 8, 1993. The notice also provided that Prince would be liable for any deficiency remaining after the proceeds of the sale were applied to R & T Motors' costs of retaking and attorney's fees and the outstanding debt. It also informed her that she could redeem the vehicle at any time before sale by paying R & T Motors $16,992.98 plus the expenses of repossession, repair, and preparation for sale. Prince received the notice and signed the return card. The Blazer was sold on September 8, 1993, to Carder Buick for $8,500. R & T Motors filed this action against Prince for the deficiency of $8,704.17.

On July 16, 1996, R & T Motors filed a motion for summary judgment supported by the affidavit of George Carder, III, R & T Motors' vice president, in which he stated in pertinent part:

. . .

8. R&T Motors, Inc. notified Ms. Prince of the proposed public sale of the vehicle by certified mail, which was received by Ms. Prince on August 19, 1993. See Exhibits 2 and 3.
9. R&T Motors, Inc. caused a notice of public sale to be published in the Searcy *Daily Citizen*, a newspaper having county-wide circulation, on August 18, 1993, and August 19, 1993. See exhibit 4.
10. Pursuant to the notice, the sale was conducted on September 8, 1993, at the time and place designated in the notice.
11. At the commencement of the sale, a representative for R&T Motors, Inc. publicly announced the sale to all persons on the premises.
12. At the sale, Ron Peyton, representing Carder Buick, submitted a bid of $8,500.00, which was accepted.
13. R&T Motors, Inc. notified Ms. Prince of the amount of the deficiency in the sum of $8,704.17 and made demand for payment.

R & T Motors also filed copies of the installment sales contract, the notice of sale that it sent to Prince, the certified mail return card signed by Prince, and proof of publication of the notice of sale.

In response to the motion for summary judgment, Prince argued that genuine issues of fact remained to be tried regarding the commercial reasonableness of the sale and whether R & T Motors had sustained any damages. Prince attached a copy of a September 1, 1993, used truck and van guide showing the value of the Blazer at the time of its sale following repossession to be over $12,000. Prince later amended her response to the motion for summary judgment and filed the affidavit of her husband, Rick Prince, in which he stated that the value of the Blazer was in excess of $16,000.

On August 20, 1996, the circuit judge filed an opinion letter in which he stated that insufficient price alone does not make the sale commercially unreasonable. He stated that, because Prince relied only upon the inadequacy of the sale price, no fact was in dispute. He found the sale to be commercially reasonable and granted summary judgment to R & T Motors.

A hearing was held on the total amount of the judgment on September 25, 1996. At this hearing, Prince again argued that summary judgment was inappropriate because the sale was not commercially reasonable. The circuit judge replied:

> [Y]ou were given every opportunity by affidavit to say what was wrong with the sale, and all you said was that the amount received for the car was made at a commercially unreasonable sale, and I ruled that that alone was not good enough. Now if you have got anything else, say so.

The circuit judge entered judgment for R & T Motors for the deficiency of $8,704.17, prejudgment interest in the amount of $2,394.21, interest from the date of judgment at 10%, and attorney's fees in the amount of $3,500.

On appeal, Prince argues that, after she raised the defense that the sale was not commercially reasonable, the circuit judge should have required R & T Motors to prove that it conducted the sale in a commercially reasonable manner. As before, however, Prince points to no fact, other than the sale price of the Blazer, as evidence that the sale was not conducted in a commercially reasonable manner.

Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Wirth v. Reynolds Metals Co.*, 58 Ark. App. 161, 947 S.W.2d 401 (1997). All proof submitted must be considered in the light most favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party. *Id.* Once the moving party makes a prima facie showing of entitlement, the opposing party must meet proof with proof by showing a genuine issue of material fact. *Id.* When a prima facie showing is made, the adverse party may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Id.*; Ark. R. Civ. P. 56(e). Where the facts are not disputed and the law can be applied, a summary judgment is an appropriate means of avoiding the expense and time of a formal trial. *Neel v. Citizens First State Bank*, 28 Ark. App. 116, 771 S.W.2d 303 (1989).

It is true that a party that has sold collateral in violation of the Uniform Commercial Code is not entitled to a deficiency judgment. *Bank of Bearden v. Simpson*, 305 Ark. 326, 808 S.W.2d 341 (1991); *First State Bank of Morrilton v. Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987). Arkansas Code Annotated § 4-9-504(3) (Repl. 1991) provides:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, *but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable.*

(Emphasis added.)

As this code section requires, the primary concern of both debtor and creditor is that every aspect of the disposition of the collateral be conducted in a commercially reasonable fashion. *Holiman v. Hagan's Motors, Inc.*, 32 Ark. App. 62, 796 S.W.2d 356 (1990). However, the court stated in *Holiman* that "[w]here the debtor is concerned over the price received for the trade-in or the collateral, he should challenge the aspect of the sale which he feels

has made the disposition commercially unreasonable so as to result in an insufficient price." *Id.* at 64, 796 S.W.2d at 357-58. The burden is on the secured party as the plaintiff to establish the deficiency, and if the secured party's handling of the disposition of the collateral is attacked, it has the burden of proving that every aspect of that disposition was commercially reasonable. *Id.* at 64, 796 S.W.2d at 358. *Accord Henry v. Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983). Whether a sale of collateral was conducted in a commercially reasonable manner is essentially a factual question. *Beard v. Ford Motor Credit Co.*, 41 Ark. App. 174, 850 S.W.2d 23 (1993); *Cheshire v. Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990); *Jones v. Union Motor Co.*, 29 Ark. App. 166, 779 S.W.2d 537 (1989).

However, in Arkansas, sale price alone is not dispositive of whether a sale is commercially reasonable. Arkansas Code Annotated § 4-9-507(2) (Repl. 1991) provides: "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." Moreover, in *Thrower v. Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 590, 670 S.W.2d 430, 433 (1984), the Arkansas Supreme Court discussed the relevance of the price received upon resale of the collateral or of a trade-in accepted as a part of the transaction:

> [T]here are many elements in any such sale which must be considered to see if the disposition was commercially reasonable and some degree of flexibility must be allowed to assure that unfair practices do not go undetected, or that the creditor is not held to any particularly hard and fast rules. § 85-9-507(2) states in part: "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." Also, whether the collateral is sold wholesale instead of retail is not necessarily determinative of commercial unreasonableness. . . . Any difference between the fair market value and the price actually received, however, is ordinarily a material consideration, but this fact must be examined in light of all aspects of the sale to determine commercial reasonableness. (Citations omitted.)

Further, in *Goodin v. Farmers Tractor & Equip. Co.*, 249 Ark. 30, 33, 458 S.W.2d 419, 421 (1970), the supreme court stated:

> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself . . . sufficient to establish that the sale was not made in a commercially reasonable manner. Ark. Stat. Ann. 85-9-507(2). Yet that precise proof — that a better price could have been obtained by a sale at a different time and in a different method — comprised the only substantial evidence adduced by Goodin upon the point at issue. What little case authority there is upon this provision of the Code indicates that decidedly stronger proof is needed to establish commercial unreasonableness. In view of the precise language of the Code we are unable to say that the appellant's meager proof made the necessary prima facie showing that Farmers's public sale was not commercially reasonable. (Citations omitted.)

Accordingly, we hold that R & T Motors established a prima facie case that the sale was conducted in a commercially reasonable manner and that Prince failed to "meet proof with proof" in response. In support of its motion for summary judgment, R & T Motors submitted evidence, by affidavit and otherwise, as to every relevant detail of the disposition of the collateral. In response, however, Prince produced no evidence, other than the bare assertion that a better price might have been realized, to show that the sale was conducted in a commercially unreasonable fashion. Moreover, she has provided no convincing argument or authority to persuade us that the rules governing summary judgments in general do not apply in cases such as this. Even when the defendant-debtor raises the defense that the sale was conducted in a commercially unreasonable manner, summary judgment may be awarded if the debtor fails to "meet proof with proof" in response to the motion for summary judgment. Because Prince made no challenge to any other aspect of the repossession and sale, we hold that she failed to demonstrate that a material question of fact remained for trial.

Affirmed.

BIRD and ROGERS, JJ., agree.

Johnny COOK *v.* STATE of Arkansas

CA CR 96-1507 952 S.W.2d 677

Court of Appeals of Arkansas
Division III
Opinion delivered October 8, 1997

[redacted]

G. *Keith Watkins*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Johnny C. Cook pleaded guilty to a Class C felony (possession of a controlled substance) on October 26, 1995, and was sentenced to five years of probation. The conditions of his probation prohibited him from committing any offense punishable by imprisonment. On January 25, 1996, the State filed a petition for revocation. The petition alleged that, on January 21, 1996, Mr. Cook committed the offenses of second-degree battery of a police officer, possession of marijuana, and possession of drug paraphernalia. A revocation hearing was held on May 6, 1996. After the hearing, the trial court found that Mr. Cook had violated the conditions of his probation and sentenced him to ninety months in the Arkansas Department of Correction. Mr. Cook now appeals.

For reversal, Mr. Cook raises three arguments. First, he contends that the trial court erred in denying his request to be represented by the attorney who represented him when he was placed on probation. Next, he asserts that the search warrant that led to the seizure of contraband was invalid. Finally, Mr. Cook argues

that the trial court erred by not holding the revocation hearing within sixty days of his arrest. We find no error and affirm.

At the revocation hearing, the evidence showed that the police were issued a search warrant that authorized them to search Mr. Cook's mobile home. They executed this warrant on January 21, 1996. Upon searching the residence the police recovered a set of scales and a quantity of marijuana. They also found hemostats, rolling papers, and a roach clip containing burned residue. Based on this evidence, the trial court specifically found that Mr. Cook violated his probation by being in possession of drug paraphernalia.

We now turn to Mr. Cook's first point on appeal, i.e., that the trial court erroneously refused to appoint as counsel the same attorney who had represented him when he was placed on probation. When Mr. Cook pleaded guilty to possession of a controlled substance and was given probation, he was represented by private counsel, Paul Petty. After the petition to revoke his probation was filed, Mr. Cook requested that he be represented by the same attorney. Instead, the trial court appointed Keith Watkins, a public defender. Mr. Cook now submits that this was error, asserting that his previous counsel had never filed any motion to withdraw as attorney of record. He cites *Philyaw v. State*, 288 Ark. 237, 704 S.W.2d 608 (1986), *overruled on other grounds*, *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996), a case in which the supreme court announced:

> When an accused appears with retained counsel, the trial judge should not allow the attorney of record to withdraw until:
>
> (1) new counsel has been retained; or
>
> (2) a showing of indigency has been made and counsel has been appointed; or
>
> (3) a voluntary and intelligent waiver of the right to counsel is established on the record.

288 Ark. at 248, 704 S.W.2d at 613.

We find no merit to Mr. Cook's first argument. The instant case is clearly distinguishable from *Philyaw v. State*, *supra*, because

that case involved a criminal defendant who argued on appeal that his conviction should be reversed because he was not represented by counsel. In *Philyaw*, the defendant's attorney was permitted to withdraw prior to trial, and the defendant was forced to proceed without counsel. In the instant case, Mr. Cook represented that he was indigent, at which point the trial court promptly appointed an attorney who has represented Mr. Cook from that time through the present.

We certainly agree that a defendant must be afforded the right to counsel at every stage in a criminal proceeding, and this right extends to probation revocation hearings. *See Furr v. State*, 285 Ark. 45, 685 S.W.2d 149 (1985). However, our supreme court has held that, while an accused has the right to counsel, he does not have the right to counsel of his own choosing. *See Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995). In the case at bar Mr. Cook wanted to be represented by Mr. Petty, but the trial court instead appointed Mr. Watkins. This did not constitute error. Rule 16 of the Criminal Rules of Appellate Procedure provides:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause. After the notice of appeal of a judgment of conviction has been filed, the Supreme Court shall have exclusive jurisdiction to relieve counsel and appoint new counsel.

While the rule provides that trial counsel shall continue to represent a convicted defendant through the appeal process, it is implicit that counsel's representation in the matter terminates if the appeal concludes in an affirmance. It should logically follow then that counsel's representation in a criminal proceeding does not continue after conviction if no appeal is taken that would extend such representation.

Mr. Petty represented Mr. Cook through the time that he pleaded guilty to possession of a controlled substance on October 26, 1995. While Mr. Cook asserts that he is entitled to continued representation by his original counsel at any subsequent

revocation hearing, he fails to support this contention with any authority or convincing argument, and therefore we reject it. *See Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993).

Mr. Cook next argues that his revocation should be reversed because the search warrant at issue was erroneously issued and is therefore invalid. The face of the search warrant indicated that it was signed and issued by the magistrate at 5:50 p.m. on January 21, 1996. However, the affidavit in support of the warrant was not sworn to until 5:55 p.m., five minutes later that day. Rule 13.1(b) of the Arkansas Rules of Criminal Procedure provides that an application for a search warrant shall be supported by an affidavit or recorded testimony given under oath. Mr. Cook argues that, since the swearing of the affidavit did not precede the issuance of the search warrant, the warrant could not have been supported by the affidavit as required by the above rule.

Mr. Cook's second argument is clearly without merit because it has long been the law in this state that the exclusionary rule does not apply in revocation hearings. *Robinson v. State*, 29 Ark. App. 17, 775 S.W.2d 916 (1988). While an exception may exist if the probationer can prove a lack of good faith by the law enforcement officers, *McGhee v. State*, 25 Ark. App. 132, 752 S.W.2d 303 (1988), Mr. Cook failed to do so. We are not persuaded that a five-minute discrepancy between the issuance of the search warrant and the affidavit provides a ground for reversal.

Mr. Cook's remaining argument is that the trial court erred in denying his motion to dismiss, which was premised on his contention that the revocation hearing did not take place within sixty days of his arrest. Arkansas Code Annotated section 5-4-310(b)(2) (Repl. 1993) provides that a revocation hearing "shall be conducted by the court that suspended imposition of the sentence on the defendant or placed him on probation within a reasonable period of time, not to exceed sixty (60) days, after the defendant's arrest." Mr. Cook asserts that he was served with the petition for revocation on January 30, 1996, and that his hearing was not held until May 6, 1996. He acknowledges that the period between April 1, 1996, and May 6, 1996, is excludable because the delay in the proceedings during this time span was the result of two con-

tinuances that were granted at his request. However, he submits that, since sixty-two days elapsed between January 30, 1996, and April 1, 1996, his motion to dismiss should have been granted.

We find that Mr. Cook's final argument has not been preserved for our review. In *Summers v. State*, 292 Ark. 237, 729 S.W.2d 147 (1987), the supreme court held that if a probationer fails to raise his motion to dismiss the revocation petition for lack of a speedy hearing before the hearing, he has waived his rights. In the case at bar, Mr. Cook first argued his contention that the sixty-day limitation was violated when he appeared for a hearing on April 22, 1996. This hearing was originally scheduled for April 1, 1996, and was continued until April 22, 1996, at Mr. Cook's request.[1] Prior to the April 22, 1996 hearing, Mr. Cook had ample opportunity to raise this argument to the court, which would have put the State on notice that such an argument was being asserted. Because Mr. Cook failed to raise this argument prior to the date of the revocation hearing, the argument has been waived.

We observe that, even if a timely objection had been made regarding the sixty-day limitation rule, such objection would have been of no avail. The sixtieth day after January 30, 1996, was March 30, 1996, which fell on a Saturday. Rule 1.4 of the Arkansas Rules of Criminal Procedure applies to statutes governing criminal proceedings, and provides that, "[w]hen the first or last day of a time period is a Saturday, Sunday, or state or federal legal holiday, it shall not be computed as part of the period, which shall run until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday." The April 1, 1996, hearing date fell on the Monday after March 30, 1996. Thus, no violation occurred in this regard.

Having examined the record in light of the arguments raised on appeal, we find no error and affirm Mr. Cook's revocation.

Affirmed.

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[1] Before conclusion of the April 22, 1996, revocation hearing, Mr. Cook sought, and was granted, a further continuance to May 6, 1996, at which time his probation was ultimately revoked.

CRABTREE and MEADS, JJ., agree.

Lee MOORE *v.* TAYLOR SALES, INC.

CA 96-1225 953 S.W.2d 889

Court of Appeals of Arkansas
Division I
Opinion delivered October 8, 1997

Robert A. Newcomb and *Harry P. Stuth*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *James D. Lawson*, for appellee.

JOHN MAUZY PITTMAN, Judge. Lee Moore has appealed from a default judgment for appellee, Taylor Sales, Inc., entered against him by the Pulaski County Circuit Court. We hold that the circuit judge did not abuse his discretion in entering a default judgment against appellant and affirm.

In June 1995, appellee sued Architectural Exteriors, Inc., doing business as Architectural Exterior Innovations, Inc., and

Randy Harris, Mike Renfroe, George Abbe, and appellant, doing business as Architectural Exteriors, Inc., and Architectural Exterior Innovations, Inc., for $19,467.78. Appellant was personally served with process on June 13, 1995, and also accepted summonses for Architectural Exteriors, Mike Renfroe, and Randy Harris on that date.

The defendants failed to file timely answers, and on July 19, 1995, appellee moved for default judgment. On July 24, 1995, Harry Stuth, Jr., a Texas attorney, filed an answer for all defendants except Mr. Abbe. In November 1995, appellant filed for summary judgment. A hearing on the motion for summary judgment was held on November 27, 1995. Although the transcript of that hearing is not in the record, appellant filed on that date a response to the motion for default judgment, stating that he was caught by surprise at the hearing when the issue of the default judgment was brought up. On December 7, 1995, appellant filed a pleading arguing that, although he had delivered the petition to his attorney in a timely manner, his attorney had, through inadvertence and mistake, allowed the response time to elapse without filing an answer. Appellant explained that Mr. Stuth was recovering from a heart transplant that had taken place on May 15, 1995, and was working two hours a day when appellant delivered the complaint to him. The circuit judge entered a default judgment against all defendants on December 11, 1995.

Appellant moved to set aside the default judgment. In support of this motion, Mr. Stuth filed an affidavit wherein he stated:

> 3. I know that Lee Moore delivered to me copies of the Plaintiff's petition on or about June 24, 1995. I know that I contacted James Lawson, Esq., attorney for Plaintiff within several days and discussed possibility of settling this cause of action. I know that I contacted him several more times within the next 14 day period.
>
> 4. During this period of time I had just returned to the office from receiving heart transplant surgery on May 15, 1995. I was working at the office on a three to four day a week basis, three hours a day, after having been out of the office for approximately seven weeks.
>
> 5. I know that the unusual [sic] procedures that are employed in my office when I am retained by Defendant with regard to due

> dates for answers and other pleadings were not instituted in this case by mistake and inadvertence. As a result, the Answer of the Defendants I represent was not filed timely but was filed on July 24, 1995, 30 days after service was obtained on Mr. Moore and the two corporations.
>
> 6. The reason for this failure to file timely was not the result of conscious indifference, or failure of the Defendants to bring to my attention this cause of action, but only the mistake and inadvertence that occurred in my office. The error was the direct result of the somewhat abnormal state of my office having been gone for almost seven weeks, and being able to work only two to three hours a day. I am in solo practice; I am in an office with other attorneys who can help to some extent, but they were unable to take over all of the work that was pending at the time my heart trouble began. As a result, a mountain of work to be performed accumulated which kept me from operating in a normal and efficient manner.

On February 29, 1996, the circuit judge set aside the default judgment as to Architectural Exteriors, Inc., Architectural Exterior Innovations, Inc., Mr. Renfroe, Mr. Harris, and appellant. On June 17, 1996, a hearing was held to determine whether appellee was entitled to a default judgment against appellant and the other defendants. Mr. Stuth testified that he had received the complaint sometime around June 20 and that, during the month of June and most of July, he was working at his office for an hour a day. He testified that he had received a letter from appellee's counsel, James Lawson, dated July 25, 1995, wherein he stated that he did not intend to pursue the motion for default judgment in order to allow the defendants time to submit a settlement proposal. Mr. Stuth admitted that appellee's counsel had not told him that he did not need to file an answer.

On June 26, 1996, the circuit judge entered a default judgment for appellee against appellant and Architectural Exteriors, Inc., and dismissed the complaint against Mr. Renfroe, Mr. Harris, and Architectural Exterior Innovations, Inc. Although Architectural Exteriors, Inc., joined appellant in filing the notice of appeal, it has not filed a brief on appeal to this court.

■■ The standard by which we review the granting of a motion for default judgment is whether the trial court abused its

discretion. *Maple Leaf Canvas, Inc. v. Rogers*, 311 Ark. 171, 842 S.W.2d 22 (1992); *Divelbliss v. Suchor*, 311 Ark. 8, 841 S.W.2d 600 (1992); *B&F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). Default judgments are not favorites of the law and should be avoided when possible. *B&F Eng'g, Inc. v. Cotroneo, supra.* In 1990, the supreme court amended Rule 55 by making it more lenient, and allowing more discretion to trial courts in deciding whether to enter a default judgment. The revised rule reflects a preference for deciding cases on the merits rather than on technicalities. *Divelbliss v. Suchor, supra*; *B&F Eng'g, Inc. v. Cotroneo, supra.* Under former Rule 55(c), a default judgment could be set aside upon a showing of "excusable neglect, unavoidable casualty, or other just cause." The new Rule 55(c) reads as follows: "The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (4) any other reason justifying relief from the operation of the judgment."

Appellant argues that the default judgment should be set aside because he did not receive three days' written notice of the November 27, 1995, hearing. It is clear, however, that the circuit judge set aside the default judgment entered after that hearing. Accordingly, appellant has suffered no harm from any irregularity inherent in that proceeding. As for the June 1996 hearing, the abstract of the record provided by appellant does not indicate that appellant made any objection to the entry of default judgment on this ground. We therefore need not consider this argument. *See Reeves v. Hinkle*, 326 Ark. 724, 934 S.W.2d 216 (1996).

Appellant also argues that he was led to believe that appellee would not pursue the motion for default judgment. Appellee responds that it did not intend to waive its right to pursue a default judgment but simply waited while settlement discussions were under way. Although the amended version of Rule 55 gives the trial court more discretion in determining whether to enter a default judgment, appellee is correct in arguing that there is no provision under Arkansas law for "waiver" of the right to a default judgment. *See Lewis v. Crowe*, 296 Ark. 175, 752 S.W.2d 280 (1988). As we stated in *Bell v. Lee*, 8 Ark. App. 139, 142, 648 S.W.2d 524, 525 (1983):

> Although we realize that most litigants strive to resolve their differences outside of the courtroom and that many controversies are in fact settled on the courthouse steps, a party to a suit is not relieved of the responsibility of adhering to the rules of civil procedure and must file an answer within the statutory time.

Appellant also argues that it was error for the circuit judge to enter a default judgment because he has a meritorious defense to the complaint. It is true that Ark. R. Civ. P. 55(c) requires that the party seeking to have the judgment set aside must demonstrate a meritorious defense to the action. In *Maple Leaf Canvas, Inc. v. Rogers, supra,* Maple Leaf also argued that it had a meritorious defense and that no prejudice had resulted to the appellees. The supreme court addressed this argument as follows:

> The mail sat on Oates's desk for two months. No reason for the lapse is offered. Rather, Maple Leaf contends that no prejudice resulted to the appellees and that it has a meritorious defense. Maple Leaf, however, must first satisfy the court that a threshold reason exists for denying default judgment. The reason it presents is not convincing. The failure to answer the complaint seems due more to carelessness or, . . . a result of not attending to business.

311 Ark. at 174, 842 S.W.2d at 24. *Accord Truhe v. Grimes,* 318 Ark. 117, 884 S.W.2d 255 (1994).

Therefore, our focus must be upon whether appellant's failure to file a timely answer amounted to excusable neglect as provided in Rule 55(c). Appellant points out that, under revised Rule 55, the reporter's notes state that the rule should be interpreted in accordance with federal case law:

> In deciding whether to enter a default judgment, the court should take into account the factors utilized by the federal courts, including: whether the default is largely technical and the defendant is now ready to defend; whether the plaintiff has been prejudiced by the defendant's delay in responding; and whether the court would later set aside the default judgment under Rule 55(c).

With these considerations in mind, we note that "excusable neglect" was also included in the rule before the 1990 amend-

ment. Therefore, pre-1990 cases dealing with an attorney's neglect are still relevant. Without doubt, the cases dealing with an attorney's neglect that were decided before the 1990 amendment to Rule 55 would support the trial court's decision. In *Allen v. Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987), the supreme court affirmed the circuit court's refusal to render a default judgment because the complaint had failed to state facts sufficient to state a cause of action. The court noted, however, that an attorney who had filed an answer one day late had failed to show excusable neglect. Although he had drafted an answer on the morning of the day it was due, he was distracted late that afternoon by a meeting with his partners and neglected to file the answer that day. The court stated:

> In *DeClerk v. Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982), the attorney prepared an answer, but he put it in a place where it was covered by other papers, and as a result, it was not discovered until four days after its due date. We held that the trial judge abused his discretion in condoning such negligence by refusing to grant a default judgment. We stated, "If such carelessness is excusable, then any attorney can shift the responsibility for filing any pleading to his secretary by simply dictating the pleading and dismissing the [matter] from his mind."
>
> We see no basic difference in *DeClerk* and this case. If the attorney believed that the problem with the associate was of such importance that it demanded his full attention, he could have delegated the responsibility for filing to another attorney in the firm, who would have understood the necessity of a timely filing. Instead, he merely failed to take any action on the matter. The fact that the answer was filed only one day late is of no consequence whatsoever.
>
> We state without reservation that the attorney of the employees responsible for the late filing failed to show excusable neglect, unavoidable casualty, or other just cause. Accordingly, we conclude that the trial court erred in finding that the attorney's conduct was excusable and, thus, in allowing the answer to be filed.

294 Ark. at 5, 740 S.W.2d at 139.

This issue was also presented in *Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (Ark. App. 1980), wherein we reversed and remanded a circuit court's setting aside of a default judgment and stated:

> It is beyond debate that illness of a party's counsel, so severe as to prevent him from appearing in behalf of his client, is an appropriate ground for vacating a default judgment provided the party litigant did not know of it in time to retain other counsel or was prevented in some way from doing so; otherwise, such illness of counsel is not grounds for setting aside the judgment. *See* C.J.S., *Judgments*, § 334, page 624; *Johnson v. Jett*, 203 Ark. 861, 159 S.W.2d 78 (1942).
>
> This record, to say the very least, does not demonstrate in any way that appellee's attorney's purported illness was so severe as to prevent him from filing an answer within the allotted time provided under law. The record tends to support a conclusion that the appellee's predicament could have been avoided by the exercise of care or diligence. . . . Indifference, inattention and inexcusable negligence are not the same as excusable neglect. These terms are incomparable.

270 Ark. at 658-59, 606 S.W.2d at 115.

B&F Engineering, Inc. v. Cotroneo, 309 Ark. 175, 830 S.W.2d 835 (1992), is the leading case on the issue of excusable neglect since Rule 55(c) was amended in 1990. In that case, the complaint and summons were served on B&F, which forwarded them to its liability insurer. No answer was filed, and Cotroneo moved for a default judgment. B&F responded with a general denial, arguing that its failure to file an answer was due to mistake, inadvertence, or excusable neglect by its insurer in failing to notify its counsel of the action. The insurer's claims examiner filed an affidavit explaining that he had received the complaint but had failed to recognize that it was a separate cause of action from a pending suit arising out of the same accident and which the insurance company was already defending. In the affidavit, he stated that he had not notified the company's attorney of the Cotroneo complaint. After a hearing, the circuit court entered a default judgment against B&F. On appeal, the supreme court acknowledged that the 1990 amendment to Rule 55(c) was intended to liberalize

Arkansas practice regarding default judgments and should be interpreted in accordance with federal law. Nevertheless, it was not persuaded that the discretion of the trial court had been abused under the circumstances. The court stated:

> That observation may seem inconsistent with our affirmance of the default judgment in this case; however, we do not mean to retreat from the intent and spirit of the recent amendment to Rule 55 and choosing between those conflicting policies in this case was not an easy task. While we subscribe to the concept of efficient and expeditious disposition of litigation, we recognize as well that the interests of justice are generally best served when cases are resolved on the merits. Nevertheless, under the circumstances of this case we are constrained to hold that the trial court did not abuse its discretion by granting the default judgment in favor of the appellant. To hold otherwise would, we believe, give sanction to a slipshod treatment of writs of summons by defendants.

309 Ark. at 179, 830 S.W.2d at 837. The supreme court also noted that federal courts had not been liberal in treating defaults attributable to the inaction of insurance companies as excusable.

In *Divelbliss v. Suchor*, 311 Ark. 8, 841 S.W.2d 600 (1992), the supreme court again noted that, in determining whether a trial court abused its discretion in refusing to set aside a default judgment, the reason for failure to respond should be considered on a case-by-case basis. The supreme court affirmed the trial court and stated: "The proof from the record discloses nothing more than carelessness on the part of the agent, and, on such proof, the trial court ruled correctly in refusing to set aside the default judgments." 311 Ark. at 13, 841 S.W.2d at 602-03.

Truhe v. Grimes, 318 Ark 117, 884 S.W.2d 255 (1994), provides guidance in this case. There, the supreme court affirmed the circuit court's denial of a motion to set aside a default judgment. Truhe had moved to set aside the default judgment, asserting that he had immediately turned over the summons to his insurance company and had been assured by its agent that it would defend the suit. Truhe argued that the insurance company's negligence should not be attributable to any action or inaction on his part. In rejecting his argument, the supreme court drew an analogy

between the attorney-client relationship and that of an insurer and insured and noted that both involve a contractual relationship, the prime purpose of which is to handle the litigation within the framework of judicial proceedings. The supreme court acknowledged that the 1990 amendment to Rule 55(c) was intended to liberalize Arkansas practice regarding default judgments but pointed out that it had long held clients responsible for the acts of omission or commission of their attorneys.

Here, it is undisputed that appellant was personally served with process and that he delivered the summons and complaint to Mr. Stuth, his lawyer, soon thereafter. Although Mr. Stuth had had a heart transplant the month before, he was working in his office for an hour or so three to four days a week and assured appellant that a response would be filed. Mr. Stuth kept his office open during the relevant time period and did not associate another attorney to help him prepare and file this answer. Under these facts, we cannot say that the circuit judge abused his discretion in granting the default judgment to appellee.

Affirmed.

AREY and CRABTREE, JJ., agree.

David Shane HOLLOWELL *v.* STATE of Arkansas

CA CR 97-67 953 S.W.2d 588

Court of Appeals of Arkansas
Division III
Opinion delivered October 8, 1997

Dowd, Harrelson, Moore & Giles, by: *Gene Harrelson*, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. David Shane Hollowell was convicted of two counts of second-degree battery for abuse of his seven-year-old stepdaughter and was sentenced to six years on each count to be served consecutively. He appeals, arguing that the trial court erred in sustaining the prosecutor's objection to appellant's exercise of peremptory challenges during jury selection. We find no error and affirm.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment forbids the State's use of peremptory strikes in a purposeful, racially discriminatory way in a criminal prosecution. The procedures to be followed when a *Batson* objection is raised are well established: if a defendant makes a prima facie showing that racial discrimination is the basis for a juror challenge, the State has the burden of showing that the challenge was not based on race. If the defendant makes a prima facie case and the State fails to give a racially neutral reason for the challenge, the court is required to conduct a sensitive inquiry. *See Wooten v.*

State, 325 Ark. 510, 931 S.W.2d 408 (1996) *cert. denied*, 136 L. Ed. 2d 862, 117 S. Ct. 979 (1997); *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996).

In *Georgia v. McCollum*, 505 U.S. 42 (1992), the Supreme Court held that the Constitution prohibits criminal defendants from engaging in purposeful discrimination on the basis of race in the exercise of peremptory challenges. The Court held that if the State demonstrates a prima facie case of racial discrimination by the defendant, the defendant must articulate a racially neutral explanation for peremptory challenges.

In *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Supreme Court held that the Equal Protection Clause forbids intentional discrimination on the basis of gender just as it prohibits discrimination on the basis of race. The Court stated:

> As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual.

511 U.S. 127, 144-45 (citations omitted). The Arkansas Supreme Court has recognized the applicability of the principles announced in *J.E.B.* in criminal cases in Arkansas. *See Cleveland v. State*, 318 Ark. 738, 888 S.W.2d 629 (1994).

In the case at bar, the prosecutor raised a *Batson*-type objection to the defendant's apparently gender-based use of peremptory challenges to strike prospective jurors who were women. Ultimately, the court refused to allow two of defendant's peremptory challenges finding that they were based on gender. The jury that was seated consisted of seven women and five men, with the State having used five peremptory strikes and the defendant having used seven.

Appellant's first argument on appeal is that the trial court erred in applying the *Batson* standard to the prosecutor's objection of gender discrimination regarding the defense's use of perempto-

ries. While recognizing that *McCollum* prohibits a criminal defendant from exercising peremptories in a discriminatory way based on race, and that *J.E.B.* expanded the *Batson* doctrine to prohibit prosecutors from exercising peremptories in a discriminatory way based on gender, appellant argues that neither the Supreme Court nor courts in Arkansas have ruled that the *Batson* doctrine applies to defense counsel in a criminal case when exercising peremptory challenges based on gender. Therefore, appellant argues, the trial court abused its discretion in sustaining the prosecutor's objection "because there was no legal basis upon which to object or sustain an objection."

We disagree. In *J.E.B.* the Supreme Court said:

> Today, we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause[.]
>
> . . . .
>
> [T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man.

511 U.S. at 130–31, 146.

The equal protection right referred to in all the cases belongs to the prospective juror. *See, e.g., Batson v. Kentucky, supra.* The juror has a right not to be struck peremptorily solely on the basis of race or gender. The standards governing proof of discriminatory intent established by *Batson* for racially motivated strikes apply to gender based strikes. *J.E.B., supra; Cleveland v. State, supra.* A defendant in a criminal case may not exercise his peremptory challenges in a racially discriminatory manner. *Georgia v. McCollum, supra.* In *McCollum* the Court held that the defendant is a "state actor" in this context and that the State has standing to raise the issue. *McCollum,* 505 U.S. at 55-56. It is sufficiently clear that under the decisions of the Supreme Court a defendant in a criminal case may not engage in purposeful gender discrimination in the exercise of peremptory challenges of prospective jurors. Other state courts have reached the same conclusion. *State v. Turner,* 879 S.W.2d 819 (Tenn. 1994); *Commonwealth*

v. Fruchtman, 633 N.E.2d 369 (Mass. 1994), *cert. denied*, 513 U.S. 951 (1994) (based, at least in part, on state law).

Appellant's remaining argument is that, if the *Batson* standard applies, the trial court erred in its application of the standard and that its findings were clearly against a preponderance of the evidence. We disagree.

In the case at bar, the prosecutor objected when the defense struck the first female prospective juror. The trial court indicated that there had yet been no pattern shown. When the defense struck the second female potential juror, the prosecution again objected. The following exchange took place:

> COURT: Is there any other excuse other than being women?
> DEFENSE COUNSEL: No. I didn't like her look.
> COURT: What about her looks?
> DEFENSE COUNSEL: Pregnant.
> COURT: If you are going to excuse all the women, I'm not going to let you unless there's some kind of reasoning.
> DEFENSE COUNSEL: I have only excused two.
> COURT: I know. I'm just telling you. Next one I'd like to have some reasoning for cause from something said or something you can tell me that you —
> DEFENSE COUNSEL: All right.

The defense attempted to strike the third female potential juror, and the prosecution again objected:

> PROSECUTOR: Your Honor, we would object once again that there's definitely a pattern that's developed. We've had three women coming up and three struck for no reason other than that I could tell other than they were women.
> DEFENSE: She's from Wisconsin and I've just always had — Army.
> COURT: I'm not going to let you strike her for that reason. Do you have a better reason?
> DEFENSE: You're going to make me put some women on the jury. I guess I just —
> . . . .
> DEFENSE: I have got to take Mrs. Wilson, huh? You don't want me to strike any woman?
> COURT: What's the real reason?

DEFENSE: How about she works at the Christian Academy School.
COURT: No.
DEFENSE COUNSEL: These are peremptory challenges, Your Honor. These aren't —
PROSECUTOR: It's the same as having a black juror now. It's the same standard, exactly the same.
DEFENSE COUNSEL: I don't like this particular one.
PROSECUTOR: We always have to have a reason to use a peremptory challenge on any —
COURT: Some reason.
DEFENSE COUNSEL: All right.
COURT: Well, if she works with little kids there, it may be — it's close. I may let you strike her, but this other one, just because she's from Wisconsin.
DEFENSE COUNSEL: All right.
PROSECUTOR: Yes, sir.

After that juror was seated, two more women were seated without objection from the defense. The prosecution then struck a female, and the defense was allowed to excuse the next female potential juror. When another female potential juror was called and the defense attempted to strike, the following exchange took place:

PROSECUTOR: Your Honor, once again, we'd just ask for some type of reason.
COURT: What's your reason?
DEFENSE COUNSEL: She has grown children at home and I feel like she was going to start thinking about her children. This little girl — and they're all girls. If they weren't all girls, but I just feel like she's going to start having a bias against him.
PROSECUTOR: Your Honor, in response to that, that could apply to any female with children. I think — I realize it's not reason for cause, but there has to be some real reason. That's — like I said, having children would apply to anybody out there with children. I think you're still talking about class of women. I think that he would need, although not enough for cause, something more than that.
DEFENSE COUNSEL: Well, what it is, Judge, if I strike one and you put them back on there, you're going to get the jury mad at me because I struck them.
PROSECUTOR: Well, from our point —

> COURT: If you want to strike one, you probably ought to come up here like he's been doing.
> DEFENSE COUNSEL: All right. We'll do this one then.
> PROSECUTOR: We just voiced our objection as to this juror. I think there hasn't been reason shown to strike Mrs. Samson.
> COURT: I don't think so either.
> DEFENSE COUNSEL: That's going to be two that you made me put on there. They're going to be biased against me. I'm afraid — I'll start coming up here when we do that.
> COURT: You excused one without cause.
> DEFENSE COUNSEL: Well, I think that is cause. She's got three little girls and —
> COURT: Enough reason would be a good question to appeal on. It appears you're trying to get rid of all the women with the slightest of excuses.
> DEFENSE COUNSEL: I'm not going to object to that.

The trial court must determine from all relevant circumstances the sufficiency of a neutral explanation, and the standard of review is whether the trial court's determination is clearly against a preponderance of the evidence. *See Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990). We afford great deference to the trial court's exercise of discretion in determining discriminatory intent relating to the use of a peremptory strike. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997). In *Sonny* the court said:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. . . . [T]he state of mind of a juror. . .based on demeanor and credibility lies "peculiarly within a trial judge's province."

328 Ark. 321, 326 (1997) (quoting *Hernandez v. New York*, 500 U.S. 352 (1991), in turn quoting *Wainwright v. Witt*, 469 U.S. 412 (1985)). Given the exchanges between the trial court and defense counsel, we cannot say that the trial court abused its discretion in remaining unpersuaded by counsel's offer of gender-neutral explanations. Nor can we say that the trial court's determination is clearly against a preponderance of the evidence.

Affirmed.

MEADS, J., agrees.

ROAF, J., concurs.

Thelma Laster STEWART *v.* FIRST COMMERCIAL BANK

CA 96-1498 953 S.W.2d 592

Court of Appeals of Arkansas
Division IV
Opinion delivered October 8, 1997

R. Ted Vandagriff, for appellant.

William Reed, for appellee.

SAM BIRD, Judge. On January 22, 1988, Thelma Laster Stewart and Thearders Hall entered into a written contract by which Hall agreed to loan Stewart $2,000 in cash, pay off a $4,100 balance owed by Stewart to Farmers Credit Service, and pay future taxes on Stewart's fifty-seven acres in Lonoke County. The loan was to be repaid, plus interest "at a maximum rate allowed by law" and certain other specified expenses, on or before January 1, 1995. The contract provided:

> . . . [Stewart] agrees to deed the [fifty-seven acres] to Thearders Hall as security for the above specified loan and Thearders Hall will have the option (AT HIS DISCRETION) to use the [fifty-seven acres] as security for future loans for himself or whatever (use the property as his own and for his benefit . . . .D]

Stewart's deed to Hall was recorded on January 22, 1988, and the written contract was recorded on October 13, 1989.

In May 1991, Hall used the fifty-seven acres as security to obtain a $40,300 loan from appellee, First Commercial Bank of Lonoke, secured by a mortgage in favor of First Commercial.

In 1992, appellant was ready to pay off her loan to Hall, but could not get Hall to communicate with her or to provide her with the amount of her loan balance. She filed suit against him to compel an accounting for her payments and a statement of the loan balance, and to obtain a judicial interpretation of her contract with Hall. As a result of that lawsuit, on August 31, 1992, the chancellor entered a decree by which he determined the amount of the balance owed by Stewart to Hall on the loan and declared that the deed from Stewart to Hall was given as security for the loan and not as an outright conveyance. He also ordered Hall to reconvey the land to Stewart, "subject to the right, title, and interest of First Commercial Bank of Lonoke," upon Stewart's payment of the amount due on her loan from Hall into the registry of the court, to be applied as a credit against money owed by Hall to First Commercial. Stewart paid the money, and Hall (after prompting by a contempt citation) conveyed the fifty-seven acres back to Stewart by warranty deed.

At approximately the same time that the above-described lawsuit between Stewart and Hall was taking place, Hall defaulted on his loan from First Commercial, and the bank filed a foreclosure action against him on May 15, 1992. A default judgment was entered. First Commercial purchased Hall's interest in the fifty-seven acres at the foreclosure sale and received a commissioner's deed.

First Commercial was not a party to the lawsuit between Stewart and Hall, and Stewart was not a party to the foreclosure suit between First Commercial and Hall. Thus, the status of the title to the fifty-seven acres at that point was that Stewart had a deed to herself from Hall describing the fifty-seven acres, pursuant to the decree of the chancery court, and First Commercial had a commissioner's deed to itself describing the fifty-seven acres, arising out of its foreclosure suit against Hall.

Because of these two competing claims to the fifty-seven acres by Stewart and First Commercial, in 1994 First Commercial

(hereinafter referred to as appellee) instituted a quiet-title action against Stewart (hereinafter referred to as appellant) in Lonoke County Chancery Court. The case went to trial, and upon stipulations and testimony, the chancellor entered a decree by which he fashioned the following solution: Since appellee had failed to give appellant notice of its foreclosure action, appellant would be given one year in which to redeem the property by paying the balance owed on Hall's $40,300 loan. If appellant failed to redeem the property within the year, the title would be quieted in appellee.

From that decree appellant brings this appeal arguing, first, that appellee did not meet the requirements for a statutory quiet title action as set forth in Ark. Code Ann. § 18-60-506 (1987); and second, that it would be inequitable for her, as an innocent victim, to bear the burden of paying Hall's $40,300 loan. We agree with appellant that appellee did not meet the requirements for maintaining a quiet-title action.

One other item of information is necessary to an understanding of our decision in this case. In connection with appellee's loan to Hall, appellee had obtained a title insurance policy covering the fifty-seven acres that contained the following "special exceptions":

1. General Taxes and Special Assessments due for 1990 and subsequent years.
2. Special Assessments due Improvement District #5 for the year 1990 and subsequent years.
3. Lease Agreement by and between Willie Laster and Floyd Turner, dated November 17, 19___, filed December 27, 1978 in Miscellaneous Book 38 at page 778, records of Lonoke County, Arkansas. For a term of 15 years, beginning January 1, 1979 and ending the 31st day of September, 1993.
4. Agreement executed by and between Thelma Laster Stewart and Thearders Hall, dated January 22, 1988 and filed for record October 13, 1989 at 3:20 PM in Miscellaneous Book 57 at page 164, records of Lonoke County, Arkansas.

The fourth of these "special exceptions" refers to the recorded contract between appellant and Hall that stated that the deed appellant gave to Hall on January 22, 1988, was given as security to Hall for his loan to appellant.

In deciding this case we recognize that we review chancery cases de novo. *Diener v. Ratterree*, 57 Ark. App. 314, 945 S.W.2d 406 (1997). We will not reverse the chancellor's findings unless they are clearly against the preponderance of the evidence or clearly erroneous. *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

Arkansas Code Annotated § 18-60-506 (1987), provides as follows:

> If the petitioner cannot show a perfect claim of title to any particular tract or tracts of land, it shall be held to constitute a prima facie title if he shall show that he, and those under whom he claims, have had color of title to the land for more than seven (7) years and that during that time, he, or those under whom he claims, have continuously paid the taxes thereon.

We agree with appellant that the chancellor erred in ordering that title to the fifty-seven acres be quieted in appellee unless appellant redeemed the land by paying the balance owed on Hall's mortgage to it.

First, appellee did not show that it held title to the fifty-seven acres. It is obvious from the record, insofar as the parties hereto are concerned, that title to the land is vested in appellant. The chancellor in the lawsuit between appellant and Hall held that appellant's deed to Hall, although absolute on its face, was, in fact, a mortgage that secured Hall's loan to appellant. By virtue of the recorded contract between appellant and Hall and by its title insurance policy, appellee had both constructive and actual knowledge of the terms of the agreement between appellant and Hall. Any interest that Hall had in the fifty-seven acres by virtue of the contract and deed was subject to the equitable title retained by appellant, and when appellant paid her indebtedness to Hall, thereby satisfying the mortgage, Hall's interest (and thus appellee's interest) in the land ceased to exist. It is not unusual for a deed to be given as security for a loan instead of as an outright conveyance, and an examination of the agreement would have informed appellee of

the very strong possibility that appellant's deed to Hall would be treated as such. *See Fuller v. Fuller*, 240 Ark. 475, 400 S.W.2d 283 (1966); *Davis v. Davis*, 48 Ark. App. 95, 890 S.W.2d 280 (1995); *Brown v. Cole*, 27 Ark. App. 213, 768 S.W.2d 549 (1989). Appellee must therefore be charged with knowledge that Hall did not have good record title. *See generally*, *Taylor v. Scott*, 285 Ark. 102, 685 S.W.2d 160 (1985); *Midland Savings and Loan Co. v. Brooks*, 177 Ark. 470, 6 S.W.2d 828 (1928).

Since Hall did not have good title to the land, he could not, by his mortgage, convey good title to appellee. A grantee cannot receive greater title than its grantor has. *See generally Neal v. Stuckey*, 202 Ark. 1119, 155 S.W.2d 683 (1941); *Rust v. Kelley Brothers' Lumber Co.*, 180 Ark. 517, 21 S.W.2d 973 (1929).

Secondly, since appellee cannot show perfect title, it must, in order to quiet title to the land, meet the statutory requirements of color of title and payment of taxes for seven continuous years. There is very little evidence in the record regarding payment of taxes during the seven years preceding the institution of this quiet-title action, and even that evidence is inconclusive. The chancellor's decree in the contract case filed by appellant against Hall noted that Hall had paid $329.50 in taxes. Since the decree was entered on August 31, 1992, those taxes would have had to have been paid between 1988 and 1992. However, it is impossible to tell from the decree to which years these tax payments apply.

During the trial of this case, Steve Clark, appellee's loan officer, stated that he had no records regarding what property taxes, if any, appellee had paid during the preceding seven years. Charles Laster, appellant's son, testified that he made tax payments for his mother for "a couple of years." He provided a tax receipt for the 1992 property taxes and the 1993 improvement district taxes. Finally, the title insurance policy obtained by appellee in 1991 indicated that the taxes were due for 1990 and subsequent years. There is no evidence in the record regarding the payment of those taxes. The only evidence of appellee's payment of taxes is a handwritten note sent by the Lonoke County tax collector's office to Charles Laster. When Mr. Laster tendered a check in

1995 for the taxes, his check was returned to him by the tax collector, along with a note stating that the taxes were now in appellee's name and had been paid on October 18, 1995.

It was appellee's burden to prove that title should be quieted in it. *Corn v. Arkansas Warehouse Corp.*, 243 Ark. 130, 419 S.W.2d 316 (1967). Upon our review of the record, we cannot say that appellee has proven payment of taxes for seven continuous years, as required by Ark. Code Ann. § 18-60-506. Therefore, the chancellor's finding that title should be quieted in appellee is clearly erroneous.

In reaching this decision, we have not overlooked the language in the January 22, 1988, agreement between appellant and Hall by which appellant gave to Hall the option of using the fifty-seven acres as security for future loans for himself. Appellee seems to argue that this language vested in Hall the authority to mortgage the land to appellee notwithstanding the earlier language in the agreement that clearly stated that appellant's deed to Hall was given as security for Hall's loan to her. Even if we did hold that, by this language, Hall acquired an interest in the land that he could mortgage, such interest was subject to the right of appellant to extinguish that interest by the repayment of her loan to Hall.

Based upon the foregoing, we reverse and remand the chancellor's decree with directions to enter an order consistent with this opinion.

Reversed and remanded.

ROGERS and ROAF, JJ., agree.

Mary BOSQUET *v.* STATE of Arkansas

CA CR 92-89 953 S.W.2d 894

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered October 8, 1997
[Petition for rehearing denied November 12, 1997.]

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Mary Bousquet, was convicted in a jury trial of two counts of delivering a controlled substance (cocaine), for which she was sentenced to consecutive terms of fifteen years in prison.[1] She contends on appeal that the trial court erred in allowing the State to exercise its peremptory challenges to exclude black persons in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). We find no merit in her argument and affirm.

As an initial matter, we note that the "venerable practice" of peremptory challenges is designed to promote the goal of fairness in jury trials. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997) (*citing Holland v. Illinois*, 493 U.S. 474 (1990)). It is a custom which dates back beyond the founding of the Republic to origins in the common law. *Id.* The historical practice of allowing a litigant to strike jurors for any reason came into being for the purpose of fostering both the perception and the reality of an impartial jury. *Id.* However, the exercise of peremptory challenges is not without qualification. In *Batson*, *supra*, the United States Supreme Court held that the Equal Protection Clause of the United States Constitution forbids a prosecutor in a criminal case to use his or her peremptory challenges to exclude jurors solely on the basis of race. *Id.* at 84. This prohibition has been extended to litigants in private matters as well. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

Under *Batson* jurisprudence, as recently enunciated by the Court in *Purkett v. Elem*, 514 U.S. 765 (1995), once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to

[1] Appellant's conviction occurred in 1991. However, in 1992, we dismissed her direct appeal for failure to prosecute. In 1996, appellant retained new counsel and sought reinstatement of her appeal. We granted that request on November 27, 1996.

the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination.[2] In *Purkett*, the Court restated the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Our courts have adhered to the guidelines prescribed by the Supreme Court and have developed specific procedures to be followed when considering a *Batson* challenge. *Sonny v. Balch Motor Co., supra.* As was reiterated by the court in *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996), *cert. denied* 117 S.Ct. 979 (1997):

> First, the defendant must make a prima facie case that racial discrimination is the basis of a juror challenge. In the event that the defendant makes a prima facie case, the State has the burden of showing that the challenge was not based upon race. Only if the defendant makes a prima facie case and the State fails to give a racially neutral reason for the challenge is the court required to conduct a sensitive inquiry.

Id. at 514, 931 S.W.2d at 410 (*quoting Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996). The standard of review for reversal of a trial court's *Batson* ruling is whether the trial court's findings are clearly against the preponderance of the evidence. *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996).

Appellant is an African-American. At trial, she raised *Batson* objections to the State's use of peremptory challenges to exclude four African-Americans from the jury. The first objection came when the State struck prospective juror John Johnson. The prosecutor explained that this juror was excluded because he was fidgety, refused to make eye contact with him, and seemed to be

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[2] Appellant raises the issue that we must apply the law of *Batson* as it existed at the time of her trial in 1991. We reject that argument as it is contrary to the decision in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), where the Court specifically addressed the retroactivity of its ruling in *Batson* and held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."

uncomfortable and inattentive. The prosecutor further stated that Mr. Johnson "looked away when asked if he agreed with the law against selling cocaine. I interpreted that to be possibly some hesitancy on his part." The court found that the prosecution had stated a race-neutral reason for the exclusion of this juror and overruled appellant's objection, noting that one African-American had been seated and that the State had not used its remaining strikes to exclude that juror.

The second objection was made when the State used a strike to eliminate Peter Ware from the jury. The prosecutor responded to the motion by saying:

> [t]he juror on the questionnaire gives his age 25. He says, Education, and next to that he says "general, plus 41 hours." I don't know any other juror that I've seen a questionnaire where that answer seems to be so unresponsive. I don't know what "general, plus 41 hrs.," meaning hours, means. Secondly, on the line where its says "number of children," this defendant, this juror, excuse me, has drawn a, what I would call a "smiley face," which consists of a circle with a little smiley face therein, similar to those types of faces which are on those little stickers which previously might have said, "Have a nice day." The fact that this juror has filled out this questionnaire in what I consider to be a very cavalier fashion, also the fact that his occupation being a waiter and cook at Shug's Riverhouse, and he's a 25 year old person, indicates to me, Your Honor, that this juror does not take this particular exercise very seriously, nor is he the type of person who, when asked questions, responds in a reasonable manner. I would conclude from that that this juror is not the type of person that I want on this jury where he could listen to certain testimony and make decisions and make responses in his own mind that would be reasonable. Secondly, when I sat down with Ms. Fowler, who is a deputy prosecuting attorney, about this questionnaire which I saw, Ms. Fowler looked at me and said, "You know, because all during your *voir dire* this juror stared at me and never quit staring." And, Your honor, based on that, it has absolutely nothing to do with the fact that this is a black person. And the court would recall that just on these last people who were called there was a black female, probably close to the age of this defendant which was, who was looking at me all during the *voir dire*, was answering questions by nodding yes or no like the other jurors

> were, and there was, I have no problem with that because of her race. But I do have a problem with this juror because of the questionnaire and that I because of what Ms. Fowler said that this person never looked at me once when I was asking him questions.

The trial court accepted the State's explanation as being racially neutral and overruled appellant's objection, observing that the State had not used one of its remaining strikes to exclude another black juror in the group and that there were currently two black persons who had been selected for service on the jury.

Appellant's third objection was made when the State excluded juror Ruth King. In explaining the exclusion of Ms. King, the prosecutor stated that she had been the foreperson of the jury on a previous drug-related case that had resulted in a hung jury. He said that he had been surprised by that outcome because the case was a strong one where police officers had seen the defendant dispose of cocaine as they approached him. He recalled that Ms. King seemed hostile to him during closing arguments in that case, and he had learned that she had voted to acquit. He also pointed out that he had used a peremptory challenge to exclude from this jury a white person, Kathy Bolan, who had sat on the hung jury with Ms. King and had also voted to acquit.

The final objection was raised to the State's use of a strike against juror James Bledsoe. In response to the objection, the prosecutor explained that Mr. Bledsoe had sat on the same hung jury with Ms. King and Ms. Bolan and that he, too, had voted to acquit. The prosecutor further stated that Mr. Bledsoe had seemed antagonistic toward him in the previous case, which pitted the credibility of the police against that of the defendant. He felt that Mr. Bledsoe bore hostility toward the police. The court accepted the State's explanation as being race-neutral and overruled appellant's objection. The court observed that the previous case and the case at bar both involved narcotics and the credibility of the police and that the State had struck a white juror for the same reason.

At the conclusion of *voir dire*, the court stated:

> In order to complete the record on the *Batson* objections, I would note that there are three black jurors seated on this current jury, namely Mrs. Laura Montgomery, Mrs. Catherine Burns, and Mrs. Geneva Higgins. Two of these black jurors were seated and accepted while the State still had strikes remaining and could have struck them. As one court put it, this is not a monochromatic jury. The percentage or proportion of the jurors on this jury, on the seated jury, exceeds the racial make-up of this community, which, I understand, is less than 20%, about 16%.

Prima Facie Case

A *prima facie* case may be established by: (1) showing that the totality of relevant facts gives rise to an inference of discriminatory purpose; (2) demonstrating total or seriously disproportionate exclusion of blacks from the jury; or (3) showing a pattern of strikes, questions, or statements by a prosecuting attorney during *voir dire* suggesting racial motivation. *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996). In the case at hand, the trial court asked the prosecutor to enunciate his reasons for the strikes immediately after each objection was made. In this situation, once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot. *Prowell v. State*, *supra*; *see also Cleveland v. State*, 326 Ark. 46, 930 S.W.2d 316 (1996). Consequently, we will assume the existence of a *prima facie* case for purposes of our review.

Race-Neutral Explanations

According to the decision in *Purkett v. Elem*, *supra*, at this stage of the analysis the proponent of a peremptory challenge is not required to offer an explanation that is either plausible or persuasive. The issue is the facial validity of the prosecutor's explanation; it must be a reason that does not implicate the denial of equal protection. Unless discriminatory intent is inherent in the State's explanation, the reason offered is to be considered race-neutral. In *Purkett*, the explanation offered for excusing the juror

was that he had long, unkempt hair, as well as a mustache and beard. The Court held that the explanation was race-neutral in that shagginess and the wearing of facial hair is not peculiar to any race.

Here, although the appellant presents no direct challenge to the trial court's findings that the reasons offered by the State were race-neutral, we have no hesitancy in concluding that they were. None of the reasons advanced are peculiarly associated with race, and we can discern no discriminatory intent inherent in the prosecutor's explanations. *See e.g., Hugh Chalmers Chevrolet-Cadillac-Toyota, Inc. v. Lang*, 55 Ark. App. 26, 928 S.W.2d 808 (1996). A juror's hesitancy to follow the law has been accepted as a race-neutral explanation, *Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996), as well as a prosecutor's feeling that he "had gotten some mixed signals about what [a prospective juror] would require in terms of the State's proof." *Sims v. State*, 320 Ark. 528, 900 S.W.2d 508 (1995). Striking a juror for the reason that the juror had been on a jury that had acquitted a criminal defendant has been accepted as a race-neutral explanation. *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994). Also, our supreme court has recognized that challenges based on a juror's age, demeanor during *voir dire*, and employment background are acceptable as race-neutral explanations. *Sonny v. Balch Motor Co., supra.* The trial court's findings concerning the racial neutrality of the State's explanations are not clearly against the preponderance of the evidence.

Discriminatory Intent

Appellant's argument for reversal is directed toward this stage of the inquiry. She argues that the reasons offered by the State for excluding these jurors were merely a pretext for racial discrimination. At this juncture, the persuasiveness of the State's reasons becomes relevant in determining whether the opponent of the strike has carried her burden of proving purposeful discrimination. *Purkett v. Elem, supra.* The trial court must consider the evidence and explanations presented along with its observations of the proceedings to determine whether the neutral explanations given are genuine or pretextual. *Sonny v. Balch*

Motor Co., supra. Our standard of review affords great deference to the trial court's exercise of discretion in determining discriminatory intent relating to the use of a peremptory strike. This is so because the question turns largely on the issue of credibility, and the trial court is in a superior position to judge the truthfulness of the prosecutor's explanation with respect to the demeanor of the juror involved. *Id.*

The trial court in this instance considered the overall facts and circumstances and found the prosecutor's explanations to be persuasive. In finding the absence of discriminatory intent, the court observed that the first two jurors in question were struck at a time when black persons had been seated on the jury, even though the State had strikes available which it could have used to remove them. The court also found that the remaining jurors were struck for the same reason that a white person was excluded. The court further found that there were three black persons seated on the jury and that the percentage of black persons on the jury exceeded that found in the community.

It has been said that a prosecutor's failure to apply a stated reason for striking black jurors to similarly situated white jurors may evince a pretext for excluding jurors solely on the basis of race. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995). We think the converse is equally true - that the exclusion of a white juror for the same reason that black jurors are excluded may indicate the lack of discriminatory intent. Also, the non-use of available peremptory strikes to exclude black persons from a jury is considered cogent evidence indicating the absence of discriminatory motivation. *See e.g. Cleveland v. State, supra*; *Watson v. State*, 318 Ark. 603, 887 S.W.2d 518 (1994); *Tucker v. State*, 313 Ark. 624, 855 S.W.2d 948 (1993). And, the presence of minority members on the jury, while by no means determinative, is significant. *Cooper v. State, supra.* When these elements are combined with the explanations given by the prosecutor, we cannot say that the trial court's finding is clearly against the preponderance of the evidence. Therefore, we must reject appellant's contention that the reasons offered by the State were pretextual.

With all due respect for the dissenting judge's opinion, it is one that exceeds the bounds of the argument raised on appeal. The appellant does not contend that the trial court failed to adequately delve into the reasons asserted by the State for its exercise of the strikes. It is appellant's sole contention that the reasons, based on this record, were pretextual and that the trial court's finding to the contrary is clearly erroneous. Under long-standing procedure, this court is to consider only the arguments raised by the parties, and we are not to consider reversing a trial court for unargued reasons. *Hancock v. First Stuttgart Bank*, 53 Ark. App. 150, 920 S.W.2d 36 (1996). By confining ourselves to the arguments that are raised, we are striving to avoid the mistaken role of being a "super trial court" or an advocate of one party to the appeal. That is not our function as an appellate court. In sum, when we examine the facts and circumstances surrounding the exercise of the strikes and give due deference to the trial court's superior position to evaluate the prosecutor's responses, we are in no position to say that the explanations given were so fantastic or implausible as to compel a conclusion of improper discriminatory intent.

Affirmed.

NEAL, PITTMAN, AREY, and CRABTREE, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting.

PRETEXT (n.) A reason put forward to conceal one's true reason.

TRUE (adj.)
1. In accordance with fact.
2. In accordance with correct principles or an accepted standard, rightly so called, genuine and not false.

OXFORD AMERICAN DICTIONARY 528, 738 (1980)

[T]he trial court in this case had a duty to do more than accept without comment, inquiry, or finding of fact the prosecutor's explanation. To say that such an explanation, or any other explanation, may be regarded as sufficient without any judicial inquiry makes a mockery of the Batson decision . . . . Surely any prosecutor can offer neutral reasons . . . .

Colbert v. State, 304 Ark. 250, 257, 801 S.W.2d 643 (1990) (Newbern, J., concurring).

The majority opinion shows that trial courts in Arkansas are not obligated to conduct any inquiry concerning the genuineness of racially neutral explanations offered after people of color have been peremptorily excluded from jury service. Arkansas follows this approach despite the promise in *Batson v. Kentucky*, 476 U.S. 79 (1986), that, in deciding if a party has carried her burden of persuasion of intentional race discrimination by the way that an opponent peremptorily excludes minority group members from jury service, "a court *must* undertake a 'sensitive inquiry' into such circumstantial and direct evidence of intent as may be available." *Id.* 476 U.S. at 93 (emphasis added). I respectfully dissent.

The State exercised peremptory challenges to exclude four African-Americans in appellant's trial. John Johnson and Peter A. Ware were struck without questioning. Ruth King and James Bledsoe were excluded after being questioned. The prosecutor used four of his five peremptory challenges to strike African-Americans. Three other African-Americans were part of the jury.

The prosecutor contended that John Johnson was "fidgety," and that Johnson did not make eye contact during voir dire. He asserted that Peter Ware's answer on a juror questionnaire was unresponsive when it indicated that his education was "general, plus 41 hours," and that Ware's answer was unresponsive concerning whether he had children when it contained a zero with a "smiley face." The prosecutor also stated concerning Ware:

> The fact that his occupation being waiter and cook at Shug's River House, and he a (sic) 25 year-old person, indicates to me, Your Honor, that this juror does not take this particular exercise very seriously, nor is he the type of person who, when asked questions, responds in a reasonable manner. . . . Secondly, when I sat down and I began to tell Ms. Fowler, who is a deputy prosecuting attorney, about this questionnaire which I saw, Ms. Fowler looked at me and said, "You know, because all during your voir dire this juror stared at me and never quit staring."

The prosecutor explained that he peremptorily challenged King and Bledsoe because King had been the foreperson and Bledsoe had served in another drug case that resulted in a hung jury (six votes for conviction and six votes to acquit).

The trial judge simply "accepted" the prosecutor's reasons for exercising the peremptory challenges as racially neutral. Despite argument by appellant's trial counsel (appellant is represented by different counsel on appeal) that the prosecutor's reasons were "simply a pretext for the impermissible use of the peremptory challenge," the trial court made no effort to determine the genuineness of the racially neutral explanations, and it made no findings for us to review on that critical issue. Rather, the trial judge stated as to John Johnson:

> All right. The State has stated a racially neutral reason, which this Court accepts based upon the overall circumstances of this case, including the fact that there was—that the State did not strike a black juror for which it had an opportunity to strike, namely Mrs. Geneva Higgins.
> I notice that Mrs. Higgins has been here on several other occasions. But, based upon that, the overall circumstances of the case, I accept that as a racially neutral reason as has been previously accepted in other cases, even other cases out of this Court. So not regarding the untimeliness of the motion, this Court would not — would have overruled the *Batson* objection in any event.
> As to Ware, the trial judge stated:
> The Court accepts the State's explanation as being racially neutral, and based in (sic) the obvious evidence in this case, I would note that also at this point the State has several challenges left. . . . There are now two black jurors seated on this jury that the defense, I mean that the State could have struck because they had peremptory challenges available to them, and so motion, your objection based upon *Batson v. Kentucky* is denied.

As to Ruth King, the trial court stated concerning appellant's *Batson* objection:

> The Court finds that [King's vote to acquit in a different case] to be a racially neutral and acceptable reason in this matter, and so your motion is overruled, Sir.

The court's ruling as to James Bledsoe was as follows:

> The fact that the State has stated that Mr. Bledsoe sat on the same jury with Mrs. King and Mrs. Bolan [a white person also peremptorily challenged], which they have also struck, Mrs. Bolan being white, and Mrs. King and Mr. Bledsoe being black, that is a racially neutral reason that has been accepted in other cases, the fact that they have sat on hung juries. They have also struck a white for the same reason that they say was on the same jury, and it is their information that these folks also voted against them somehow. But, they say that other reasons against Mr. Bledsoe, the statement that they have previously sat on juries which did not reach a verdict, and feeling that they were a cause of it, and because it is a similar case involving narcotics, and it was undercover agents versus other persons. In other words, the same or similar circumstances the Court feels that that's a racially neutral reason, and your motion will be overruled.

However, *Batson v. Kentucky* and other cases clearly require that trial courts do more than "accept" a prosecutor's racially-neutral explanations for using peremptory challenges to exclude persons of color from jury service. The Supreme Court observed in *Batson* that trial courts must undertake a "sensitive inquiry" into available circumstantial and direct evidence of discriminatory intent in deciding if a criminal defendant has carried the burden of persuasion on the discrimination claim. *Batson*, 476 U.S. at 93. The Court recognized that using peremptory challenges to exclude persons of color from jury service violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. As Justice Powell stated in the majority opinion:

> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

Batson, *supra*, 476 U.S. at 89 (citations omitted).

The decisions in *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987), and *Mitchell v. State*, 295 Ark. 341, 750 S.W.2d 936 (1988), show that the Arkansas Supreme Court once followed the

Batson standard by requiring that trial judges conduct a "sensitive inquiry" aimed at evaluating the genuineness and sufficiency of a prosecutor's racially neutral explanations for using peremptory challenges to exclude persons of color from jury service. In *Ward*, the supreme court reversed and remanded Ronald Ward's convictions and death sentences for murdering three people. The prosecutor exercised all eight of his peremptory challenges to strike African-Americans from the jury, but the trial court failed to rule on the prosecutor's race-neutral explanations. Our supreme court relied on *Batson v. Kentucky* and the requirement that a trial judge undertake a "sensitive inquiry" into the direct and circumstantial evidence available to decide if the prosecutor's racially neutral explanations were genuine. *Ward*, at 93, 733 S.W.2d at 730.

A year later the supreme court reversed and remanded Lonnie Mitchell's convictions for kidnapping, rape, and battery for which he had received separate life sentences on the kidnapping and rape convictions, and thirty years' imprisonment on the battery conviction. *Mitchell, supra.* In that case the prosecutor peremptorily struck the only African-American from the jury and explained that the black juror was struck because the prosecutor doubted his truthfulness and candor in responding to direct questions during voir dire. Writing for the court, Justice Newbern stated:

> Mitchell made a prima facie case of discrimination in the prosecution's use of its peremptory challenge to remove the only black prospective juror after questioning him closely on whether his race would affect his vote. Absent inquiry by the court, we have before us no factual determination whether the prosecutor was assuming Mr. Petty could not withstand the racial pressures and thus assuming he could not have been answering truthfully on that subject. *The court has a duty to go beyond the prosecutor's explanation and make a "sincere and reasoned" effort to evaluate its genuineness and sufficiency "in the light of all the circumstances of the trial."*
>
> . . .
>
> *Because the trial court accepted the prosecutor's explanation at face value and made no inquiry, we need not consider the explanation's validity to decide this case. We must note, however, that the explanation was one*

> *which could have been given with respect to any venire person and could be used to screen improper motive.*

Mitchell v. State, 295 Ark. at 348-49, 750 S.W.2d at 940 (emphasis added, citations omitted).

However, since 1990, Arkansas has followed the procedure that when a racially neutral explanation is offered (step 2), the trial court must then merely determine from all relevant circumstances whether the racially neutral explanation is sufficient. *Colbert v. State*, 304 Ark. 250, 801 S.W.2d 643 (1990). In *Colbert*, our supreme court reversed and remanded a conviction for delivery of a controlled substance — rock cocaine — and a sentence of life imprisonment and fine of $25,000, because a trial judge failed to rule on the sufficiency or insufficiency of racially neutral explanations offered by a prosecutor who struck two black members of the venire, leaving the defendant to be tried by an all-white jury. The court focused on whether the trial judge should have ruled on whether the prosecutor's explanation for excluding the black venire persons was sufficient to be racially neutral, as the following excerpt from the majority opinion demonstrates:

> We could infer from the fact that the trial proceeded without any action being taken that the court accepted as sufficient the prosecutor's "racially neutral" explanation, and we could then discuss whether we agree or disagree with the trial court that the reasons given by the state were sufficient to satisfy the issue raised by the appellant. Under our previous holdings, however, even if the state's explanation satisfied the trial court, the court was still required to make a sensitive inquiry to eliminate any possibility of racial bias. *See Mitchell v. State*, 295 Ark. 341, 750 S.W.2d 936 (1988).
>
> . . .
>
> We now hold that upon a showing by a defendant of circumstances which raise an inference that the prosecutor exercised one or more of his peremptory challenges to exclude venire persons from the jury on account of race, the burden then shifts to the State to establish that the peremptory strike(s) were for racially neutral reasons. *The trial court shall then determine from all relevant circumstances the sufficiency of the racially neutral explanation. If the*

> *State's explanation appears insufficient, the trial court must then conduct a sensitive inquiry into the basis for each of the challenges by the State.*
>
> The standard of review for reversal of the trial court's evaluation of the sufficiency of the explanation must test whether the court's findings are clearly against a preponderance of the evidence. *In every instance, however, the court shall state, in response to the defendant's objection, its ruling as to the sufficiency or insufficiency of the racially neutral explanation provided by the State.*

Colbert at 254–55, 801 S.W.2d at 645–46 (emphasis added). In a separate concurring opinion, joined by Justices Dudley and Glaze, Justice Newbern agreed that the racially neutral explanations given by the prosecutor were "thin," and that reversal was justified because the trial court did not conduct the "sensitive inquiry" prescribed in *Batson*. However, Justice Newbern objected that the majority opinion had gone "out of its way to strike with crippling blows" the opinions in *Ward* and *Mitchell*, stating:

> This case is a good example of the kind in which the requirement for a sensitive inquiry by the trial court is proper, and it is a good example to show why it is required.
>
> While the defendant may have an overall burden of proof on the issue of discrimination in the selection of jurors, I believe it is clear, and the majority opinion here recognizes, that once the prima facie display has been brought to the court's attention, the burden of going forward with the evidence clearly shifts to the prosecution. When a pattern or other evidence of discrimination, either in the case at hand, or historically, appears, the defendant has demonstrated the need for a factual inquiry . . .
>
> *The majority opinion recognizes that the trial court in this case had a duty to do more than accept without comment, inquiry, or finding of fact the prosecutor's explanation. To say that such an explanation, or any other explanation, may be regarded as sufficient without any judicial inquiry makes a mockery of the essence of the Batson* decision.
>
> Had the trial court inquired behind the prosecution's racially neutral explanations, we would probably not have this issue before us. While I agree with the majority opinion that the explanations appear to be "thin," given other factors in the record, I am not certain that they might not have been wholly racially neutral. The problem is that the trial court, despite his much better position than ours for doing so, did not attempt to find out. Surely any prosecutor can offer neutral reasons . . . .

Colbert at 257, 801 S.W.2d at 647 (emphasis added).

Since *Colbert*, our supreme court has held that *Batson* challenges do not require a trial court to undertake a "sensitive inquiry" into the genuineness of racially neutral explanations offered when black members of a venire are peremptorily excluded where it has found the racially neutral explanations "sufficient." *See Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997); *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996); *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996); and *Hollamon v. State*, 312 Ark. 48, 846 S.W.2d 663 (1993).

However, in *Purkett v. Elem*, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), the United States Supreme Court issued a per curiam opinion that explains when the plausibility of racially neutral explanations should be examined:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forth with a race-neutral explanation (step 2). *If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.* . . . The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. . . .
>
> *It is not until the third step that the persuasiveness of the justification becomes relevant — the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.*

Id., 131 L.Ed.2d at 839 (citations omitted, emphasis added).

Thus, *Batson* and *Purkett* show that trial judges *must* make explicit findings about the sufficiency *and genuineness* of the racially neutral explanations given by parties whose peremptory challenges raise *prima facie* claims of race discrimination. *Purkett* shows that trial courts are obligated to scrutinize racially neutral explanations for genuineness — not mere sufficiency — as part of the third step

of the *Batson* analytical process, and before deciding if the *Batson* movant has met her burden of proving intentional race discrimination by a preponderance of the evidence. That position is simply consistent with the Supreme Court's requirement in *Batson* that trial courts undertake a "sensitive inquiry" into the available evidence regarding a prosecutor's allegedly discriminatory intent before deciding if a *Batson* movant has carried her burden of persuasion.

The Effect of Failing to Undertake a "Sensitive Inquiry" Regarding Genuineness of Racially Neutral Explanations

Here the trial court undertook no inquiry, sensitive or otherwise, designed to assess the genuineness of the prosecutor's racially neutral explanations. It made no findings about the genuineness of the racially neutral explanations. Had the trial court conducted the required "sensitive inquiry" and made findings, then we could review the totality of the circumstances surrounding each challenge and the racially neutral explanations to decide appellant's claim that the trial court's *Batson* rulings are clearly against the preponderance of the evidence. But without the requisite inquiry and findings mandated by *Batson* and *Purkett*, we have nothing to review on the crucial pretext question that is central to deciding whether discriminatory purpose has been established under equal protection analysis. *See Washington v. Davis*, 426 U.S. 229 (1976).

Like the situations in *Ward* and *Mitchell*, the trial court in this case "accepted" the prosecutor's explanations for peremptorily challenging Johnson, Ware, King, and Bledsoe at face value, did not "go beyond the prosecutor's explanation," and failed to make "a 'sincere and reasoned' effort to evaluate [their] genuineness and sufficiency 'in the light of all the circumstances of the trial.'" *Mitchell v. State*, *supra*, 295 Ark. at 348, 750 S.W.2d at 940. As in *Mitchell*, the prosecutor's racially neutral explanations for excluding Johnson, Ware, King, and Bledsoe could have been given to screen a discriminatory motive. But without the "sensitive inquiry" mentioned in *Batson* that *Purkett* held proper at the third step of the *Batson* process, the trial court could not possibly have found that the prosecutor's explanations withstood pretext scrutiny and were genuine.

Merely because a jury includes one or more members of a racial minority does not mean that racially neutral explanations for excluding others are genuine. Yet, in ruling on appellant's *Batson* objections, the trial court repeatedly mentioned that the prosecutor had not struck other African-Americans. The Fourteenth Amendment's equal protection guarantee, as *Batson* and *Purkett* show, means that whenever a prosecutor presents a race-neutral explanation for peremptorily excluding a person of color from the jury within the context of a *Batson* challenge, then a trial judge must make findings concerning the explanation based upon a "sensitive inquiry" into its genuineness. That duty does not depend on whether there are other persons of color seated on the jury. The United States Supreme Court recognized this truth in *Batson* when it stated:

> "A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." For evidentiary requirements to dictate that "several must suffer discrimination" before one could object would be inconsistent with the promise of equal protection to all.

Id. at 95-96 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), and *McCray v. New York*, 461 U.S. 961, 965 (1983)) (Marshall, J., dissenting from denial of certiorari). Equal protection for all requires equal protection for everyone.

Justice Newbern was right in *Colbert, supra*, that "any prosecutor can offer neutral reasons" for exercising peremptory challenges. That is why trial judges must, under *Batson* and *Purkett*, "distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of [race] discrimination." *People v. Wheeler*, 22 Cal.3d 258, 282, 148 Cal. Rptr. 890, 583 P.2d 748 (1978). The "sensitive inquiry" required by *Batson* and *Purkett* obligates trial courts to inspect racially neutral explanations and determine if they are genuine, or simply shams offered to conceal discriminatory intent contrary to the constitutional guarantee of equal protection for every litigant and every potential juror.

Race discrimination in the "venerable" practice of peremptory challenges was legal for almost 370 years before *Batson* was decided in 1986. It has hidden behind racially neutral explanations for barely more than a decade. Given the widespread and longstanding practice of peremptorily eliminating persons of color from juries, it is both unrealistic and unreasonable to expect that prosecutors who articulate racially neutral explanations for exercising peremptory challenges will not do so to conceal discriminatory intent. Justice Thurgood Marshall addressed this reality in his concurring opinion in *Batson* as follows:

> Any prosecutor can easily assert facially neutral reasons for striking a juror . . . Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported . . . . [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice.

Batson, *supra*, 476 U.S. at 106 (quoting *King v. County of Nassau*, 581 F.Supp. 493, 502 (E.D. NY. 1984)(citations omitted).

Discriminatory intent will seldom be apparent. Trial judges are not clairvoyant. Therefore, the "sensitive inquiry" that *Batson* and *Purkett* command is vital to ensure that equal protection is provided every litigant and venire person. When trial judges "go beyond the prosecutor's explanation and make a sincere and reasoned effort to evaluate its genuineness and sufficiency in the light of all the circumstances of the trial," *Mitchell v. State*, *supra*, they are more likely to uncover a sham than by blindly accepting the prosecutor's explanation at face value. "[S]eek and ye shall find," (Luke 9:11) is as valid regarding discriminatory intent and pretext as it is for moral truth. Likewise, those who look for nothing usually find it.

Had the trial judge conducted a "sensitive inquiry" aimed at evaluating the genuineness of the prosecutor's racially neutral reasons for peremptorily challenging Johnson, Ware, King, and Bledsoe, he could have asked the prosecutor to explain why he determined Ware to be "unresponsive" about his education and parental status, especially after failing to question Ware during voir dire. The prosecutor could have been asked why Ware's occupation as a restaurant cook and waiter suggested that he did not consider jury service "seriously," particularly when the prosecutor did not challenge John Yates, a white man who worked as a stocker for Sam's Wholesale. Why was the way that Ware looked at the deputy prosecutor so different from the way that other persons in the venire looked at her that Ware was unlikely to be fair and impartial? If Ware was "staring" at the deputy prosecutor rather than paying attention, why didn't the lead prosecutor notice it? Why were King and Bledsoe deemed unfit to fairly and impartially weigh the evidence and apply jury instructions based on their service on an evenly divided jury that had disagreed on whether the prosecution met its burden of proof in a previous and unrelated drug case? The trial judge could have compared his assessment of Johnson's attentiveness during voir dire with the prosecutor's claim that Johnson was "fidgety" and inattentive. These questions, by no means exhaustive, illustrate the type of inquiry that the trial court should have undertaken under the *Batson* and *Purkett* holdings to decide whether the prosecutor's racially neutral explanations were genuine or merely pretexts made to mask discriminatory intent. The prosecutor's responses to these questions would have not only provided the trial judge with the information needed to determine if the racially neutral explanations were pretextual, but they would have also been part of the total record for appellate review of the trial court's findings on the pretext issue. It is regrettable that this type of inquiry is no longer deemed necessary or worthwhile in Arkansas.

Frederick Douglass once said, "There is no Negro problem. The problem is whether the American people have loyalty enough, honor enough, patriotism enough, to live up to their own Constitution . . . ." His words ring painfully true as one considers the references to the "venerable" practice of peremptory

challenges in the majority opinion. Judging from those references, one would think that the peremptory challenge is part of our fundamental rights and equal protection a lesser thing. When one considers that the reverse is the case, then Douglass's words not only ring true, they bring to mind the words of Stephen Vincent Benét, who wrote, "The loves we had were far too small."

Despite *Batson's* requirement for a "sensitive inquiry," peremptory challenges in Arkansas can now exclude persons of color from jury service, and *Batson* objections will be overruled, without inquiries and findings concerning whether implausible, fantastic, superstitious or otherwise racially neutral explanations are merely pretexts for discriminatory intent. *Batson* and *Purkett* show that the equal protection guarantee demands much more than that. At a minimum, the equal protection guarantee, forged into our fundamental notion of rights after 250 years of slavery and another 120 years of legalized discrimination, demands that claims of discriminatory motive in exercising peremptory challenges not be trivialized.

I respectfully dissent.

Kathy STEWART *v.* STATE of Arkansas

CA CR 97-236 953 S.W.2d 599

Court of Appeals of Arkansas
Division III
Opinion delivered October 15, 1997

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, Deputy Public defender, for appellant.

Winston Bryant, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Kathy Stewart appeals her conviction after a bench trial for possession of a controlled substance, cocaine, for which she was sentenced to three years' probation, ordered to pay a $250 fine plus court costs, and given thirty days in jail. Her sole point on appeal is that the trial court erred in declining to suppress the evidence seized from her person by the police officer who stopped her in the early morning of December 4, 1995. We agree with appellant and reverse her conviction.

The events leading up to appellant's arrest are as follows. A Little Rock police officer was patrolling what he characterized as a "high drug traffic" area when he observed appellant standing on the corner of 27th Street and Broadway at approximately 1:45 a.m. This street corner was in front of her residence at 2715 Broadway. She was wearing a jacket, and when the officer approached her he asked her to remove her hands from her pock-

ets. She removed them, but according to the officer's testimony, she continued to try to put her hand back into her right jacket pocket. At that point the officer determined he would do a "pat-down safety search." Upon reaching into that pocket, he found thirty-five one dollar bills, a one-hundred dollar bill, and a small matchbox. He opened the matchbox and found two rocks that appeared to be crack cocaine.

When the public defender asked the officer at the bench trial what criminal activity aroused his suspicion about appellant when he approached her, the following exchange took place:

> "I felt that she might have been engaged in drug trafficking."
> "Had you seen her do that?"
> "Given the area, I've made numerous arrests in that area. Given the time of day and where she was standing—"
> "But did you see Ms. Stewart engage in any of those activities other than standing on the corner?"
> "I felt that by being at that area, she was in engaged in that activity."
> "Did you see her talk to anyone, deliver any substance to anyone or do anything of that nature?"
> "No, I did not."

Appellant took the stand in her own defense. She testified that she was standing out in front of her residence. The police drove up to her, and she talked to the two officers. When they asked what was in her pockets, she told them that she had money from her paycheck, matches, and cigarettes. She approached the police car as they requested, and the police conducted a search of her outer clothing. She explained that the drugs in the matchbox belonged to her cousin who had borrowed money and her jacket earlier that evening.

The State first argues that we should not reach the merits of appellant's appeal because she failed to preserve the issue for review. Specifically, it asserts that although appellant filed a motion to suppress the cocaine based upon an illegal search and seizure, brought it to the attention of the trial judge at the commencement of the bench trial, and renewed her motion at the close of the trial, she failed to object to the admission of the

cocaine upon the same search and seizure argument when it was introduced through the testimony of the chain-of-custody officer.

The State cites *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984), for this proposition, but in that case the appellant argued for the first time on appeal that the trial court should have excluded evidence based upon an illegal arrest. Such is not the case before us now; it cannot seriously be argued that this issue is being raised for the first time on appeal. The State also cites *Rideout v. State*, 22 Ark. App. 209, 737 S.W.2d 667 (1987), but that case involved an appellant who neither moved to suppress evidence nor objected to the evidence when it was admitted. Again, this is anything but true in the case before us today. The State presents no compelling authority that would require us to decline review of appellant's argument.

We recognize that there are cases stating that, with regard to motions in limine, one must contemporaneously object to the evidence if the court initially declines to rule on the motion. *Slocum v. State*, 325 Ark. 38, 924 S.W.2d 237 (1996); *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995). However, those cases state that rule in the context of jury trials.

Indeed, we believe that appellant was not required in this case to object again as the State presented its version of the facts to the judge. At the beginning of the bench trial, the public defender stated that a motion to suppress the evidence seized had been filed and asked if that issue could be taken up during the course of the bench trial testimony. The trial judge responded, "Sure. Sure. Let's do that." The prosecutor said nothing, acquiescing in this decision. After the prosecutor ended her examination regarding the chain-of-custody of the cocaine and rested the State's case, the public defender renewed the motion to suppress the evidence. She renewed the motion at the close of appellant's case, and the trial judge denied it "for the same reasons I stated earlier." Those reasons are not found in the record, but it is clear the motion was denied, and the trial judge found appellant guilty.

On the facts of this case, we cannot say that appellant failed to preserve this issue for our review. We emphasize that this was a *bench* trial, and it was the trial judge who would both find

the facts and rule on evidentiary questions. With an agreement to take up the issue during the course of trial and with the trial judge as the determiner of all facts and rulings, we cannot say appellant failed to preserve this issue for appeal. For this reason we reach the merits of appellant's argument.

■ In reviewing a trial court's denial of a motion to suppress, we make an independent determination based upon the totality of the circumstances. We reverse only if the ruling is clearly against the preponderance of the evidence. *Norman v. State*, 326 Ark. 210, 931 S.W.2d 96 (1996).

■ Appellant argues that the State could not stop and detain her based upon Rule 3.1 of the Arkansas Rules of Criminal Procedure. We agree. Rule 3.1 was the primary basis upon which the State argued that the initial stop was valid. Rule 3.1 states in pertinent part:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

"Reasonably suspects" means having a suspicion based on facts or circumstances that of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than bare suspicion; a suspicion that is reasonable as opposed to imaginary or conjectural suspicion. Ark. R. Crim. P. 2.1. Based upon the testimony elicited from the police officer, he had nothing more than "feelings" that appellant "might" be engaged in drug trafficking.

■ ■ The State alternatively asserts that the police officer correctly stopped to question appellant under the authority found in Ark. R. Crim. P. 2.2, which provides that an officer may ask any person to furnish information or cooperate in the investigation of or prevention of crime. Although this was never urged as a basis to sustain the stop at the trial level, we recognize that we may

affirm a trial court if it reached the right result for the wrong reason. *Hagen v. State*, 315 Ark. 20, 864 S.W.2d 856 (1993). The Arkansas Supreme Court has interpreted Rule 2.2 such that an officer may approach a citizen in much the same way that a citizen may approach another citizen and request aid or information. *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 799 (1997). When the patrol car drove up to appellant standing on a street corner, this was simply a consensual public encounter and was not yet a seizure. *See U.S. v. Hernandez*, 854 F.2d 295 (8th Cir. 1988). The initial encounter of appellant and the police on a public street corner fits most appropriately within the parameters of Ark. R. Crim. P. 2.2, considering the manner of the interference, the gravity of the crimes in the area, and the circumstances of the encounter. Therefore, the initial meeting between the officer and appellant was legitimate under Rule 2.2. *See McFadden*, 327 Ark. at 21.

The behavior of the police officer was proper until the subsequent search exceeded permissible limits. Pursuant to Ark. R. Crim. P. 3.4:

> 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 officer or others, the officer . . . 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.*

(Emphasis added.) The purpose of a frisk pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), is to allow an officer to pursue an investigation without fear of violence. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 285 (1982).

While this encounter did not rise to the level of suspicion of criminal activity as contemplated by Rules 3.1 and 3.4, police officers cannot be asked to risk what they perceive could be a lethal encounter in performing their public duties unless they are also allowed to make a protective frisk. Certainly an officer's safety is as important during an encounter pursuant to Rule 2.2 as it is in the context of a Rule 3.1 stop with a reasonable suspicion

of crime. Here, appellant's furtive movements and unwillingness to keep her hand out of her pocket warranted a protective pat-down search.

However, after this protective search, the officer went beyond mere protection. We see nothing in the record to suggest that the matchbox taken from appellant's pocket contained a weapon or posed a risk to the officer's safety. Even if this is a high-crime area, without some evidence other than suspicion or a hunch that a matchbox contains a controlled substance, it is patently inappropriate for an officer, under the guise of maintaining his or others' safety, to take a matchbox and open it. This was not a search incident to arrest. A protective search must be no more invasive than is necessary to ensure the officer's safety; looking inside the matchbox ensured no more safety to the officer.

As the United States Supreme Court in *Terry* stated:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Terry, 392 U.S. at 9, citing *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891). The Court went on to state:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

Terry, 392 U.S. at 15.

People often have no choice but to live in what might be characterized as high-crime or high-drug-traffic areas. However, Fourth Amendment rights follow all citizens, no matter where they live. It is apparent that the police officer suspected

that appellant was in possession of drugs, but searching appellant's personal belongings when the officer's safety was not in jeopardy exceeded constitutional bounds. The State asks us to follow *Jackson v. State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991), wherein crack cocaine was discovered inside appellant's matchbox that was found during a pat-down search. An equally divided court affirmed the search of the matchbox, the divisive point being whether the opening of the matchbox was constitutional. A case affirmed by an equally divided court is afforded no precedential weight. *France v. Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987). On the issue before us, we are more aligned with the reasoning espoused by the dissenting judges in the *Jackson* case. Because this was an unreasonable search and seizure, the motion to suppress the fruit of the search should have been granted.

Reversed and remanded.

CRABTREE and MEADS, JJ., agree.

Forest A. McMILLAN *v.* U.S. MOTORS

CA 96-1231 953 S.W.2d 907

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 15, 1997
[Petition for rehearing denied November 19, 1997.]

Lane, Muse, Arman & Pullen, by: *Shannon Muse Carroll*, for appellant.

Roberts Law Firm, P.A., by: *Mike Roberts*, for appellee.

D. FRANKLIN AREY, III, Judge. This is a workers' compensation case in which the appellant, Forest McMillan, claims that he sustained a shoulder injury at work. The Workers' Compensation Commission denied benefits. On appeal, appellant argues that he did prove a compensable injury, that his injury was causally related to his employment, and in the alternative, that his injury aggravated a preexisting condition. We affirm.

In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1991). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). Where, as here, the Commission has denied a claim because of a failure to show entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995).

In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings

of fact only those portions of the testimony it deems worthy of belief. *Id.*

Appellant's primary job consisted of operating a machine that made motor shafts. On Friday, January 13, 1995, near the end of his shift, appellant was taking a part out of the machine he was operating and replacing it with another. While following this procedure, appellant's shoulder popped, and he experienced extreme pain, which he described as feeling "like somebody drove a shaft down through my neck and all the way down that came out my heel in my foot." Appellant did not complete any additional production work during his shift; he completed some clerical duties and went home.

Appellant testified that he could not use his left arm that weekend. He returned to work the following Monday, using only his right hand and arm to perform his tasks. He did so again on Tuesday; when his supervisor noticed, appellant explained that he had hurt his shoulder the previous Friday. Appellant testified that he continued to work for more than a full week without seeking medical treatment, explaining that he had separated his right shoulder on two prior occasions, and only received medication as treatment.

Appellant contended that his employer required him to take off work because of his physical problems, and would not permit him to return to work without a full medical release. Appellant was examined at the Austin Medical Clinic on January 23, 1995. Appellant previously sought treatment at this clinic on November 2, 1994, for a similar problem with his left shoulder that he developed while chopping wood at home. The doctor's notes from his January 23, 1995 visit reflect that the appellant's problems were the same for which the doctor treated appellant on November 2, 1994.

Doctor Austin gave the appellant a release, but his supervisors would not accept it. Appellant testified that his supervisors told him they would not allow him to come back to work until he was "100%." Appellant then went to see another physician, Dr. Robert Manis, at which time he was given anti-inflammatory medication and prescribed physical therapy. Dr. Manis' notes reflect

chronic pain syndrome secondary to old injuries of the appellant's shoulders, with capsulitis of the shoulders.

Appellant stated that the physical therapy prescribed by Dr. Manis worsened his condition. He never returned to work for appellee. Appellant testified that he was unable to use his left arm for approximately two and one-half months following the alleged injury.

The Commission affirmed and adopted the Administrative Law Judge's opinion. The Commission found appellant "to be a most credible witness;" it observed that appellant's testimony concerning his complaints and the reporting of his problems to appellee was undisputed. Nonetheless, the Commission found that the medical evidence was in conflict with appellant's testimony. In support of this observation, the Commission referred to the notes of Dr. Austin and Dr. Manis. Noting that it is appellant's burden to prove the job relatedness of any injury, the Commission found that appellant was not entitled to benefits because of the inconsistency between his testimony and the medical evidence. It made the following two conclusions, among others:

> 3. Claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and during the course of his employment which is compensable under our Workers' Compensation Laws.
>
> 4. Claimant has failed to prove by a preponderance of the credible evidence that his physical problems and/or disability is causally related to his employment.

The Commission's opinion displays a substantial basis for the denial of relief. Appellant alleges that he sustained an injury as the result of a specific incident that is identifiable by time and place of occurrence. Thus, appellant had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(5)(E)(i) (Repl. 1996). While the Commission found appellant to be *a* most credible witness, it also found the medical evidence to be conflicting. Specific reference was made to the doctors' notes, that in turn referenced old injuries as the possible source of appellant's pain. The inconsistencies between appellant's testimony and the medical evidence persuaded

the Commission that appellant failed to prove entitlement to benefits. The Commission concluded that appellant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and during the course of his employment, or that there was a causal relationship between his injury and his employment. Because we believe there is a substantial basis for the Commission's denial of relief, we affirm.

In affirming the Commission's decision, we dispose of all three of appellant's arguments on appeal. First, appellant argues that he suffered a compensable injury. A "compensable injury" is one "arising out of and in the course of employment. . . ." Ark. Code Ann. § 11-9-102(5)(A)(i); *see Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 103, 852 S.W.2d 804, 807 (1993). "Arising out of the employment" refers to the origin or cause of the accident. *Deffenbaugh Indus.*, 313 Ark. at 103, 852 S.W.2d at 807. Thus, in order to prove a compensable injury appellant must prove, among other things, a causal relationship between his employment and the injury. By concluding that the appellant did not prove that there was a causal relationship between the injury and the employment, the Commission precluded a finding of a compensable injury.

Likewise, appellant's second argument alleges a causal relationship between his employment and his injury. The Commission's conclusions, and the findings in support of those conclusions, dispose of this argument.

Appellant offers an alternative argument for his third point: that the injury aggravated a preexisting cumulative trauma injury. This argument also requires proof of a compensable injury. It is the rule "that when a pre-existing injury is aggravated by a later *compensable injury*, compensation is in order." *Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 367, 768 S.W.2d 521, 523 (1989)(emphasis supplied). Thus, to prevail on this alternative argument, appellant must prove a compensable injury, which in turn requires proof of a causal relationship between his employment and the injury. Again, as explained above, the Commission's conclusions foreclose this argument.

Affirmed.

ROGERS, GRIFFEN, and CRABTREE, JJ., agree.

PITTMAN and NEAL, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. The appellant in the case at bar stated that, at approximately 11:00 p.m. on January 13, 1995, while taking a part out of a machine he was operating and replacing it with another part, his shoulder popped, and he experienced extreme pain. Appellant further stated that, as a result of this incident, he was deprived of the use of his left arm and shoulder and was unable to perform his job as he had done prior to this incident. While acknowledging that he had been treated for a similar problem with his left shoulder after chopping wood at home in November 1994, appellant testified that his problem in November was a mere ache that neither deprived him of the use of his arm nor caused him to miss any work.

The Commission specifically found that appellant was a "most credible" witness. It then noted that appellant's testimony was in conflict with medical evidence indicating that appellant's problems following the incident at work were the same as those for which he was treated in November 1994, and that appellant suffered from chronic pain syndrome secondary to old injuries of the shoulders. The Commission resolved the conflict in favor of appellee. The majority of this court holds that the Commission's opinion displays a substantial basis for denying appellant relief. I would reverse and remand for additional findings because the Commission's opinion is too ambiguous to allow us to conduct any meaningful appellate review.

The central mystery in this case is why the Commission, having specifically found that appellant's testimony was credible and supported his claim, nevertheless denied him benefits. The Commission stated that it did so because the medical evidence was "conflicting," and the majority accepts this as a sufficient finding to explain the denial of relief. I disagree. A satisfactory finding of fact must contain all the specific facts relevant to the contested issues so that the reviewing court can determine whether the Commission has resolved those issues in conformity with the law. *Wright v. American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986).

We cannot tell whether the Commission properly applied the law in the case at bar. Although the Commission tells us that the medical testimony conflicts with that of appellant, it fails to inform us of the nature of the conflict: Did the Commission believe that the work-related incident described by appellant never occurred, or that the incident was not characterized by sudden and severe pain, or that the effects of the incident were not as disabling as those described by appellant? The Commission could have taken any of these views of the facts, and some of them might have supported denial of benefits. We ultimately do not know, however, because the Commission's opinion omitted the minimum prerequisite of judicial review: a "simple, straightforward statement of what happened." *Id.* at 21, 709 S.W.2d at 109.

Other possibilities exist. The Commission might have believed every word of appellant's testimony and have denied benefits because it concluded that the substance of that testimony would not allow an award of benefits in light of the medical evidence that appellant had suffered from similar conditions in the past. This possibility has some merit; it would at least explain the central mystery of why the Commission apparently resolved a credibility issue against the "most credible" appellant. However, it presents other problems that are especially troubling in light of the majority's decision to affirm this case. For example, it seems to ignore the general rule that the employer takes the employee as he finds him, and that employment circumstances that aggravate preexisting conditions are compensable. *See Public Employee Claims Division v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992); *see also Hubley v. Best Western-Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996) (aggravation of a preexisting noncompensable condition by a compensable injury is itself compensable); *Farmland Insurance Co. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996) (aggravation of preexisting condition stemming from a specific work-related incident need not be the major cause of claimant's disability to be compensable); *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996) (Commission's finding that there was no causal connection between fall and surgery reversed where record showed that claimant was able to work until he fell and contained no evidence that claimant's earlier back problems caused the sur-

gery). More cases could be cited, but it is meaningless and misleading to discuss law in the absence of facts. The central question in all cases alleging aggravation of a preexisting condition, of course, is whether the condition was exacerbated by an independent intervening cause. *McDonald Equipment Co. v. Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989); *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). Here the Commission failed to tell us whether a work-related incident occurred, let alone whether such an incident constituted an independent intervening cause with respect to any disability that may have resulted. In the absence of such findings, any discussion of the law is pointless.

In the case at bar, we attempt to guess what the Commission believed the facts to be. Our guesses may be clever, they may be informed, they may even be correct, but I submit that no meaningful review is possible when we are reduced to guessing whether the Commission erred in its application of the law.

I respectfully dissent.

NEAL, J., joins in this dissent.

GET RID OF IT, INC. *v.* CITY OF SMACKOVER, et al.

CA 96-1519 952 S.W.2d 192

Court of Appeals of Arkansas
Division IV
Opinion delivered October 15, 1997

John D. Lightfoot, P.L.L.C., by: *John D. Lightfoot*, for appellant.

Jeffrey C. Rogers, for appellee.

Tom Wynne, Prosecuting Atty., by: *Caren Harp*, Chief Deputy Prosecuting Atty for appellee.

JUDITH ROGERS, Judge. Appellant, Get Rid of It, Inc., brings this appeal from an adverse decision on its request for declaratory judgment. For reversal, appellant contends that the chancellor erred in ruling that the Arkansas Privatization Act did not apply to the transaction for services between appellees, Union County and the City of Smackover, and their solid waste contractor. Appellant further contends that the chancellor erred in failing to declare County Ordinance #422 void as it pertains to the imposition of a penalty on delinquent solid waste accounts in excess of the maximum permitted under Arkansas law. We affirm because appellant's abstract is flagrantly deficient.

On March 27, 1995, and July 21, 1996, Union County and the City of Smackover, respectively, entered into separate contracts with Solid Waste Management of Arkansas, Inc. for the collection and disposal of solid waste within their jurisdictions. The City of Smackover filed this suit to enjoin appellant from collecting solid waste within its jurisdiction in violation of the exclusive contract with Solid Waste Management. Appellant answered the

complaint and filed a counterclaim joining Union County, its county judge, and quorum court members as parties to the suit. In its counterclaim, appellant urged the chancellor to declare that the contracts entered into by Union County and the City of Smackover with Solid Waste Management were invalid because of their failure to comply with the Arkansas Privatization Act found at Ark. Code Ann. §§ 8-5-601-612 (Repl. 1993) and to declare that County Ordinance #422 was void because the late fee charged on delinquent accounts exceeded the maximum penalty allowed under Arkansas law.

In its two issues on appeal, appellant claims error in the chancellor's rulings with regard to the Privatization Act and County Ordinance #422. However, the decree from which this appeal arises has not been included in appellant's abstract. Although we are not obliged to do so, we have examined the record only to find that the chancellor's decision was communicated to the parties in a thirteen-page letter opinion which was incorporated into the final decree. We also discovered that the case was submitted to the court based on detailed stipulations and briefs submitted by the parties; however, only a few of the stipulations have been abstracted, and the briefs submitted by the appellees have been omitted entirely from appellant's abstract. As a consequence, we do not learn from appellant's abstract the arguments set forth by appellees in support of their actions or all of the pertinent facts relied upon by the chancellor in making his rulings. More importantly, we do not learn the basis for the chancellor's decisions regarding the issues raised on appeal. These omissions leave us with only a one-sided account of what occurred below.

Rule 4-2(a)(6) of the Rules of the Supreme Court and Court of Appeals provides that an appellant's abstract should consist of an *impartial* condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the court for decision. Further, Rule 4-2(b)(2) provides that we may affirm the judgment or decree for noncompliance with the rule if the abstract presented is flagrantly deficient. The supreme court's reason for the rule is one of practicality in that there is only one transcript to

be spread among seven members of that court. *See McPeek v. White River Lodge Enterprises*, 325 Ark. 68, 924 S.W.2d 456 (1996). However, it is no less burdensome for the judges of this court to pass around the lone transcript. Every case submitted has the potential of being heard by six members of this court if the three-judge panel assigned to the case does not reach a unanimous decision, a situation that occurs on a frequent basis. For us to require compliance with the abstracting rule cannot be considered a trap for the unwary, since some form of the rule has been in existence for over one hundred years. *See Zini v. Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986).

■ ■ It is fundamental that the record on appeal is confined to that which is abstracted. *In re Estate of Brumley*, 323 Ark. 431, 914 S.W.2d 735 (1996). We do not go to the record to reverse. *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992); *Boren v. Qualls*, 284 Ark. 65, 680 S.W.2d 82 (1984). It has long been held that the judgment appealed from is a necessary constituent of an abstract. *Winters v. Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996); *Hailey v. Kemp*, 300 Ark. 120, 776 S.W.2d 828 (1989); *Davis v. Wingfield*, 297 Ark. 57, 759 S.W.2d 219 (1988). To decide an appeal, this court must, at an absolute minimum, know what the trial court ruled before it can possibly determine any error. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993). Because of the flagrant deficiencies of appellant's abstract, we affirm the chancellor's decree.

Affirmed.

BIRD and ROAF, JJ., agree.

Kimberly Latrice MILES *v.* STATE of Arkansas

CA CR 96-1366 954 S.W.2d 286

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered October 15, 1997

Morehead & Morehead, by: *Robert F. Morehead*, for appellant.

Winston Bryant, Att'y Gen., by: *Vada Berger*, Asst. Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. This is a criminal case in which appellant, Kimberly Latrice Miles, was charged with second-degree murder in the starvation death of one of her children. The jury found her guilty of manslaughter but could not agree on a sentence. Over a year later, the trial court sentenced her to three years' imprisonment in the Arkansas Department of Correction. Appellant raises three points on appeal: (1) the evidence was not sufficient to support the verdict, (2) the trial court erred in denying appellant's motion for a new trial, and (3) the trial court abused its discretion and inflicted cruel and unusual punishment in sentencing appellant to three years' imprisonment. Finding no error, we affirm.

Appellant is a mildly mentally retarded young woman in her early twenties. Her IQ is reported as 64. She had two children at the time in question, the baby who starved to death and a toddler. The baby was born on February 8, 1994, and died on March 15, 1994, approximately five weeks later. Appellant and her two children lived with appellant's mother and stepfather in efficiency apartment-type living quarters within her parents' house. She concealed her pregnancy with this baby. She delivered the baby alone at home, only going to the hospital after delivery. The premises where appellant and her children lived were clean and sensibly furnished. There was food in the refrigerator, baby formula and food for newborns. There were no hazards, and the toys were safe. The toddler interacted with adults and appeared healthy and well-clothed.

(1) The Sufficiency of the Evidence

A motion for a directed verdict in a criminal case must state the specific grounds for the motion. *Walker v. State*, 318 Ark. 107, 883 S.W.2d 831 (1994). If a motion for directed verdict is general and does not specify a basis for the motion, it will be insufficient to preserve a specific argument for appellate review. *Id.*

Here, appellant moved for a directed verdict at the close of the State's case but did not explain the specific grounds upon which it was based. The record does not show that appellant renewed the motion at the close of her case; however, after closing arguments the trial court stated that "the record needs to reflect that . . . the defendant . . . renewed the motion at the conclusion of the defendant's case and it was, again, denied." No record was made of the grounds relied upon in making the second motion. Appellant argues that "it was crystal clear from the evidence that the only factual matter that could be in dispute was the appellant's mental capacity," and that "where the trial court and the parties understand what the motion is about, it is not necessary to make a motion that would be clear to one not involved with the case whatever," citing *Hattison v. State*, 36 Ark. App. 128, 819 S.W.2d 298 (1991). Appellant's reliance upon *Hattison* is misplaced. First, it was decided prior to the "bright line" that was drawn in *Walker v. State, supra.* Second, unlike *Hattison*, we do not agree that appellant adequately brought to the trial court's attention the issue now argued on appeal. Consequently, appellant is precluded from arguing on appeal that there was not sufficient evidence to prove that she had the requisite "culpable mental state" of recklessly causing the death of her infant son.

Moreover, even if we were to consider this argument on appeal, we would still affirm. Appellant was found guilty of manslaughter. "A person commits manslaughter if . . . [h]e recklessly causes the death of another person." Ark. Code Ann. § 5-10-104 (Repl. 1993). "Recklessly" is defined as follows:

> 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[.]

Ark. Code Ann. § 5-2-202(3) (Repl. 1993). In reviewing the sufficiency of the evidence, we do not weigh the evidence on one side against that on the other but simply determine whether the evidence in support of the verdict, viewed in the light most favorable to the appellee, is forceful enough to compel reasonable minds to reach a conclusion one way or another. *Johnson v. State*, 326 Ark. 3, 929 S.W.2d 707 (1996).

Here, the State presented testimony that appellant gave the baby only two bottles on Sunday, March 13; that she did not feed the baby on Monday, March 14, nor on Tuesday, March 15, even though unbeknown to appellant the baby did receive one small bottle from the stepfather on March 15; that the deceased baby's skin was very tight over his head, his stomach was sunken, his eyes were sunken, his ribs were visible, he was very small, and he had no body fat; that appellant was aware the baby was unresponsive as early as 3:00 or 4:00 p.m. on the afternoon of its death; that she checked on the baby again at 9:00 p.m., and the baby was "real pale" and "real cold," but she did not alert her mother and stepfather until approximately 11:00 p.m. that night; that she watched television until telling her parents; that one reason she did not alert anyone sooner about the baby's unresponsiveness was because appellant thought she might "get in trouble" for not having fed the baby; and that when the baby arrived at the emergency room around midnight, it was pronounced dead on arrival. An autopsy was performed, and the cause of death was determined to be starvation. Photographs were introduced, supporting the physical description of the baby when it arrived at the hospital.

This constitutes substantial evidence that appellant recklessly caused the death of her baby. She consciously disregarded a substantial and unjustifiable risk that death might occur if she did not feed the baby more often, and the disregard thereof constituted a gross deviation from the standard of care that a reasonable person would observe in appellant's situation.

(2) The Denial of Motion for New Trial

Appellant was tried in January 1995. In February 1995, following the trial but before sentencing, appellant's counsel received a letter from a social worker with the Jefferson County Health Department. The letter was made available to the trial judge in February 1995. On March 6, 1996, the trial court sentenced appellant to three years' imprisonment in the Arkansas Department of Correction. On April 4, 1996, appellant filed a motion for a new trial, relying upon the discovery of the social worker's identification and the information she had about appellant's situation. The motion was denied. We find no abuse of discretion.

In her letter of February 6, 1995, the social worker reported that she visited appellant's house on March 15, 1994, the date of death; that the baby was asleep; that she saw nothing to alarm her; that she visited the family following the death and asked appellant why she had not fed the baby; that appellant told her she had tried to feed him but that he only sucked a little bit; that appellant's mother told her the oldest child did not suck much when he was a baby either; that in her opinion appellant had "no earthly idea" that the baby was wasting away because she could not get him to suck; that in her opinion appellant tried hard to care for the baby to the best of her mental ability; and that in her opinion appellant's baby "died through ignorance and no ill intent on her . . . part."

Newly discovered evidence is the least favored ground in moving for a new trial. *Misskelley v. State*, 323 Ark. 449, 478, 915 S.W.2d 702, 717 (1996). When a new trial is denied on this ground, we will reverse only for an abuse of discretion. *Id.* To prevail, appellant must demonstrate that the new evidence would have impacted the outcome of the case and that due diligence was exercised in trying to discover the evidence. *Id.* Appellant has not satisfactorily demonstrated either.

Appellant's counsel stated in the motion for new trial that appellant and her stepfather had "alleged that someone from social services had monitored the child and had seen no negligence, but they did not know her name." The only reference to a search for the identity of the social worker was described in the motion as

follows: "A search throughout the Human Services Department did not reveal any record of any such support service provider." Counsel had over nine months between his entry of appearance and the trial to investigate the case fully. The baby was only five weeks old at the time of death. If inquiries at the Department of Human Services were not fruitful, due diligence would require further inquiries to locate the social worker, particularly at the local health department and at the hospital where the baby had been born such a short time earlier. The failure to further investigate the social worker's identity demonstrates a lack of diligence rather than a showing of due diligence.

Appellant argues on appeal that neither the State nor the trial court relied upon a lack of due diligence as a basis for denying the motion, and therefore such a basis cannot be relied upon on appeal. The argument is wrong. We affirm a trial court if it reaches the right result, even if it gives a different reason in doing so. *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993).

Moreover, we do not agree with appellant's argument that the social worker's testimony would have produced a different outcome in the trial. Testimony was presented at the trial that the living quarters were clean, that the baby was clean, and that food was available. The social worker's testimony in this regard would have added nothing. Any statements made by appellant and attempted to be introduced through the social worker would have been inadmissible hearsay since they would have been offered to prove the truth of the matter asserted and would not have been offered against appellant. Ark. R. Evid. 801(c), 801(d)(2)(i), 802. Further, the social worker's opinion that the baby died "through ignorance and no ill-intent on [appellant's] part" would not have affected the outcome of the trial because an intent to kill is not a necessary element of the crime of manslaughter. *Bevills v. State*, 264 Ark. 846, 575 S.W.2d 443 (1979). Finally, the social worker's credibility would have been seriously attacked on cross-examination in response to her statement that she saw nothing to alarm her when she visited the home on the date of the baby's death. The testimony and photographs introduced at trial showed an emaciated infant with tight skin over his head and sunken eyes. We find

no abuse of discretion in the trial court's denial of appellant's motion for a new trial.

(3) The Sentence

As her third point of appeal appellant argues that the trial court abused its discretion in sentencing her to three years' imprisonment and that the sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. We find no error.

The sentence imposed by the trial court was within the statutory range of punishment. It is within the trial court's discretion to impose punishment within the statutory range. *Adams v. State*, 25 Ark. App. 212, 755 S.W.2d 579 (1988). Moreover, the fact that this trial court had not sentenced a defendant in another case to serve time in prison, even though convicted of manslaughter, does not constitute an abuse of discretion. *See Ward v. State*, 20 Ark. App. 172, 726 S.W.2d 289 (1987) (appellate courts will not reduce or compare sentences imposed within statutory limits).

Finally, appellant's argument that the sentence constituted cruel and unusual punishment was not preserved for appeal. Appellant never presented to the trial court the argument now made on appeal. Even constitutional arguments will not be considered for the first time on appeal. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997).

Affirmed.

ROBBINS, C.J., CRABTREE, and MEADS, JJ., agree.

PITTMAN, J., concurs.

NEAL, J., dissents.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the result reached and join in all but the majority's discussion of the merits of appellant's argument regarding the sufficiency of the evidence.

Rule 33.1 of the Arkansas Rules of Criminal Procedure (formerly Rule 36.21(b)) provides that, in jury trials, any issue per-

taining to the sufficiency of the evidence is waived for purposes of appeal unless preserved by timely and specific motions for directed verdict in the trial court. Over five years ago, when faced with the argument that the rule had been vitiated by inconsistent application, the supreme court acknowledged that discussing the merits of a sufficiency argument despite an appellant's failure to preserve the issue constitutes a "deviation" from the rule. *See Collins v. State*, 308 Ark. 536, 826 S.W.2d 231 (1992). Since that time, *Collins* has been cited for the proposition that, when a criminal defendant fails to preserve a sufficiency issue for appeal, the appellate court "cannot consider" the question on its merits. *See Cummings v. State*, 315 Ark. 541, 869 S.W.2d 17 (1994); *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992); *Bealer v. State*, 49 Ark. App. 119, 897 S.W.2d 577 (1995). *See also Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997) (appellant's failure to make a specific directed-verdict motion "precludes our review" of the sufficiency issue); *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997) (upon appellant's failure to make timely and specific directed-verdict motions, the supreme court is "barred from addressing" the issue).

I respectfully concur.

OLLY NEAL, Judge, dissenting. Although I agree with the majority's conclusion that appellant failed to properly preserve her sufficiency of the evidence argument for our review and that her claim of cruel and unusual punishment is unavailing, I must dissent. The trial court should have granted appellant a new trial.

Appellant was charged with the offense of second-degree murder, and ultimately convicted of manslaughter, a Class C Felony. As pointed out in the majority opinion, proof of manslaughter requires evidence that the accused "recklessly caused the death of another person." Ark. Code Ann. § 5-10-104(a)(3). Negligent homicide is a lesser-included offense and requires proof that the accused "negligently causes the death of another person." Ark. Code Ann. § 5-10-105(b)(1). A person acts negligently when he "should be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur." Ark. Code Ann. § 5-2-202(4). Negligent homicide is a Class A misdemeanor.

In the present case, although the trial court instructed the jury on the offense of negligent homicide, appellant was not given a full opportunity to develop proof that her conduct should be classified as negligence. In her motion for new trial, she pointed out that the hospital at which the child was born recognized a risk that appellant did not possess sufficient intelligence to care for the child properly, that the social worker had contacted her because of an assignment from her agency, that the social worker had observed her child on the date in question, and that the social worker failed in her duty to point out the "substantial and unjustifiable risk" that the child would die from starvation. The fact that the social worker failed to point out the starvation risk is relevant to the question of whether appellant was actually aware of the risk, as required for a manslaughter conviction.

It has been stated that failure to give a lesser-included offense instruction does not constitute reversible error when there is no rational basis for giving the instruction. *Gidron v. State*, 316 Ark. 352, 872 S.W.2d 64 (1994). It is also clear that reversible error may not be predicated upon failure to give a lesser-included offense instruction where the jury has actually been instructed on different grades of an offense and chooses to convict the accused of the greater. *Spann v. State*, 328 Ark. 509, 944 S.W.2d 537 (1997). Although appellant's argument on appeal does not hinge on whether the proper instructions were given to the jury, her argument is well taken. It is inappropriate to deny a motion for new trial where there is newly discovered evidence that may have had an effect on the outcome of the trial and the fact that the evidence was not discovered sooner is not attributable to a lack of diligence. *Misskelly v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996).

Here, based on the evidence that was actually before the court, there was arguably no support for a negligent homicide instruction. However, the testimony of the new witness, Margaret Conner, could very well have established a rational basis for an even greater reduction of appellant's charge. Ms. Conner, who indicated that she had more than twelve years' experience as a Clinical Psychiatric Social Worker, was prepared to testify that she saw nothing out of the ordinary when she visited appellant's home

on the day of appellant's son's death. Ms. Conner's testimony could very well have illuminated the circumstances surrounding her appointment as a caseworker for appellant's son, including whether the assignment was based on the hospital's opinion that appellant lacked sufficient intelligence to recognize signs warning of danger to the child's health. Appellant's parents had already testified that they never warned appellant that the child was wasting, and there was other evidence that appellant simply failed to appreciate the gravity of the situation her son was in.

The majority opinion is based on an all-or-nothing, convict-or-acquit type analysis, when in actuality, a conviction of the even lesser offense of negligent homicide, a class A misdemeanor, would be a materially different "outcome" than appellant's felony conviction. Because the new witness's testimony could have been used to provide a basis for a negligent homicide instruction, and could have led to an even greater reduction in sentence, it was an abuse of discretion to deny appellant a new trial.

The second hurdle appellant must overcome is to show that her failure to discover the new witness prior to trial did not result from a lack of diligence. *Misskelly v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996). Appellant's trial counsel apparently "heard" from appellant that someone had been sent from social services to assess the appellant's home. Counsel stated in his affidavit that he did a thorough search "throughout the Human Services Department." Because of appellant's marginal mental state, and the fact that she was the only link between her attorney and the "mysterious" social worker, it would be unfair to counsel to suggest that he acted negligently or without diligence because he was unable to find the missing witness. Ms. Miles, simply put, did not give her attorney enough to go on. It was not unreasonable for counsel to suspect that the Human Services Department, which has superintending control over matters relating to abuse and neglect of children, would yield information relating to "child welfare."

Ms. Conner's own description of her employment is further indication that she could not be "leisurely" found. She stated "I am employed by the Dept. of Health, Jefferson County Health Unit. . . . I am contracted by Jefferson Comprehensive Care Sys-

tem Inc., [a private agency]." The abbreviated information appellant provided her attorney was a wholly insufficient lead from which counsel could learn the potential witness's identity. Appellant was unable to provide a name, telephone number, business card or supervising agency. Also, appellant failed to "flag" the true relevance of the witness's testimony when she failed to mention that the "social worker" had visited and checked on the child just hours before he died. Finally, the trial court *never found* that counsel failed to act diligently, and to make such a finding on appeal, relying solely on the record, which is undeveloped on that point, is patently unfair.

Karen (Benson) TURNER *v.* Paul BENSON

CA 97-359 953 S.W.2d 596

Court of Appeals of Arkansas
Division III
Opinion delivered October 15, 1997

Dodds, Kidd, Ryan & Moore, by: *Judson C. Kidd*, for appellant.

Atkinson Law Firm, by: *Rita B. Atkinson* and *Richard W. Atkinson*, for appellee.

TERRY CRABTREE, Judge. The parties in this case were divorced in May of 1992 and custody of their two minor children, Christal and Ben, was awarded to appellant, Karen Turner. Since their divorce, both appellant and appellee have remarried, and Christal has reached majority. In November of 1995, appellee sought custody of Ben, who was 13 years old at the time. After a hearing on August 1, 1996, the chancellor awarded custody to appellee. Appellant contends that the order changing custody was clearly against the preponderance of the evidence. We disagree and affirm.

In deciding whether a change of custody is warranted, a chancellor must first determine whether there has been a material change in the circumstances of the parties since the most recent custody decree. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996). If a material change has occurred, the chancellor determines custodial placement with the primary consideration being the best interest of the child. *Riley v. Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994).

Although chancery cases are reviewed *de novo* on appeal, we will not disturb a chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996). Since the question turns largely upon the credibility and demeanor of witnesses, this court defers to the superior position of

the chancellor to make such determinations. *Schwarz, supra.* The deference to be accorded to the chancellor is even greater in cases involving child custody.

> In those cases a heavier burden is placed on the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the child's best interest. We have often stated that we know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as great a weight as those involving child custody. (Citations omitted.)

Milum v. Milum, 49 Ark. App. 3, 5, 894 S.W.2d 611, 612 (1995); *see Fitzpatrick v. Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989).

In his petition, appellee alleged that appellant had begun using her husband's surname (Turner) as Ben's surname, that she had consistently interfered with appellee's visitation schedule, and that she had made derogatory statements about appellee in Ben's presence. Appellee pointed to the chancellor's prior admonishments that Christal and Ben needed healthy relationships with both parents and argued that the above actions harmed his relationship with Ben.

Several witnesses testified on behalf of both parties at the hearing. Appellee and others testified to the good relationship he had with Ben and the animosity that Christal had developed toward him. Dr. DeYoub, a court-appointed psychologist, evaluated the parties and the children, and his reports were admitted into evidence. Of critical importance were his remarks regarding the relationship between appellee and Christal:

> She did not make a single statement about Mr. Benson. I found the interview with her to be quite chilling. She rejects her father without the slightest display of emotion.
>
> . . .
>
> What happened to Christal is a serious matter, because that relationship is gone with her dad and time and maturity will only determine if she will ever change. The threat that Ben will do the same is a real one.

Dr. DeYoub indicated that a change of custody was a viable option, and that the court could do so immediately or wait to determine whether matters were otherwise resolved. Dr. DeYoub's report stated that if the problems persisted, appellee should gain custody of Ben. He also opined that if custody were changed immediately, Ben's relationship with appellant would remain strong, and his relationship with appellee would strengthen.

Dr. Tanner, a counselor hired by appellant, testified that Ben had a strained relationship with and feared appellee. Dr. Tanner recommended that custody remain unchanged.

Although appellant raises only one point on appeal, five points of argument are made thereunder. Two of these arguments are challenges to the chancellor's consideration of the evidence. First, appellant contends that the change of custody was not warranted in light of appellee's testimony that he and Ben enjoyed a good relationship. Second, appellant argues that Dr. DeYoub, the attorney ad litem, and Dr. Tanner unanimously recommended that Ben stay with appellant. This particular statement is not completely accurate. As stated, Dr. DeYoub's opinion was that a change of custody was an option. The ad litem did not testify at trial, but did submit a letter in support of appellant's motion to reconsider. However, no hearing was held on the motion. Only Dr. Tanner, who, as the chancellor recognized, was hired by appellant, recommended that custody not be disturbed.

The chancellor was in a superior position to judge the credibility and demeanor of the many witnesses at the hearing, and in doing so she utilized to the fullest extent all of her powers of perception in evaluating the witnesses, their testimony, and the child's best interest, *Milum*, *supra*, and we cannot say that her findings were erroneous.

Appellant also contends that Dr. DeYoub's report clearly reflected a desire on Ben's part to live with appellant, and that the chancellor erred in not considering this preference. While the preference of the child is a factor to be considered when making a custody determination, *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986), the chancellor has the

discretion to decline to give weight to the child's preference, and it is not binding upon the court. *Malone v. Malone*, 4 Ark. App. 366, 631 S.W.2d 318 (1982). We cannot say that the chancellor abused that discretion in the present case.

Appellant's fourth contention is that the chancellor erred in changing custody when the evidence showed that the good relationship between Ben and appellee had not been adversely affected. The chancellor stated that her concerns stemmed from appellee's poor relationship with Christal and the fear that Ben's relationship with appellee would suffer the same fate if custody were not changed.

Appellant was admonished three years prior to the custody hearing that she was alienating Ben from appellee. An award of custody to one parent does not lessen the noncustodial parent's responsibility to the child, nor does it affect his right as a parent to provide guidance and to participate in decisions affecting the welfare of the children. *Clark v. Reiss*, 38 Ark. App. 150, 831 S.W.2d 622 (1992); *see Provin v. Provin*, 264 Ark. 551, 572 S.W.2d 853 (1978). Whether one parent is alienating a child from the other is an important factor to be considered in change-of-custody cases, for, just as the chancellor noted below, a caring relationship with both parents is essential to a healthy upbringing. The testimony of several witnesses left the chancellor with the clear impression that Ben was happy during visitation with appellee, but was uncomfortable in expressing his enjoyment when he returned to appellant. Former spouses are often hostile to one another; and it is unfortunate when their children are forced to bear the brunt of this bitterness. This type of alienation, knowing or otherwise, can hardly be said to be in the best interest of the child. *Riley, supra.*

Lastly, appellant argues that since there was evidence of a good relationship between Ben and appellee, the chancellor must have changed custody solely to punish appellant. Appellant points only to statements made by the court regarding the inappropriateness of allowing Ben to choose which name he should use at such a young age. It is important to note that while the chancellor did have a strong opinion as to the way appellant dealt

with the situation, her statements, as abstracted by the parties, were well intentioned and warranted. No evidence of punishment was presented.

The chancellor made a difficult decision based on extensive and varied testimony. Because she was in a better position to determine the credibility of witnesses and the best interests of the child, and because her findings are supported by the evidence, we affirm.

ROBBINS, C.J., and MEADS, J., agree.

Jill Looney GREEN *v.* Diann Looney McAULEY

CA 97-83 953 S.W.2d 66

Court of Appeals of Arkansas
Division I
Opinion delivered October 22, 1997

Sloan, Rubens & Peeples, by: *Kent J. Rubens* and *Cristina M. Flechas*, for appellant.

Rees Law Firm, by: *Tom Young*, for appellee.

D. FRANKLIN AREY, III, Judge. Appellant, Jill Looney Green, appeals from an order entered by the Crittenden County Probate Court that appoints appellee, Diann Looney McAuley, successor co-executrix of their father's estate. Appellant argues that appellee's appointment is barred by a family settlement agreement; appellant also claims the probate court erred by limiting the hearing below to one hour. We reverse and dismiss the appellee's Petition for Appointment of Executrix, because it is barred by the family settlement agreement. This holding makes it unnecessary to address appellant's second point.

Joe E. Looney, Sr., died testate; his widow and five children survived him. Besides appellant and appellee, these children were Joe E. Looney, Jr., Debbie Looney Wintersteen, and David Looney. The decedent's will nominated Joe, Jr., and Debbie to serve as co-executors. It further provided that if either co-executor discontinued his or her service, then the next-oldest child would be nominated to serve as successor co-executor.

Initially, Joe, Jr., and Debbie both accepted appointment as co-executors. Debbie later resigned. Appellee, claiming to be the oldest child, petitioned to be appointed co-executrix pursuant to the terms of the will; her petition was filed on January 11, 1994. Shortly thereafter, appellee filed a supplement to her petition, praying for the removal of Joe, Jr.; she alleged that he labored under "numerous conflicts of interest." Joe, Jr., David, and the decedent's widow objected to this supplement; further, the widow objected to appellee's appointment as successor co-executrix. The record does not disclose a ruling on this petition.

In February of 1995, the decedent's five children signed a document entitled "Mutual Release and Settlement Agreement." Relevant provisions of this agreement are set forth in the margin.[1] The agreement notes that "certain matters are in dispute between

[1] WHEREAS, certain matters are in dispute between the parties hereto, which disputed matters the parties desire and intend to settle and resolve without admission of fault nor liability by either of them;

. . .

the parties"; these disputes concern "disposition of assets of the Estate and other matters pertaining to the Estate. . . ." For the consideration recited, appellee discharged and released the estate "from any and all claims, demands, [and] actions,. . . of any kind or every nature whatever, whether known or unknown,. . . relating to the Estate, except as set forth herein." Paragraph six of the agreement excepted certain real estate from the agreement. The

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WHEREAS, disputes arose between the parties hereto concerning disposition of assets of the Estate and other matters pertaining to the Estate;

. . .

WHEREAS, the Estate and Mrs. McAuley mutually desire now to resolve their differences as to this matter without further legal proceedings, and without any admission of fault or liability by either of them;

. . .

1. *Release of Estate by Mrs. McAuley*. For and in consideration of the promises and considerations set forth herein, and the release contained herein, and other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, Mrs. McAuley on behalf of herself, her attorneys, administrators, beneficiaries, wards, heirs, executors, assigns, business entities, successors, trustees, affiliates, subsidiaries and any and all related entities, does hereby fully, finally and forever discharge and release the Estate and its Executor, their present and former officers, directors, related companies, agents, attorneys, business entities, affiliates, subsidiaries, successors, parent corporations, employees and assign, of and from any and all claims, demands, actions, causes of action, suits, damages, losses, charges and/or expenses of any kind or every nature whatever, whether known or unknown, contingent or matured, relating to the Estate, except as set forth herein. Mrs. McAuley agrees to accept the considerations and promises set forth herein in place and stead of any assets which she might otherwise receive from the Estate, both in her own right and as Trustee for her minor children, and disclaims all interest in and to such assets and the Estate, except as otherwise provided herein. Mrs. McAuley agrees to dismiss and/or withdraw and/or waive her objections to various actions for which the Estate has sought approval in the Probate Court of Crittenden County and to the Executor's First Annual Accounting.

. . .

6. *Estate Lands*. It is expressly agreed and understood by the parties hereto that this Mutual Release and Settlement Agreement does not apply to any land or real estate in which the Estate owns or claims an interest, other than the cabin at Greer's Ferry Lake and tenant houses and other than pursuant to the Contact [sic], and, specifically, that Mrs. McAuley does not release her right as Trustee for her minor children to share in the distribution of real estate or the proceeds of real estate. . . . .

agreement does not contain a specific reservation of appellee's right to seek appointment as co-executrix.

Appellee filed a petition in May of 1996, again seeking appointment as successor co-executrix of the estate. At the hearing on appellee's petition, appellant's counsel argued that the terms of the agreement barred appellee from pursuing her petition. Appellee testified that she signed the agreement; the agreement was admitted into evidence. At the conclusion of the testimony, the probate judge appointed appellee successor co-executrix. He specifically ruled that the agreement did not disqualify appellee from appointment.

On appeal, appellant argues that the probate court erred by not recognizing that the agreement barred appellee from serving as executrix. Appellant contends that appellee's petition constitutes a claim against the estate that appellee surrendered for valuable consideration. Appellant further notes that appellee did reserve the right to certain assets of the estate, but otherwise released her claims fully, finally, and completely.

The agreement entered into by the decedent's children in February of 1995 constitutes a family settlement agreement. The agreement notes ongoing disputes, which the parties intended to settle and resolve; these disputes concerned disposition of the estate's assets and "other matters. . . ." The parties' motive to amicably settle the estate constitutes sufficient consideration for a family settlement agreement. *See Harris v. Harris*, 236 Ark. 676, 370 S.W.2d 121 (1963); *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993). Execution of the agreement by appellant, appellee, and their siblings indicates their mutual intent to enter into a binding agreement. *See Thurman v. Thurman*, 50 Ark. App. 93, 900 S.W.2d 221 (1995).

Family settlement agreements are favorites of the law. *Thurman*, 50 Ark. App. at 97, 900 S.W.2d at 224. A common refrain of our supreme court's decisions concerning family settlement agreements is that they are favored and should be encouraged where no fraud or imposition is practiced. *Pfaff v. Clements*, 213 Ark. 852, 213 S.W.2d 356 (1948); *see Harris*, 236 Ark. at 685, 370 S.W.2d at 127.

We construe a family settlement agreement by seeking the real intent of the parties as revealed in the agreement. *See Gannaway v. Godwin*, 256 Ark. 834, 511 S.W.2d 171 (1974); *cf.* 96 C.J.S. *Wills* § 1113 (1957) (as to compromise agreements between beneficiaries, "[i]f there is no ambiguity apparent in the terms of the contract, its meaning must be determined from the words used, and from no other source."(footnote omitted)). In the absence of fraud or mistake, we must adhere strictly to the terms of the family settlement agreement. *Gannaway*, 256 Ark. at 838, 511 S.W.2d at 174.

A review of the agreement's preamble reveals the parties' intent to bar the appellee's petition. Appellee's first petition to be appointed successor co-executrix predated the execution of the agreement; this first petition was contested. The agreement makes reference to certain disputes concerning asset disposition "and other matters pertaining to the Estate. . . ." The parties noted their intent to settle and resolve these disputes without further legal proceedings.

The substantive language of the agreement also evidences an intent to bar this petition. The will's provision allowing for the appointment of the next-oldest child as a successor co-executor gave appellee a preference in appointment. *See* Ark. Code Ann. § 28-48-101(a)(1)(1987). Upon Debbie's resignation, appellee had the right to request appointment as a successor co-executrix, by motion or petition. *See* Ark. Code Ann. § 28-48-107(a). However, in paragraph number one, appellee discharges and releases the estate "of and from any and all claims, demands, [and] actions. . . of any kind or every nature whatever,. . . relating to the Estate, except as set forth herein." The type of claim, demand, or action discharged is not limited to property claims; as long as the petition *relates* to the estate, it is barred. There is no specific reservation of appellee's right to seek appointment as successor co-executrix. Thus, appellee discharged and released the estate from her right to seek appointment that she otherwise had pursuant to our probate code and the terms of the will.

Appellee argues that the agreement's reservation of her interest in certain real estate suffices to allow her pursuit of this

claim. The agreement cannot be read in this fashion. It releases and discharges the estate from *all* claims, demands, and actions, "except as set forth" therein. There is no specific reservation of the ability to seek appointment as successor co-executrix; without this specific reservation, the agreement releases and discharges the claim. *Cf. Gannaway*, 256 Ark. at 838, 511 S.W.2d at 173-74 (releases which discharged all claims of heirs except their interest in real estate prevent their subsequent claim to certain common stock, even though the releases do not specifically mention the stock).

Because appellee's petition for appointment is barred by the family settlement agreement, we reverse the probate court's decision to appoint appellee successor co-executrix, and dismiss appellee's petition. Appellant's remaining point is moot in light of this disposition, so it will not be addressed.

Reversed and dismissed.

JENNINGS and GRIFFEN, JJ., agree.

Sharon MARION *v.* TOWN and COUNTRY MUTUAL INSURANCE COMPANY

CA 97-162 952 S.W.2d 681

Court of Appeals of Arkansas
Division IV
Opinion delivered October 22, 1997

Oscar Stilley, for appellant.

Randall Templeton, for appellee.

SAM BIRD, Judge. Appellant Sharon Marion appeals the dismissal of her suit against Town and Country Mutual Insurance Company and the granting of Town and Country's motion for summary judgment. We find no error and affirm.

Appellant purchased a home from Jim Walter Homes a/k/a Mid-State Homes, Inc., and executed a promissory note to Mid-State Trust IV (Mid-State) on December 28, 1992, secured by a mortgage to Mid-State covering the purchased property. A foreclosure proceeding was commenced by Mid-State on September 29, 1995, that resulted in a default judgment being entered against appellant on December 14, 1995. Appellant contested the default foreclosure decree by motions challenging the validity of service of process, but she did not appeal from the court's entry of the foreclosure decree or the denial of her motions. The foreclosure sale was held on January 24, 1996, and the property was bought by Mid-State, the lienholder, for the entire balance owed by appellant on the note, including interest, costs, and fees. The sale was confirmed by the court on April 8, 1996, and a commissioner's deed conveying the property to Mid-State was executed and filed the following day. Subsequently, appellant filed a notice of appeal and supersedeas, and on April 25, 1996, the chancellor entered an order staying the judgment pending the appeal from the order confirming the commissioner's sale.

In the meantime, on January 26, 1996, appellant applied for homeowner's insurance from appellee, Town and Country Mutual Insurance Company. During the process of completing the application for insurance, appellant failed to mention to the insurance agent the pending foreclosure action or that Mid-State had

purchased the property at the foreclosure sale. The structure burned to the ground on July 22, 1996, as the result of an accidental fire. Appellant filed a claim and proof of loss with appellee. The claim was denied by appellee for two reasons: material misrepresentation by appellant in the insurance application for failure to disclose the foreclosure action, and appellant's lack of an insurable interest in the property at the time of the fire.

Appellant filed suit against appellee and filed a motion for summary judgment. Appellee filed a motion to dismiss and a motion for summary judgment. Mid-State filed a motion to intervene and appellee responded in opposition to it.

No formal hearing was held, and all the issues were presented to the court on the pleadings and briefs. Appellant's motion for summary judgment was denied. Appellee's motions to dismiss and for summary judgment were granted, without explanation. Mid-State's motion to intervene was not addressed.

On appeal appellant first argues that the trial court erred in dismissing her complaint on the grounds that she had no insurable interest in the property. Insurable interest is defined in Ark. Code Ann. § 23-79-104 (Repl. 1992):

> 23-79-104](a) No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured at the time of the effectuation of the insurance and at the time of the loss.
>
> 23-79-104](b) "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.

Appellant contends that at the time she applied for the insurance, she had an insurable interest in the property because she was living in the home, and Mid-State had not yet received the commissioner's deed. She says that as soon as the sale was confirmed by the court and the commissioner's deed was executed, she filed a supersedeas, which she contends suspended the force and effect of the foreclosure judgment. Thus, she argues that because she still had the right to possession and Mid-State could not get a writ of

assistance, she had an insurable interest at the time of the fire. Furthermore, she argues that she was bound by her bond to pay all costs and damages if she were eventually successful in the prosecution of her appeal from the foreclosure-sale confirmation order.

Arkansas Code Annotated section 23-79-104 requires that, for the insurance policy to be enforceable, an insurable interest in the insured property must exist both "at the time of the effectuation of the insurance and at the time of the loss." We do not agree with appellant's argument that she had an insurable interest in the property when the fire occurred on July 22, 1996.

In *Fleming v. Southland Life Ins. Co.*, 263 Ark. 272, 564 S.W.2d 216 (1978), an appeal involving a mortgage-foreclosure action, our supreme court held that where the mortgagor has waived his statutory right of redemption, a judicial sale is complete upon confirmation of the sale, and the mortgagor's right of redemption terminates at that time (although it may be be terminated even sooner if so specified in the foreclosure decree).

In *Adams v. Allstate Ins.*, 723 F. Supp. 111 (E.D. Ark. 1989), a fire occurred after a foreclosure sale but before approval of the sale by the state court. The appellate court held that the foreclosure did not affect appellant's interest in the property because it was not yet final and that Adams retained an insurable interest in the residence until the commissioner's sale was approved by the state court. Of course, *Adams* is factually distinguishable from the case at bar because here the fire did not occur until more than three months after the sale had been confirmed and after the commissioner's deed had been delivered to Mid-State, the buyer at the foreclosure sale.

The authority referred to above is controlling in this case. The confirmation of the foreclosure sale and the delivery of a commissioner's deed to the buyer had the effect of terminating appellant's insurable interest in the property. This holding is also in accord with *Jones v. Texas Pac. Indem. Co.*, 853 S.W.2d 791 (Tex. Ct. App. 1993), wherein the appellate court affirmed the trial court's order granting appellee insurance company's summary-judgment motion on the grounds that appellants, the former owners, became "tenants at sufferance" following a mortgage

foreclosure and had no insurable interest in their dwelling at the time of the fire because (1) they were subject to immediate eviction; (2) they had no future legal interest in the dwelling; (3) they had diminished motive to protect the property; (4) they did not suffer any pecuniary loss; and (5) they did not receive any benefit from the dwelling, even though they were still living there.

Also, we do not agree with appellant that the filing of a notice of appeal and a supersedeas bond in the foreclosure action had the effect of extending her insurable interest beyond the confirmation of the foreclosure sale. This argument disregards the function and effect of the supersedeas. As stated by this court in *Searcy Steel Co. v. Mercantile Bank of Jonesboro*, 19 Ark. App. 220, 719 S.W.2d 277 (1986):

> The effect of a supersedeas on a judgment was discussed by our court as early as *Fowler v. Scott*, 11 Ark. 675 (1850), which declared that the function of a supersedeas is to stay the execution of the judgment pending the period it is superseded, but the validity of the judgment is not effected [sic] by the stay. It is merely a legal prohibition from execution on the judgment until that prohibition has been removed by operation of law or a judgment of the supreme court. In *Miller v. Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905), the court reaffirmed its declaration in *Fowler* and restated that the supersedeas does not have the effect of vacating the judgment but only stays proceedings to enforce it.

19 Ark. App. at 225, 719 S.W.2d at 280.

The position taken in *Searcy Steel Co.*, *supra*, was reaffirmed by this court in *Everett v. Wingerter*, 35 Ark. App. 139, 816 S.W.2d 613 (1991); *see also Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

At the time appellant filed her supersedeas and obtained the court order staying execution on the April 8, 1996, judgment, the court had already confirmed the foreclosure sale, the commissioner's deed had been executed and delivered, and title had passed to Mid-State. The supersedeas and stay order were effective only to prohibit further execution of the judgment by Mid-State and did not have the effect of nullifying the court's confirmation of the sale or the commissioner's deed that followed. For all intents

and purposes, title to the property was vested in Mid-State and appellant no longer had an insurable interest therein.

There is another reason appellant did not have an insurable interest in the property at the time of the fire. As stated above, at the foreclosure sale, Mid-State's bid for the property at the foreclosure sale was equal to the entire amount of appellant's debt to it, including principal, interest, costs, and fees. Upon confirmation of the sale, appellant's debt to Mid-State was thus fully extinguished. At that point, appellant no longer had an "actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance . . ." as required by Ark. Code Ann. § 23-79-104(b). Appellant's voluntary undertaking by her supersedeas to "deliver possession of the foreclosed property, and to pay all costs and damages for delay that may be adjudged against appellant on appeal . . ." cannot be used to bootstrap herself into having an insurable interest in property that she no longer owned, upon which she owed nothing, that she did not rent, and of which she was in possession solely by virtue of the court's stay.

Contrary to appellant's argument, the determination that appellant had no insurable interest in the property did not have the effect of rendering the property "totally uninsurable," nor did it necessarily leave Mid-State with an "uninsured dwelling" while appellant prosecuted her appeal. When the sale to Mid-State was confirmed and the Commissioner's deed delivered to it, Mid-State became the owner and it had an insurable interest in the property.

Because we find that appellant had no insurable interest in the property at the time of the fire, it is unnecessary to reach the other issues argued by appellant.

Affirmed.

ROGERS and ROAF, JJ., agree.

Renee MATHEWS *v.* Rodney OGLESBY

CA 96-1187 952 S.W.2d 684

Court of Appeals of Arkansas
Division II
Opinion delivered October 22, 1997

Linda D. Shepherd, P.A., for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Bruce D. Eddy*, for appellee.

JOHN F. STROUD, JR., Judge. Appellant Renee Mathews appeals from a chancery court decree changing her child's surname to that of the child's father, appellee Rodney Oglesby. She argues that, in making the ruling, the chancellor did not consider the child's best interests. We agree and reverse and remand for further proceedings.

Appellant and appellee are unmarried. On December 13, 1995, appellee filed a petition in Pulaski County Chancery Court alleging that appellant was about to deliver a child, Joshua Levi Mathews. Appellee asked that he be declared the child's father, that he be required to pay child support, that custody be vested in appellant, that the child's birth certificate be amended to show him as father of the child, and that the child's surname be changed to Oglesby. The child was born the next day.

On February 16, 1996, a temporary hearing was held wherein custody was awarded to appellant. Appellee was given visitation rights, was encouraged to seek employment that provided health coverage, was ordered to pay child support, was ordered to obtain a child safety seat, and was directed that, should he obtain a tax refund, he apply it to a $360.00 child-support arrearage. All other issues in the case were reserved for the final hearing.

The final hearing was held on May 17, 1996. The parties stipulated that appellee was the father of the child and that his name could appear on the birth certificate as the father of the child. However, appellant opposed any change in the child's surname. The chancellor therefore heard evidence on that issue in the form of testimony by appellant, appellant's mother Diana Mathews, and appellee. Appellant testified that she discovered she was pregnant in April 1995. She contacted appellee, who expressed surprise at the news. Two weeks later, appellee told appellant he was tired of her and didn't want anything else to do with her. He further encouraged her to have an abortion. About one month later, appellee reestablished communications with appellant. However, he refused to accompany appellant to her doctor appointments until later in her pregnancy when he accompanied her to two ultrasound appointments. After one of the appointments, he told appellant that if she did not put his name on the birth certificate, he wanted nothing to do with her. Contact between them ceased for eight weeks.

Appellee was present at the birth of the child. According to appellant, he did nothing during her pregnancy to offer financial support, even though he had purchased, in May of 1995, a truck that carried $400.00 per month payments. Further, appellee was behind in child support and did not show up at the first two visitations scheduled by the chancellor at the February hearing. According to appellant, she did not want her child's surname changed because his social security number, his medical and pharmaceutical records, and his Medicaid were all in the name of Mathews. She also expressed discomfort at the prospect of having a last name different from her child. However, upon cross-examination, appellant stated that if she were to get married sometime in the future, she would not be reluctant to change her name to her husband's name. Diana Mathews corroborated her daughter's testimony regarding appellee's missed visitation and child-support arrearages.

In appellee's testimony, he admitted that he had not purchased a child safety seat as ordered by the chancellor and that he had used his $900.00 tax refund to pay bills instead of paying child support. He also admitted that he was behind on child sup-

port and that he had initially encouraged appellant to have an abortion.

During appellant's testimony, before the testimony of Diane Mathews and appellee was offered, the chancellor made the following comment:

> It has been this Court's policy to change the last name to that of the father unless it is a situation where the child is, let's say, ten or eleven years old, been in school for a number of years, everybody knows that child by that last name. We're talking about an infant here. So in all likelihood the Court is going to change the last name.

At the close of the hearing, the chancellor changed the child's name without further comment.

Arkansas Code Annotated § 20-18-401(f)(3) (Supp. 1995) provides that, when the paternity of a child is determined by a court of competent jurisdiction, the name of the father and the surname of the child shall be entered on the birth certificate in accordance with the finding and order of the court. However, that statute is not interpreted to mean that the child's surname should necessarily be that of the father. *McCullough v. Henderson*, 304 Ark. 689, 804 S.W.2d 368 (1991). Instead, the decision to change or not change the child's surname should be "the product of the chancellor's informed discretion, exercised in response to what is deemed to be in the best interests of the child." *Id.*; *see also Reaves v. Herman*, 309 Ark. 370, 830 S.W.2d 860 (1992). When the best interests of the child are at stake, the chancellor should look into the peculiar circumstances of each case and act as the welfare of the child appears to require. *Clark v. Reiss*, 38 Ark. App. 150, 831 S.W.2d 622 (1992). Here, the chancellor followed a "policy" that took but one factor into consideration, i.e., the age of the child. The mechanical application of such a policy precludes consideration of the full panoply of factors inherent in determining the best interests of a child.

On *de novo* review of a fully developed chancery record, where we can plainly see where the equities lie, we may enter the order that the chancellor should have entered. However, we may decline to do so if justice will better be served by a remand.

Bradford v. Bradford, 34 Ark. App. 247, 808 S.W.2d 794 (1991). Since the chancellor announced her policy regarding name changes in the midst of appellant's testimony, the parties' presentation of evidence may have been affected. Therefore, to ensure that the evidence is fully developed on this issue, we reverse and remand for a further hearing to determine if the name change is in the best interest of the minor child. In light of our holding, we need not address appellant's contention that the chancellor's policy violates her constitutional guarantee of equal protection.

Finally, appellant urges us to adopt a presumption in favor of the surname chosen by the child's custodial parent. *See generally Gubernat v. Deremer*, 140 N.J. 120, 657 A.2d 856 (1995). We decline to do so. When the best interests of the child are involved, the chancellor should make his or her decision on an individualized basis, not on the basis of a presumption. *Fox v. Fox*, 31 Ark. App. 122, 788 S.W.2d 743 (1990). *See also* Note, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1314 (1984).

Reversed and remanded.

PITTMAN and NEAL, JJ., agree.

William Andrew HYDE *v.* STATE of Arkansas

CA CR 97-314 953 S.W.2d 911

Court of Appeals of Arkansas
Division IV
Opinion delivered October 22, 1997

James R. Marschewski, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant William Hyde pled guilty to and was convicted of delivery of marijuana in August 1991. The trial court withheld imposition of sentence for five years conditioned on Hyde's good behavior and other conditions. The State filed a petition to revoke in May 1996, based on

Hyde's possession of drug paraphernalia. The trial court granted the petition and sentenced Hyde to ten years' imprisonment with eight years suspended. Hyde's sole issue on appeal is that there was insufficient evidence to support the revocation. We affirm.

At the hearing on the State's petition to revoke, Officers Paul Smith and David Slaughter testified that they had received information regarding Hyde's possession and use of controlled substances at his home. The officers went to the house on May 8, 1996, approached Hyde on the front porch, and told him of the allegations made against him.

The officers testified that Hyde told them that he had some marijuana at his home for "personal use" and that he used it for his back problems. He also admitted having drug paraphernalia at the house. The officers then asked if they could search the house and testified that they informed Hyde that he could refuse the search. According to the officers, Hyde consented to the search and even showed them various drug paraphernalia in the residence. Officer Slaughter testified that he also found a tray that contained some marijuana seeds and a small amount of green vegetable material. Near the tray was a pair of hemostats, some burnt ends, and a pipe with burnt residue in the bowl. However, no laboratory analysis of any of the material was introduced to prove that the substances were marijuana or other controlled substance.

Although Hyde claimed that he told the officers that the pipes were part of a collection, the officers denied being so told. Officer Smith testified that Hyde had numerous pipes and a "water bong," and that Hyde told him that the reason he had so many pipes was that he made them for himself and for his friends for smoking marijuana. In fact, the officers also arrested a man who came to Hyde's house during the search, when marijuana was found on him in a pat-down search.

For the defense, Hyde's father testified that Hyde had a pipe collection, including Indian ceremonial pipes. Hyde's wife, who was present at the time of the search, also testified about Hyde's pipe collection. She testified that there was not any marijuana in the house on the day of the search, and that the substance on the tray was herbal material that Hyde used for his back pain. Finally,

Hyde testified on his own behalf and stated that he had thirty-four pipes and seven water bongs. However, he denied that any of the substances found by the officers were marijuana, and stated that there was no marijuana at the house. He testified that he told the police about his pipe collection and that the officers told him they were not interested in his pipes, only marijuana. He stated that, when the police did not find any marijuana, they got upset and decided to take some of the pipes and charge him with possession of paraphernalia instead. He testified that Officer Smith told him that it was okay that he had the pipes as long as he did not have marijuana in the house. He testified that the vegetable substance found was a combination of herbs he had purchased at a store.

Hyde's sole point on appeal is that the trial court's revocation was clearly against the preponderance of the evidence. He argues that there was insufficient evidence on which to revoke his suspended imposition of sentence, because there was no evidence that he intended to use the items seized to smoke or otherwise ingest marijuana. He argues that mere possession of the pipes was not illegal, and that he had to be shown to have intended to use the pipes in an illegal manner. However, his arguments are without merit.

Arkansas Code Annotated § 5-64-403(c)(1) (Repl. 1996) provides that it is unlawful to possess drug paraphernalia with the intent to use it to ingest or inhale a controlled substance. It is also unlawful to possess paraphernalia with the intent to deliver it under circumstances where one should reasonably know that it will be used to inhale a controlled substance. Ark. Code Ann. § 5-64-403(c)(2) (Repl. 1996). According to Ark. Code Ann. § 5-64-101 (Repl. 1996), when determining if an object is drug paraphernalia, a court should consider, among other factors, statements by the owner concerning its use, prior convictions of the owner relating to any controlled substance, and direct or circumstantial evidence of the intent to deliver the paraphernalia for an illegal use.

In a hearing to revoke, the burden is upon the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence; on appellate review, the trial

court's findings are upheld unless they are clearly against a preponderance of the evidence. *Lemons v. State,* 310 Ark. 381, 836 S.W.2d 861 (1992); *Russell v. State,* 25 Ark. App. 181, 753 S.W.2d 298 (1988). Since a determination of the preponderance of the evidence turns on questions of credibility and weight to given testimony, this court defers to the trial court's superior position. *Lemons, supra.*

Hyde relies on *Crutchfield v. State,* 306 Ark. 97, 812 S.W.2d 459 (1991), to support his argument for reversal. In *Crutchfield,* the supreme court reversed and dismissed a conviction for possession of drug paraphernalia, because there was no proof that a four-inch piece of automobile radio antenna alleged to be drug paraphernalia was intended for drug use, no proof of residue on the paraphernalia, and no drugs found on the defendant. The antenna was found on Crutchfield in a pat-down search when he was arrested for armed robbery. The supreme court said that the lack of any link to drug use left the jury to speculate that the defendant was using the antenna for a prohibited purpose. Hyde argues that his case is analogous because there was no crime lab report showing marijuana residue on the paraphernalia, or that the green vegetable material found at his house was marijuana. He contends that the court was left "to mere speculation as to whether the items seized in the home were in fact used for the smoking of marijuana or were in fact used for smoking herbs."

■ However, Hyde's reliance on *Crutchfield* is misplaced for several reasons. First, the preponderance of the evidence clearly supports a finding that Hyde possessed the requisite intent. The arresting officers testified that Hyde told them that he had some "personal use" marijuana at the house and that he smoked it for pain in his back. Moreover, Hyde stated that he made some of the pipes for other people, which is also a criminal offense. The trial court was also entitled to consider Hyde's previous conviction for delivery of marijuana. Second, unlike Crutchfield, Hyde was not tried for possession of drug paraphernalia; the standard for review of a revocation of probation or of a suspended sentence is preponderance of the evidence, not beyond a reasonable doubt. Third, as pointed out by the State, in *Crutchfield,* the supreme court, upon rehearing, found sufficient evidence to uphold the

conviction for possession of drug paraphernalia if the State's expert testimony regarding the intended use of the antenna had not been excluded, and remanded the case for retrial. *See Crutchfield v. State, supra*, supp. op. on reh'g, 306 Ark. 104, 816 S.W.2d 884 (1991). Here, the intended use of the pipes and water bongs, unlike a piece of antenna, needs no further explanation. Such items are specifically classified as drug paraphernalia by statute. *See* Ark. Code Ann. § 5-64-101(v)(12)(A), 5-64-101(v)(12)](B), and 5-64-101(v)(12)](L) (Repl. 1996).

Affirmed.

BIRD and ROGERS, agree.

Marcus Eugene RELEFORD *v.* STATE of Arkansas

CA CR 97-6 954 S.W.2d 295

Court of Appeals of Arkansas
Division IV
Opinion delivered October 29, 1997

John Joplin, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Marcus Eugene Releford, was found guilty by a jury of two counts of aggravated robbery involving victims Jacqueline Schreckhise and Carmelita Echols. Respectively, he was sentenced to consecutive terms of eighteen and ten years in prison. As his two issues on appeal, appellant contends that there is no substantial evidence to support his convictions. We affirm.

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102(a) (Repl. 1993). A person commits aggravated robbery if he commits the offense of robbery, as defined above, and he is armed with a deadly weapon. Ark. Code Ann. § 5-12-103(a)(1) (Repl. 1993). The focus of our robbery statutes is placed on the threat of physical harm to the victim as opposed to the taking of property. *Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990); *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979).

The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the jury's verdict. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996). Substantial evidence is that which is forceful enough to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996). In determining whether there is substantial evidence, we review the evidence in the light most favorable to the State, and it is permissible to consider only that evidence which supports the guilty verdict. *Galvin v. State*, 323 Ark. 125, 912 S.W.2d 932 (1996).

Appellant's convictions were based on events that transpired on December 1, 1995, at the Von Hatten's Bakery in Fort Smith,

Arkansas. The record discloses that Ms. Schreckhise, the manager of the bakery, was working alone when appellant and another man, Harvey Johnson, came into the bakery that afternoon. The men ordered an assortment of cookies, doughnuts, a pecan pie, and cinnamon rolls. Meanwhile, Ms. Echols entered the bakery to purchase rye bread. After Ms. Schreckhise had placed the pastries in a white sack, and as she was putting the pie in a box, appellant twice struck her in the head with a metal pipe. Appellant motioned to Johnson, who knocked Ms. Echols to the floor and forcibly snatched her purse. The two then fled the bakery with the pie-box and the sack of baked goods.

Patrolman Monty McMillen was dispatched to search the area for the suspects. He found appellant and Johnson in an outbuilding behind a vacant duplex, eating pie. They ran, but McMillen apprehended appellant after a short chase. Appellant was carrying a backpack, which contained a thick metal pipe about eight inches long. In his pocket, he had thirty-three dollars in cash. McMillen later returned to the outbuilding where he found Ms. Echols's purse, her credit cards and other personal items, a white sack, and a box containing a partially eaten pie. He also found some partially burned papers, including a check bearing Ms. Echols's name.

Appellant gave a statement to the police. In it, he stated that he and Johnson had discussed robbing the bakery because they needed money. Appellant said that he had been in the bakery the day before and felt like it would be an easy target since a woman worked there alone. He said that he found the metal pipe on their walk to the bakery. Appellant admitted striking Ms. Schreckhise, and said that he got scared and grabbed only the food without getting into the cash register. He said that they went through Ms. Echols's purse and that he retained some thirty dollars in cash from it.

Appellant's first argument on appeal is that there is no substantial evidence to support his conviction for aggravated robbery against Ms. Echols. He contends that the evidence is not sufficient because Johnson did not possess a deadly weapon when she was

attacked and because there was no evidence that he used the metal pipe against her in any way. We find no merit in this argument.

The jury in this case received an instruction on accomplice liability. An accomplice is one who, with the purpose of promoting or facilitating the commission of an offense, solicits, advises, encourages, coerces, aids, agrees to aid, or attempts to aid another person in planning or committing an offense. Ark. Code Ann. § 5-2-403 (Repl. 1993); *Banks v. State*, 315 Ark. 666, 869 S.w.2d 700 (1994). Factors relevant in determining whether a person is an accomplice include the presence of the accused near the crime, the accused's opportunity to commit the crime, and association with a person involved in the crime in a manner suggestive of joint participation. *Lanes v. State*, 53 Ark. App. 266, 922 S.W.2d 349 (1996). When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986); *see also Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991). A participant cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole. *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991). Here, the evidence shows that appellant and his accomplice acted in concert to commit this offense and that appellant was armed with a deadly weapon. Under principles of accomplice liability, appellant's culpability is not diminished by the fact that the accomplice was not also in possession of a weapon. We thus cannot say that the conviction is unsupported by substantial evidence.

Appellant next argues that there is no substantial evidence to support the conviction involving Ms. Schreckhise. It is his argument that his confession provided the only evidence of his intent to commit a theft and that the confession was not sufficiently corroborated. This argument is based on Ark. Code Ann. § 16-89-111(d) (1987), which provides that a confession, unless made in open court, will not warrant a conviction unless it is accompanied by other proof that the offense was committed. The test of correctness under this statute is not whether there was sufficient evidence to sustain a conviction, but whether there was evidence that such an offense was committed, or, in other words,

proof of the *corpus delicti*. *Johnson v. State*, 298 Ark. 617, 770 S.W.2d 128 (1989). We believe that the testimony demonstrating that appellant did in fact steal the pastries provided ample corroboration of his intent. *See e.g. McQueen v. State*, 283 Ark. 232, 675 S.W.2d 358 (1984).

Affirmed.

BIRD and ROAF, JJ., agree.

Colleen THOMPSON *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 96-636 954 S.W.2d 292

Court of Appeals of Arkansas
Division IV
Opinion delivered October 29, 1997

Booth & Honeycutt, P.L.C., by: *J. Marvin Honeycutt*, for appellant.

Marlene S. Moore, for appellee.

JUDITH ROGERS, Judge. The appellant, Colleen Thompson, appeals from an order terminating her parental rights in her children J.T., R.T., D.T., and S.T. By this appeal, appellant contends that the chancellor's decision was clearly erroneous only as to her two younger children, D.T., who was born on May 26, 1987, and S.T, who was born on June 15, 1988. We find no merit in her argument and affirm.

The record reflects that the children were first removed from the custody of appellant and her husband, Charles Thompson, the children's adoptive father, in April of 1990. A full array of services was offered to the family such that reunification was achieved in August of 1992. On July 13, 1994, appellee was granted emergency custody of the children. By order of September 13, 1994, the chancellor determined that the children were dependent-neglected. This determination was based on evidence that J.T. had been physically abused and that R.T. had been sexually abused and was a sexually exploited juvenile. The chancellor found that D.T. and S.T. were dependent-neglected because appellant and Mr. Thompson were in jail awaiting trial.

In December of 1994, appellant was found guilty by a jury of raping J.T., and she was sentenced to a term of forty years in prison. The following March, she pled *nolo contendere* to the rape of R.T. and was sentenced to forty years in prison to be served concurrently with the former sentence imposed. Mr. Thompson was also convicted of raping J.T. and received a sentence of forty years in prison. His conviction was affirmed on appeal. *See Thompson v. State*, 322 Ark. 586, 910 S.W.2d 694 (1995).

On September 13, 1995, appellee filed a petition to terminate the parental rights of appellant and Mr. Thompson. By order of January 17, 1996, the chancellor granted the petition. Mr. Thompson has not joined appellant in bringing this appeal.

The chancellor's decision was based on testimony taken at a hearing held on December 18, 1995. At the hearing, J.T., then age thirteen, testified on behalf of appellee. In his testimony, he described what can only be characterized as unspeakable acts of sexual abuse perpetrated by both appellant and Mr. Thompson upon him and his eleven-year-old sister, R.T. Further elaboration is not necessary for an understanding of the issue raised on appeal. Although he denied knowledge of such acts being committed against his younger brothers, D.T. and S.T., he testified that his parents told him that "when they got old enough they would start doing what they were doing to us to them." He further testified that his younger brothers had been mistreated. He said that they were beaten, hit, and kicked, and had things thrown at them. He

also spoke of appellant selling marijuana and said that he would have to sell it if a purchaser came by when she was not at home.

Dr. Rebecca Floyd, a family physician, testified that she had treated the children since 1992. She said that they were usually dirty and dressed in clothes that were torn and tattered. She testified that their appearances at the clinic were irregular but that she had established a form of control by refusing to write the children's prescriptions for Ritalin unless they were seen by her. Dr. Floyd stated that the children had improved since they had been removed from appellant's custody in that their behavior seemed less erratic. She testified, however, that D.T. and S.T. continued to have difficulty sleeping and that they suffered from recurring nightmares. She said that both children had repeatedly expressed that they were afraid of their parents and that D.T., in particular, had fears of his parents returning to get him. Her diagnosis was that D.T. and S.T. were suffering from posttraumatic stress syndrome. She testified that it would be devastating for them to have contact with the persons responsible for causing that condition and that their only hope was for them to be placed in a more stable environment and to undergo intensive psychotherapy.

Dr. Kathlene Kralik, a clinical psychologist, became involved with the children in 1992, and she had been seeing D.T. and S.T. on a regular basis since August 1994. She said that D.T. and S.T. were victims of severe maltreatment. Her diagnosis of D.T. was that he suffered from prolonged, chronic posttraumatic stress disorder, child neglect, and physical abuse. She said that it was suspected that D.T. had been sexually abused because of certain behaviors he exhibited. She said that both children had been anxious about the hearing and feared being taken from the home of their foster mother. She related that they had clearly, repeatedly, and specifically stated that they never wanted to see their parents again, even for a final visit. In responding to a hypothetical question based on the circumstances of the case, Dr. Kralik said that the two younger children could not be safely returned to the home. She stated that the parents had a severe character disorder that could not be treated, explaining that research had shown that perpetrators of sexual offenses against minors do not respond to treatment. She said that the only solution is to keep such persons

away from children. It was her recommendation that the children have no further contact with their parents.

James Hurst, a criminal investigator with the Van Buren Police Department, described the Thompson home. He said that the house was filthy and infested with cockroaches. Clothes were strewn throughout the house, and dirty dishes were stacked all over the kitchen. He testified that the house was so nasty that he had trouble walking through it, and he felt that it was unsafe for children to live there.

Larry King, a case worker for appellee, testified that the department's involvement with the family began in October of 1989, that they were removed from the home in April of 1990 and were returned in August of 1992. He said that during that time a case plan was developed and that services were provided to the family in the forms of crisis intervention, budgeting education, homemaker services, housing assistance, and parenting classes. He testified that appellant received individual counselling, joint counselling with Mr. Thompson, and counselling with the children. Mr. King stated that the children were returned to the home in 1992 against the department's recommendation because, despite the extensive services that had been offered, they had not seen the kind of behavioral changes they felt were necessary to ensure the safety of the children.

Another case worker, Michelle Treadway, testified as to her belief that appellant's parental rights should be terminated. She said that appellant had not demonstrated the ability to protect the children from future abuse. Her opinion was also based on appellant's participation in sexual abuse and evidence that she allowed physical abuse to occur in her presence. She felt that further services would not effect rehabilitation in a timely manner for these children.

In her testimony, appellant stated that she had done none of the sexual acts spoken of by J.T., nor had she seen Mr. Thompson do any of the acts described. She said that J.T. had given her problems in the past and that the child must have been angry at her for him to say those things. She admitted that she smoked marijuana to calm her nerves and to relieve pain from back surgery

but said that she did not sell it. As for the condition of the house, appellant testified that she worked eleven hours a day, five days a week, and half days on Saturdays, and had four children who did not want to do anything. She said that she was presently working on making better choices in her life and that she planned on going to school for interior decorating when released from prison.

For reversal, appellant contends that the chancellor's decision to terminate her rights in D.T. and S.T. was clearly erroneous. She argues that there was no evidence presented that these two children were sexually abused or neglected in any manner, and thus contends that appellee failed to present clear and convincing evidence in support of its petition. We cannot agree.

Appellant is correct to point out that the grounds for termination of parental rights must be proven by clear and convincing evidence. Ark. Code Ann § 9-27-341(b) (Supp. 1995). When the burden of proving a disputed fact in chancery court is by clear and convincing evidence, the question we must answer on appeal is whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Beeson v. Arkansas Department of Human Services*, 37 Ark. App. 12, 823 S.W.2d 912 (1992). In resolving the clearly erroneous question, we must give due deference to the opportunity of the chancellor to judge the credibility of the witnesses. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). Repeatedly our courts have stated that there are no cases in which the superior position, ability, and opportunity to view the parties carry as great a weight as those involving minor children. *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993).

In terminating appellant's parental rights, the chancellor based his decision on Ark. Code Ann. § 9-27-341(b)(1) & (b)(2)(F) (Supp. 1995). In relevant part, the statute provides:

> (b) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (1) That it is in the best interest of the juvenile;
>
> (2) Of one or more of the following grounds:

(F)(i) The parent is sentenced in a criminal proceeding for a period of time which would constitute a substantial period of the juvenile's life and the conditions in subdivision (b)(2)(A) or (B) of this section have also been established.

(ii) For purposes of this section, "substantial period" means a sentence, and not time actually served, of no less than fifteen (15) years, none of which have been suspended.

Arkansas Code Annotated § 9-27-341(b)(2)(A) provides:
(A) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and, despite a meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent. It is not necessary that the twelve-month period referenced in this subdivision (b)(2)(A) immediately precede the filing of the petition for termination of parental rights, or that it be for twelve (12) consecutive months. The stated intent of this statute is to provide permanency in a juvenile's life in all instances where return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that return to the family home cannot be accomplished in a reasonable period of time. Ark. Code Ann. § 9-27-241(a) (Supp. 1995).

In the case before us, there is evidence that appellant stands convicted of crimes for which she has been sentenced to a total of forty years in prison. This sentence constitutes a "substantial period" of the children's lives as set out in the statute. Also, the children had been declared to be dependent-neglected and had been out of the home for more than the requisite one-year period of time. There is further evidence that appellee's efforts to rehabilitate the family had proved unsuccessful. The chancellor was also entitled to believe the testimony of J.T. and to disbelieve that of appellant. We also think that there is ample evidence in the record from which the chancellor could conclude that the safety and welfare of D.T. and S.T. would be best served by terminating appellant's parental rights. Our case law is clear that termination of parental rights is an extreme remedy and is in derogation of the natural rights of parents. *Anderson v. Douglas*, *supra*. However,

parental rights will not be enforced to the detriment or destruction of the health and well being of the child. *Corley v. Arkansas Department of Human Services*, 46 Ark. App. 265, 878 S.W.2d 430 (1994). We are unable to say that the chancellor's findings that termination was in the best interest of the children and that the statutory requirements had been met are clearly against the preponderance of the evidence.

Affirmed.

NEAL and GRIFFEN, JJ., agree.

Cathy WILLIAMS *v.* ST. VINCENT INFIRMARY

CA 97-30 954 S.W.2d 302

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered November 5, 1997

Walker, Campbell & Dunklin, by: *Sheila F. Campbell*, for appellant.

Jack, Lyon & Jones, P.A., by: *John W. Fink*, for appellee.

WENDELL L. GRIFFEN, Judge. Cathy Williams has appealed the decision by the Workers' Compensation Commission that denied her claim for permanent disability benefits above the anatomical impairment that she sustained following a July 12, 1990, compensable back injury. Appellant contends that the Commis-

sion should be reversed because its decision is not supported by substantial evidence. We hold that reasonable minds could have reached the decision that the Commission reached upon the evidence in the record. Therefore, we affirm.

Appellant was employed as a daycare worker at St. Vincent Infirmary Medical Center. Her job involved bending, lifting, stooping, mopping, sweeping, and other duties related to caring for, feeding, cooking for, and playing with children. On July 12, 1990, appellant injured her back while lifting a child. The appellee accepted her injury as compensable, paid for her to obtain medical treatment, and paid temporary total disability benefits based upon appellant's compensation rate of $150.21 per week. The parties stipulated that appellant's healing period ended December 5, 1991, when appellee accepted and paid permanent disability benefits corresponding to a ten-percent permanent physical impairment rating. Appellant waived future vocational rehabilitation, and contended before the Commission that she was either entitled to permanent and total disability benefits or additional permanent disability benefits exceeding the value of the ten-percent impairment rating on account of a decrease in her capacity to earn wages. The Commission found that appellant is not entitled to permanent partial disability benefits above the ten-percent impairment rating, and that appellant failed to prove by a preponderance of the credible evidence that she is entitled to permanent disability benefits due to diminution of her capacity to earn wages.

Of course, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence. Substantial evidence is such relevant evidence as reasonable minds may accept as adequate to support a conclusion. *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

Appellant argues that Ark. Code Ann. § 11-9-522(b) (1987) mandates reversal because the Commission received evidence that she only had a tenth grade education, lacked vocational training, had been a homemaker before going to work at St. Vincent Infir-

mary, remained under medical care for a substantial time after the compensable injury, and continued to take prescription pain medication for the herniated disc that resulted from that injury. The record does contain that proof. However, the Commission also received evidence showing that appellant presented a variety of somatic symptoms that were likely to be "very exaggerated and not necessarily related to an actual physical condition." Appellant's attendance at a work-hardening program was inconsistent, and her performance while attending work-hardening was reported to be inconsistent, self-limiting, and characterized by symptom magnification despite psychological counseling aimed at assuring her that she would not hurt herself during the retraining process. Although the employer introduced evidence that appellant had been offered a job as a nurse-scheduling clerk after her healing period ended and that the job was within the restrictions outlined by appellant's primary treating physician, appellant testified that she did not believe herself qualified for the job because she lacked typing and secretarial skills and felt unable to return to gainful employment.

Arkansas Code Annotated § 11-9-522(b) states:

> In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than her average weekly wage at the time of the accident. *See* Ark. Code Ann. § 11-9-522(c)(1).

Although appellant argues that the employer failed to prove that she had returned to work, obtained other employment, or received a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident through the evidence concerning the nurse-scheduling clerk position, that factor is not controlling of our decision. The issue presented by appellant's claim was whether she proved by a preponderance of the evidence that she was entitled to a finding of permanent and total disability, or whether she was entitled to permanent disability benefits for diminution of her wage-earning capacity beyond the value of the ten-percent physical impairment rating. If the Commission could have reasonably found that appellant was not entitled to permanent partial disability benefits above the value of the ten-percent physical impairment because she failed to prove by a preponderance of the credible evidence that she had sustained wage-loss disability, the alleged failure of proof by appellee would be immaterial. There was conflicting evidence on that crucial issue. The evidentiary conflict required that the Commission weigh the proof, make credibility evaluations of the witnesses, and render its decision.

■ ■ It is well settled that a decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusion if presented with the same facts. *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996). It is not the province of the court of appeals to substitute its judgment concerning matters of credibility for that of the Commission. *Hanson v. Amfuel*, 54 Ark. App. 370, 925 S.W.2d 166 (1996). The issue is not whether we might have reached a different result or whether evidence would have supported a finding that is contrary to the Commission's findings; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bradley v. Alumax, supra.* Based upon the conflicting proof in the record, we are unable to agree with appellant that reasonable persons could not have reached the same conclusion that the Commission reached in denying her claim. Therefore, we affirm.

AREY and CRABTREE, JJ., agree.

ROGERS, NEAL, and PITTMAN, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. I respectfully disagree with the prevailing opinion's disposition of this case. I believe the case should be reversed and remanded to the Commission to make specific findings of fact and to consider the medical evidence and the wage-loss factors.

The Commission stated that appellant failed to show by a preponderance of the credible evidence that she was entitled to wage-loss disability. The Commission simply concludes that appellant is capable of returning to gainful employment despite her testimony and that of her corroborating witnesses. The prevailing opinion determines that "[i]f the Commission could have reasonably found that appellant was not entitled to permanent partial disability benefits above the value of the ten percent physical impairment because she failed to prove by a preponderance of the credible evidence that she had sustained wage-loss disability, the alleged failure of proof by appellee would be immaterial." The prevailing opinion decides that based on the conflicting proof in the record reasonable minds could have reached the same conclusion as the Commission. If the Commission had made findings that the proof in the record was conflicting and set forth the basis for those findings, we would not have reached differing opinions in this case. However, the Commission failed to make specific findings of fact to support its conclusion that appellant failed to prove that she was entitled to wage-loss disability.

When determining wage-loss disability benefits, the Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant's age, education, and work experience. *Bradley v. Alumax;* 50 Ark. App. 13, 899 S.W.2d 850 (1995). It is clear from the Commission's opinion that it did not consider the wage-loss factors or any of the medical evidence in making its determination that appellant was not entitled to wage-loss disability benefits.

The Commission also found that appellant had been offered and rejected suitable employment made available by appellee. The prevailing opinion states that that finding is not controlling in its

decision. Despite the prevailing opinions dismissal of this point, I believe it would be necessary to address if the case were being reversed and remanded.

Arkansas Code Annotated § 11-9-522(b)(2) (Repl. 1996) provides:

> (2) However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or *has a bona fide and reasonable obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident*, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. (Emphasis added.)

The employer or his workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a *bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). (emphasis added) The Commission in making the finding that appellee offered appellant a position that was approved by her physician, failed to make a finding that the offer of employment was for wages equal to or greater than appellant's average weekly wage at the time of her accident. The Commission merely noted that appellant was making slightly more than minimum wage at the time of her injury. There is no indication in the Commission's opinion that the position offered to appellant paid the same or greater wages as her previous position. Without this finding, the Commission's decision on that issue would be inadequate for review. Thus, I would reverse and remand this case for the Commission to make specific findings of fact to support its conclusions.

NEAL and PITTMAN, JJ., join in this dissent.

Raymond WARREN *v.* STATE of Arkansas

CA CR 97-164 954 S.W.2d 298

Court of Appeals of Arkansas
Division III
Opinion delivered November 5, 1997

Daniel G. Ritchey, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Raymond Warren was convicted by a jury of possession of cocaine. Warren alleges three evidentiary errors in the trial. We find sufficient error in appellant's first point to reverse his conviction, and we address his second two points on appeal for the limited purpose of giving guidance to the trial court since the same issues are likely to arise again on retrial. *See Pyles v. State*, 329 Ark. 73, 79, 947 S.W.2d 754, 757 (1997).

Appellant was stopped on November 18, 1994, for speeding. The officer detected the odor of intoxicants, conducted field sobriety testing, and then arrested appellant. Officers then searched his vehicle, finding a loaded .38 caliber revolver and a cellophane bag containing nine pieces of an off-white rock-like substance later determined to be crack cocaine. Officers also

found $1,335 in bills and a large number of coins on appellant's person.

A civil forfeiture proceeding ensued over the $1,335 pursuant to Arkansas Code Annotated § 5-64-401 (Supp. 1995). In that action, the court found that appellant had won this money in a crap game shortly before his arrest, and that the State had failed to prove it was proceeds or profits from a drug sale. However, despite this determination before Judge Samuel Turner in the civil forfeiture action, the State successfully introduced the money into evidence in the criminal trial.

Also, on May 11, 1995, officers obtained a warrant and searched appellant's residence, finding additional drug paraphernalia and drug residue. Charges stemming from this search were dismissed, but the State successfully introduced the seized paraphernalia in the present case.

Appellant's first point on appeal is that the trial court erred by admitting evidence seized in a search six months after the arrest for which appellant was being tried. The evidence consisted of scales, a plate with crack cocaine, and a pill bottle with cocaine residue. The trial court allowed this evidence to be admitted under Ark. R. Evid. 404(b) and the probative/prejudicial balancing test of Rule 403.

Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In the present case, the trial court ruled, as abstracted:

> In view of the issues raised by the defense in the jury selection process, the Court is going to rule that the evidence is admissible under Rule 404(b) for another purpose such as proof of knowledge, intent, absence of mistake or accident, to rebut the suggestion made by the defendant's attorney during the jury selection process that these items were placed, without the defendant's

> knowledge, in the vehicle. I am willing to give a cautionary instruction in relation to this testimony. I am also willing to limit the manner in which the evidence is presented to present it in as bare a fashion as possible and also one that would limit any prejudicial effect.

In his pretrial ruling on the motion in limine to exclude the fruits of the later search, the trial court cautioned defendant's attorney about possibly "opening the door" to such evidence by disclaiming ownership of the drugs. Appellant contends his strategy was simply to force the State to prove each element of its case, and that his argument was purposefully limited to avoid disclaiming ownership of the drugs, which would have allowed extrinsic evidence to prove he had possessed drugs on other occasions. However, the trial court found fault in appellant's attempted line of questioning in voir dire. Essentially, appellant's attorney queried the potential jurors about whether they loaned their cars to people and whether they searched under the seat for contraband when the cars were returned. The State successfully objected to this line of questioning, and the standard instruction about statements of counsel not amounting to evidence was given. However, the trial court found that this exchange was sufficient to imply to the jurors that appellant was disclaiming ownership of the drugs, and therefore opened the door to the State to show his proximity to drugs and paraphernalia in the search six months later.

Appellant now emphasizes that his questions in voir dire were timely and successfully objected to by the State, effectively closing any door he may have inadvertently opened. Also, appellant argues that under the same reasoning, a plea of not guilty could amount to an implication of a disclaimer of ownership, opening the door to admission under 404(b). Appellant's argument goes on to say,

> It is difficult to understand how possession of controlled substance and paraphernalia alleged to be in the appellant's residence on May 11, 1995, can be relevant or probative to whether he had possession of a controlled substance under the seat of his vehicle on November 18, 1994. A future act certainly does not prove knowledge of a past act.

In response, the State simply argues that the evidence tending to prove some material point, rather than just labeling appellant a criminal, is admissible under 404(b) with a proper cautionary instruction. *Lindsey v. State*, 319 Ark. 132, 138, 890 S.W.2d 584, 587 (1994). Further, the State argues that it is proper to rebut defense claims of lack of knowledge by introducing evidence of other wrongs. *Neal v. State*, 320 Ark. 489, 493-94, 898 S.W.2d 440, 443 (1995). However, *Neal* is distinguished because in the present case, the appellant did not testify, and his only denial of knowledge is a strained implication from counsel's attempted line of questions during voir dire.

Appellant argued vigorously to the trial court that its ruling was highly prejudicial, and would have the effect of labeling the defendant a "drug dealer" to the jury based on facts wholly outside of the present information. Notably, the evidence admitted was from subsequent actions, and not prior acts as usually is the case under this rule. Appellant states in his brief that all of the cases that deal with Rule 404(b) involve prior acts. The State did not refute this assertion, but our own research discovered that subsequent actions have been admitted to show intent, but none of these cases have been so far removed in time or as tenuous in their link to the proffered evidence as the present case. For example, in *Bragg v. State*, 328 Ark. 613, 627, 946 S.W.2d 654, 661 (1997), the supreme court affirmed the trial court's admission of testimony about a subsequent drug transaction. However, in *Bragg*, the subsequent act was relevant to the State's challenged identification of the defendant and to show intent or lack of mistake regarding the drug charge stemming from a transaction one year prior.

Also, the case of *Parker v. State*, 300 Ark. 360, 364-65, 779 S.W.2d 156, 158 (1989), allowed subsequent acts to be admitted under Rule 404(b). However, the subsequent acts in *Parker* were closely linked in time as a part of the State's evidence of the defendant's plan to murder an entire family. The court reasoned, "the entire sequence of events was such an inseparable whole that the State was entitled to prove the entire criminal episode." *Id.* (citations omitted). However, the present case is easily distinguished since there is no indication that the initial traffic stop is

part of a criminal episode culminating six months later in the search of appellant's house and the seizure of paraphernalia.

Finally, the case of *Thrash v. State*, 291 Ark. 575, 581, 726 S.W.2d 283, 286 (1987), allowed evidence of subsequent acts under Rule 404(b) when subsequent burglaries established a time-frame that was independently relevant, and where the burglaries were committed with the same *modus operandi*, or same unique method of operation. *Id.* (citing *Frensley v. State*, 291 Ark. 268, 724 S.W.2d 165 (1987).) However, the facts here include neither a time frame for the commission of a crime, nor a unique method of operation.

The standard of review is a high hurdle in overturning a trial court's evidentiary ruling under Rule 403 or 404(b). The standard of review of a trial court's weighing of probative value against unfair prejudice is whether the trial court abused its discretion. *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993). The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Jarrett v. State*, 310 Ark. 358, 833 S.W.2d 779 (1992).

However, we find appellant's argument logically and legally persuasive. The limited case law holding subsequent acts admissible under Rule 404(b) is factually distinguishable from the present case. Further, the prejudicial impact of allowing the jury to see additional drug-related evidence stemming from an entirely separate, distinct, and remote (six months later) event is clearly prejudicial, and lacks any logical connection to the stop for speeding six months earlier. Accordingly, we hold that the trial court abused its discretion by admitting evidence that was seized six months after the act for which appellant was being tried, and that lacked any temporal or logical link to the current charge.

Reversing appellant's conviction on this first point renders his second two points moot, but we address them below to the extent that they may be revisited in a subsequent trial.

For his next point, appellant argues that the failed civil forfeiture proceeding to seize the $1,335 in currency as drug proceeds

should completely bar its introduction in the instant criminal matter because of the court's finding of fact that the money was gambling proceeds. This action, appellant argues, also violated Rule 403 because it was intentionally misleading to the jury and highly prejudicial to the defendant. Without citing any case law, the appellant broadly argues that admitting the money was a violation of *res judicata*, and the civil judgment and finding of fact should have estopped the State from introducing the money in the criminal matter.

Collateral estoppel bars the relitigation of issues, while *res judicata* bars the relitigation of claims. The policy consideration behind both theories is the finality of litigation. *See gen.* NEWBERN, ARK. CIVIL PRAC. AND PROC. (2d ed.), § 26-13; *Coleman's Serv. Ctr. v. Federal Deposit Ins. Corp.*, 55 Ark. App. 275, 935 S.W.2d 289 (1996). Collateral estoppel is more appropriate in the present case since appellant seeks to bar admission of a single fact already judicially determined.

The State contends that even though a civil court made a specific finding-of-fact to the contrary, the criminal court may allow into evidence the seized money and argue that it had a tendency to make the existence of any fact more probable. The State argues that this Rule 401 analysis amounts to a lower burden of proof than what the State faced at the forfeiture hearing, and is therefore proper. In the alternative, the State argues that even if the money was improperly admitted, any error is harmless because of the overwhelming proof of guilt.

Based on the potential independent relevance of the evidence, we find that the trial court did not abuse its discretion in admitting the money found on the person of the appellant at the time of the arrest.

Appellant's final argument is based on the trial court allowing the State to essentially reopen its case and put on rebuttal evidence outside the scope of appellant's defense case, and based on the prosecutor's implied comment on appellant's failure to testify in his own defense. The trial court denied appellant's motion for a mistrial.

> Declaration of a mistrial, of course, is a drastic remedy and is proper only when the error is beyond repair and cannot be corrected by any curative relief. *Goins v. State*, 318 Ark. 689, 890 S.W.2d 602 (1995). In addition, the granting of a mistrial is within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal absent a showing of abuse. *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995).

Turner v. State, 325 Ark. 237, 245, 926 S.W.2d 843, 848 (1996).

Here, the State admits that a prosecutor's comment on a defendant's failure to testify can violate the right against self-incrimination sufficient to justify a mistrial. *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995). However, the State argues that the prosecutor's comments were merely proper argument about the defendant's knowledge, a necessary element of the crime. Further, counsel are given some latitude in opening and closing remarks, *Littlepage v. State*, 314 Ark. 361, 371, 863 S.W.2d 276, 281 (1993), and remarks during closing that require reversal are rare, requiring an appeal to the jurors' passions. *Mills v. State*, 322 Ark. 647, 663, 910 S.W.2d 682, 691 (1995). The remarks here do not appeal to the jurors' passions, and do not otherwise appear to require the drastic remedy of a mistrial.

Reversed and remanded.

ROBBINS, C.J., and MEADS, J., agree.

AEROQUIP, INC. and Hartford Insurance Company *v.*
Roy "Junior" TILLEY

CA 97-343 954 S.W.2d 305

Court of Appeals of Arkansas
Division II
Opinion delivered November 12, 1997

Frederick S. "Rick" Spencer, for appellants.

Friday, Eldredge & Clark, by: *William M. Griffin III* and *Clifford W. Plunkett*, for appellee.

JOHN E. JENNINGS, Judge. This is a workers' compensation case. Appellee, Roy "Junior" Tilley, was employed by appellant, Aeroquip, Inc., and performed manual labor. The Commission found that appellee sustained a compensable injury on July 30, 1994, while working for appellant, and awarded appellee temporary total disability benefits from August 7, 1994, through September 15, 1994, and temporary partial disability benefits for two

weeks subsequent to September 15, 1994, based on six-hour working days. Appellant was also ordered to pay all reasonable and necessary medical costs associated with appellee's injury and attorney's fees.

Appellant and its insurance carrier appeal from the Commission's decision arguing that: (1) the Commission's finding that appellee proved he sustained a compensable injury is not supported by substantial evidence; and (2) the Commission erred in finding a compensable injury where there was "no medical evidence supported by objective findings of the injury." We disagree and affirm.

On appeal in workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 128 (1995). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

It is the function of the Commission to determine the credibility of the witnesses and the weight given to their testimony. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995). The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Whaley, supra.*

Appellant first argues on appeal that the Commission's finding of a compensable injury is not supported by substantial evidence. Specifically, appellant argues that appellee failed to prove by a preponderance of the evidence that he sustained a compensa-

ble injury that caused his current back problems. Appellee testified that, at the time of his injury, he was working on a bonding machine. According to appellee, in an effort to stop a rope from going through the machine too fast, he grabbed the rope to stop it and was jerked over the table. Appellee testified that the mandrel he grabbed weighed somewhere between 700 and 800 pounds. Appellee stated that he reported the incident to his supervisor, Jerry Claypool, the next day and went to the emergency room that day where he was treated by Dr. Black, who later referred appellee to Dr. Foster.

Appellee also testified that he has had previous back problems, dating as far back as the early 1980s. Appellee stated, as evidenced by the medical information presented, that he has seen various chiropractors, orthopedic doctors, and regular family practitioners regarding his back problems over the years. In addition, appellee testified that prior to this incident, he had recently missed work due to his current emotional problems.

Jerry Claypool, appellee's supervisor at the time of the accident, testified that on July 29, 1994, he talked with appellee regarding his concern over attendance and told appellee that he had used up all of his vacation and sick time. Mr. Claypool stated that on July 31, 1994, appellee reported to him the accident resulting in his injury which had occurred the day before. Mr. Claypool further testified that he was unaware of appellee's previous back condition and stated the reason for appellee's missed work during the month of July was due to appellee's nervous problems. Susan Hughes, the human resources administrator for appellant, testified at the hearing that in July of 1994, appellee had brought in a certification from the Twin Lakes Chiropractor Clinic requesting that he be off work for six days.

Medical reports in the record track appellee's back problems since the early 1980s. The medical reports prior to appellee's accident reveal that for the most part appellee's back problems stem from degenerative disc disease of the lumbar spine. A report dated July 19, 1994, from the Kerr Medical Clinic, indicates that appellee was experiencing low back pain. The report indicated that five films were taken, and the impression was that appellee

suffered from a mild to moderate degenerative disc disease, mostly around L4 and L5.

Dr. Foster, who saw appellee after his accident, indicated in his report dated August 5, 1994, that appellee had a large disc herniation at L5-S1 on the left, being probably an extruded fragment, and which would likely require operative intervention. A medical evaluation dated November 16, 1994, by Dr. Ledbetter of Ozark Orthopedic Associates agreed with Dr. Foster's assessments finding that appellee had a large L5-S1 ruptured disc with probable free fragment on the left. Dr. Ledbetter's impression was that appellee suffered from herniated nucleus pulposus at L5-S1 left, with a large free fragment, as well as from a herniated nucleus pulposus at L4-5 with degenerative disc disease. Further, it was Dr. Ledbetter's impression that appellee's main symptoms stemmed from the L5-S1 left-sided herniated nucleus pulposus and that appellee would benefit from a discectomy at L5-S1.

The Commission found that, based on a review of the evidence, appellee had shown by a preponderance of the evidence that he had sustained a compensable injury which arose out of and in the course of his employment. The Commission further found that although appellee had suffered for some time from some degenerative disc disease, the main source of appellee's current complaints and the recommended surgery arose from his L5-S1 problem area. We cannot say that, in the case at bar, reasonable minds could not have reached a similar result. The medical evidence prior to the accident showed that although appellee suffered from some back problems, none seemed to require operative intervention, nor did they include a large ruptured disc at L5-S1.

Appellant also claims that appellee had reason to feign the injury because he had no more time available to take a leave of absence (other than through workers' compensation) and therefore his testimony in this case cannot be considered a credible basis for the finding. As we previously stated, it is the function of the Commission to determine the credibility of witnesses and the weight to be given to their testimony. *Whaley, supra.*

Appellant next argues that the Commission erred in finding a compensable injury in this case where there was "no

medical evidence supported by objective findings of the injury." More specifically, appellant argues that, although there is objective medical evidence of a herniated disc in this case, there is no objective medical evidence that the herniation occurred as a result of appellee's accident on July 30, 1994. However, in *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997), we held that a claimant need not offer objective medical evidence to prove the circumstances under which the injury was sustained or the precise time of the injury's occurrence. We stated in pertinent part that:

> Although it is irrefutably true that the legislature has required medical evidence supported by objective findings to establish a compensable injury, it does not follow that such evidence is required to establish each and every element of compensability. The statutory definition of compensability as set out in Ark. Code Ann. § 11-9-102(5) contains many elements that simply are not susceptible of proof by medical evidence supported by objective findings. For example, a compensable accidental injury must be shown to have been caused by a specific incident and to be identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(5)(A)(i). Injuries inflicted at a time when employment services were not being performed are not compensable, Ark. Code Ann. § 11-9-102(5)(B)(iii), nor are injuries resulting from engaging in horseplay. Ark. Code Ann. § 11-9-102(5)(B)(i). We know of no type of medical examination or test that would result in objective findings to show exactly where and when an injury was incurred, or whether the employee was injured while performing employment services rather than engaging in horseplay. Even statutes that must be strictly construed will not be given a literal interpretation leading to absurd consequences that are clearly contrary to legislative intent. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993).

Stephens, 58 Ark. App. at 279-80, 950 S.W.2d 474-5 (1997).

Based upon the foregoing, we find that there was substantial evidence to support the Commission's finding and affirm the Commission's decision.

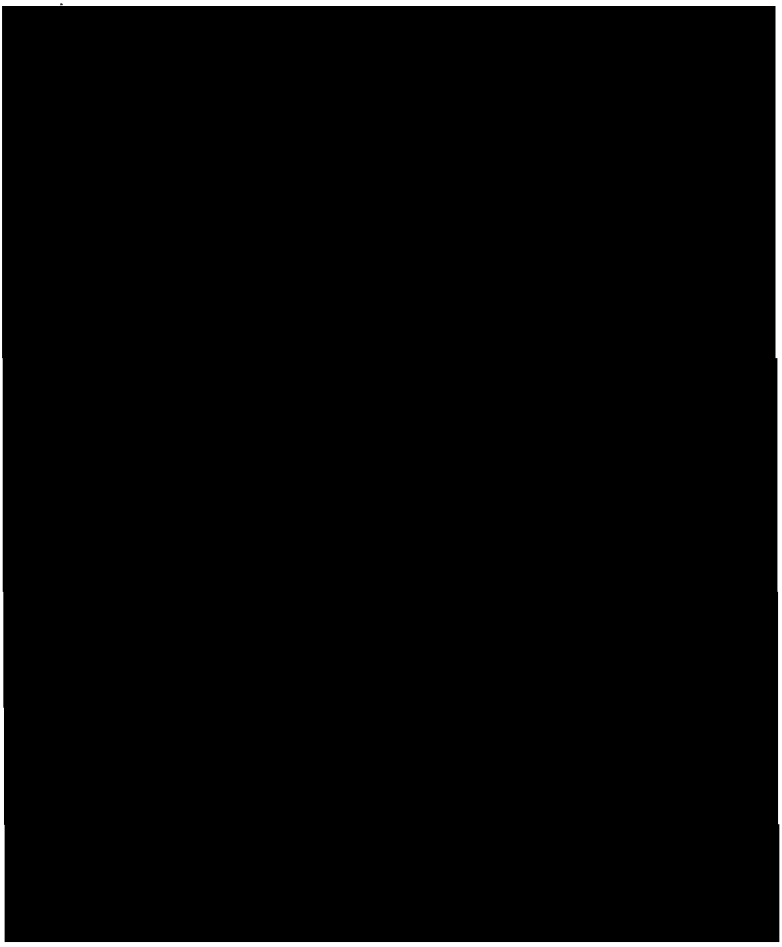
Affirmed.

PITTMAN and MEADS, JJ., agree.

James E. BOOTHE *v.* DIRECTOR,
Employment Security Department

E 97-36 954 S.W.2d 946

Court of Appeals of Arkansas
Division III
Opinion delivered November 12, 1997



Sara Sawyer, for appellant; no brief filed.

Phyllis Edwards, for appellee; no brief filed.

JOHN F. STROUD, JR., Judge. Appellant James E. Boothe appeals a decision of the Board of Review denying him unemployment compensation benefits in accordance with Ark. Code Ann. § 11-10-513 (Repl. 1996) upon a finding that appellant left his employment without good cause connected with his work and without making reasonable efforts to preserve his job rights. The Board's decision reversed the Appeal Tribunal's finding that appellant had good cause for quitting his job. Appellant argues that the Board's decision is not supported by substantial evidence. We agree and reverse and remand to the Board of Review to award appellant benefits.

On review of unemployment compensation cases, the factual findings of the Board of Review are conclusive if they are supported by substantial evidence; but that is not to say that our function on appeal is merely to ratify whatever decision is made by the Board of Review. *See Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986). As we said in *Shipley*, "We are not at liberty to ignore our responsibility to determine whether the standard of review has been met." 17 Ark. App. at 74, 703 S.W.2d at 467. When the Board's decision is not supported by substantial evidence, we will reverse. *Sadler v. Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Victor Industries Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

Appellant had been employed as a mechanic at the Coast to Coast Store in Dumas since March 11, 1992, and his wife, Darlene Boothe, had been employed as a secretary there for between nine

and ten years. The Dumas Coast to Coast store is a family business that is owned by Mr. and Mrs. James Berry, and their son, Tommy Berry.

Evidence was produced at the hearing that for a period of several months before she quit working for Coast to Coast, Darlene Boothe had been the victim of overt acts of sexual harassment by James Berry during working hours, including touching her breasts and patting her buttocks, suggesting that she help him use the bathroom because his hands were dirty, and making other inappropriate remarks with sexual innuendo.

Darlene testified that she asked James Berry to discontinue this unacceptable conduct and that he apologized to her, but the harassment continued. Finally one day when James Berry made a gesture and comment about how good it would feel to put his hands between her legs, Darlene became so nervous and upset that she had to leave the store. As a result of the harassment, Darlene decided to resign. However, before resigning, she discussed the situation with James Berry, who again apologized for his behavior, and who agreed that the store would not contest her claim for unemployment benefits. She resigned and received unemployment benefits.

Shortly before Darlene's resignation, she informed her husband, the appellant, about the sexual harassment that had been directed toward her by James Berry. Appellant contacted a private detective, and a plan was conceived to fit Darlene with a body microphone and for Darlene to engage James Berry in a recorded conversation in an attempt to get him to admit that he had been engaging in a course of sexual harassment toward Darlene. The plan was carried out, and, during the course of their conversation, James Berry made incriminating statements to Darlene about his sexual advances toward her.

Rather than confront James or Tommy Berry about the problem, appellant requested a one-week vacation and never returned to work for Coast to Coast. Appellant filed a claim for unemployment benefits, contending that he resigned because of the sexual harassment inflicted upon his wife by James Berry.

Appellant's application was denied by the Employment Security Department because of his failure to submit proof in support of his allegation that James Berry had harassed his wife. Appellant appealed the denial and, following a hearing at which the tape recording of Darlene's conversation with James Berry was introduced as evidence, the Appeal Tribunal held that under the same or similar circumstances, the average able-bodied worker would quit rather than continue to work for an employer that condoned the sexual harassment of his wife.

Evidence introduced at the hearing also revealed that after Tommy Berry learned about the charges of sexual harassment against his father, his investigation consisted of merely asking his father if the charges were true, receiving his father's negative response, and thereafter ignoring the accusations. The Appeal Tribunal decided that appellant voluntarily left his employment at Coast to Coast for good cause connected with his work, and benefits were awarded.

The Board of Review reversed the decision of the Appeal Tribunal, holding that appellant had voluntarily left his employment without good cause connected with his work and that because he had not reported the harassment to the store's manager, Tommy Berry, he had not taken reasonable steps to preserve his employment. In its decision, the Board stated that Tommy Berry lacked incentive to investigate the allegations of sexual harassment further because when he learned about them appellant and his wife had already resigned.

Evidence adduced at the hearing revealed that the corporate stock of Dumas Coast to Coast was owned 34% by James Berry, and 33% each by Tommy Berry and his mother. Although Tommy Berry testified that he was the store manager, that he was James Berry's supervisor, and that he would fire James Berry if circumstances called for it, other witnesses testified that James Berry and Tommy Berry equally shared in the responsibility of supervising the store's employees; that tax records, business cards, and correspondence of the corporation identified both James Berry and Tommy Berry as owners and managers; that James and Tommy participated equally in the supervision of employees; that

Tommy never overruled James's supervisory decisions; and that both were consulted by employees about matters relating to things such as vacations. It was not disputed that James Berry alone authorized Darlene Boothe to voluntarily resign her employment and receive unemployment compensation benefits. This action is consistent with his role as manager and co-owner.

The Board of Review held that the evidence did not show that reporting the problem to Tommy Berry would have been an act of futility. We disagree. The best evidence of what Tommy Berry would have done to solve the problem had it been brought to his attention sooner is provided by his own testimony of what he actually did when he learned about the harassment allegation, i.e., he ignored it. He testified that he knew there was a tape recording of his father and Mrs. Boothe but he did not listen to it "[b]ecause it. . . that's a private matter. That's, that doesn't have anything to do with me personally. It's an accusation that hasn't really been proved."

Appellant and his wife were justified in believing that reporting the sexual harassment to the perpetrator's son would be futile. This conclusion is supported not only by what Tommy Berry actually did (or, more accurately, what he did not do) when he learned of the problem, but by appellant's justifiable belief that James Berry, as a co-owner of the business, was just as much of a supervisor and manager of the business as was Tommy Berry, and the unrealistic prospect that James Berry would be fired or seriously disciplined by his son.

Arkansas Code Annotated section 11-10-513(b) (Repl. 1996) provides that, as a prerequisite to receiving unemployment benefits, an employee is required to make every reasonable effort to preserve his job rights before leaving employment, *Ahrends v. Director*, 55 Ark. App. 71, 930 S.W.2d 392 (1996), and such reasonable efforts include taking appropriate measures to prevent an unsatisfactory situation on the job from continuing. *Teel v. Daniels*, 270 Ark. 766, 606 S.W.2d 151 (Ark. App. 1980). But an employee is not required to take measures to resolve a problem with his employer if such measures would constitute nothing more than a futile gesture. *Oxford v. Daniels*, 2 Ark. App. 200, 618

S.W.2d 171 (1981). Sexual harassment by her supervisor has been held to be good cause for an employee to voluntarily terminate her employment. *McEwen v. Everett*, 6 Ark. App. 32, 637 S.W.2d 617 (1982). There is no question but that Darlene Boothe had good cause to resign and that she was entitled to receive unemployment benefits. Under the circumstances shown by the evidence in this case, we hold that such good cause also extends to the husband of the victim of the sexual harassment.

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

Carlos T. DEERE *v.* STATE of Arkansas

CA CR 96-1421 954 S.W.2d 943

Court of Appeals of Arkansas
Division III
Opinion delivered November 12, 1997

Heather Patrice Hogrobrooks, for appellant.

Winston Bryant, Att'y Gen., by: *David R. Raupp*, Sr. Asst. Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. On September 9, 1994, appellant, Carlos Deere, entered a plea of *nolo contendere* to the charge of theft by receiving. The court suspended imposition of sentence for five years. During that period, appellant was to comply with several conditions of suspension, including the conditions that he was not to commit any offenses punishable by imprisonment; he was not to possess any weapons; and he was not to use, possess, sell, carry, or otherwise handle any controlled substances without a valid doctor's prescription. On February 17, 1996, a warrant was executed to search appellant's apartment, based upon information that appellant was selling drugs from his apartment. The deputies conducting the search discovered "green vegetable-like material" that later tested positive for marijuana, razor blades, a set of scales, and a .22 caliber pistol. Appellant was arrested on February 20, 1996. On April 10, 1996, the State filed a petition for revocation, asserting that appellant had been arrested for possession of a controlled substance with intent to deliver, possession of drug paraphernalia, and possession of a firearm, all of which were in violation of the conditions of his suspended imposition of sentence. Following the revocation hearing, the court sentenced appellant to ten years in the Arkansas Department of Correction

and suspended the imposition of an additional sentence for ten years to run from the date of his release from prison. We affirm.

Appellant raises eight points on appeal. We note at the outset that the abstract prepared by appellant's counsel is flagrantly deficient with respect to most of the points raised on appeal. Neither the search warrant nor affidavit exhibits were abstracted, even though the arguments under the first four points of appeal challenge the validity of the February 17 search and the evidence that was procured pursuant to it. Moreover, appellant's counsel did not abstract the original plea statement, conditions of suspension, petition for revocation, judgment and commitment order, and conditions of suspension related thereto. Further, the record and envelope containing the original exhibits were checked out by appellant's counsel. The record was returned to the clerk's office, but the exhibits were not timely returned, even though the clerk's office requested their return. Appellant's counsel has previously been notified about abstracting deficiencies. See *Allen v. Routon*, 57 Ark. App. 137, 943 S.W.2d 605 (1997). We direct the clerk to forward a copy of this opinion to the Supreme Court Committee on Professional Conduct.

Under the first point of appeal, appellant argues that the deputies' entry into his apartment was "warrantless." The basis for this assertion is not clear from appellant's argument, and the abstracting deficiencies noted at the outset of this opinion make it impossible to render a decision on the merits. Moreover, it has long been the law in this State that the exclusionary rule does not apply in revocation hearings. *Robinson v. State*, 29 Ark. App. 17, 775 S.W.2d 916 (1989). We have suggested that a possible exception might be made if the police officers do not act in good faith. *Id.* Here, however, the abstract and argument presented by appellant's counsel do not persuade us that there was bad faith in the procurement and execution of this search warrant.

Under the second point of appeal, appellant argues that the search warrant left at appellant's apartment did not satisfy the requirements of Rules 13.2 and 13.3 of the Arkansas Rules of Criminal Procedure in that it did not identify the issuing judicial officer, did not indicate a time and place of issuance, and was not

executed by a judicial officer. Once again, the abstract is of no help in understanding this argument, and we are not persuaded that the exclusionary rule should be applied in this case.

As his third point of appeal, appellant argues that the affidavit supporting the issuance of the search warrant did not satisfy the requirements of Rule 13.1 of the Arkansas Rules of Criminal Procedure in that it does not set forth particular facts bearing on the informant's reliability. Moreover, appellant argues that the testimony from Officer Leary and Judge Baird Kinney did not establish probable cause for issuing the search warrant. The affidavit was not abstracted, but it appears to be set out in full in the argument section of appellant's brief. However, the testimony of Leary and Kinney is not sufficiently abstracted to decide this argument on the merits. Finally, we find no reason to apply the exclusionary rule in this case. *Robinson v. State, supra.*

Appellant argues under the fourth point of appeal that the requirements of Rule 13.2(c) of the Arkansas Rules of Criminal Procedure were not satisfied in that there was no factual basis warranting a nighttime search. In making this argument, appellant relies in part on what he describes as a "misdrawn diagram" attached to the "unexecuted affidavit of search warrant." The abstract deficiencies make it impossible to address this argument on the merits. Moreover, as noted with respect to the previous points of appeal, we are not persuaded that the exclusionary rule should be applied in this case. *Robinson v. State, supra.*

Points five and six make allegations of misconduct, conspiracy to obstruct justice, and bias against the police officer, the "state's attorney," the judge that issued the warrant, and the presiding judge. Once again, however, the abstracting deficiencies make it difficult to understand the arguments and to discern their validity. Point five argues that "the evidence and testimony relied upon to revoke appellant's suspended imposition of sentence was a result of a conspiratorial attempt to obstruct appellant's receipt of justice in State court." The argument relies in large part on the warrant exhibits that were not abstracted. The remainder of the argument is almost pure speculation about wrongdoing and conspiracy. It is impossible to address the argument on the merits.

The evidence found as a result of the search was sufficient to show that appellant violated several of the conditions of his suspension, and appellant has not established any basis for applying the exclusionary rule in this revocation case. *Robinson v. State, supra.* Point six argues that the presiding judge should have recused. First, appellant's counsel did not abstract the motion to recuse, nor the transcript of the hearing on the motion. Moreover, a judge's recusal is discretionary, his impartiality is presumed, and a party seeking disqualification bears a substantial burden to prove otherwise. *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994). Appellant has not presented us with an abstract or an argument to demonstrate that the lower court abused its discretion in denying the motion to recuse in this matter.

As his seventh point of appeal, appellant argues that the punishment he received upon revocation of his suspension was excessive, a clear abuse of discretion, and the result of prejudice. We disagree. First, appellant did not abstract either the original conditions of suspension or the judgment and commitment order imposing the sentence from which he appeals. Even so, the range of punishment for theft by receiving is five to twenty years. It is within the trial court's discretion to set punishment within the statutory range of punishment provided for a particular crime. *Adams v. State*, 25 Ark. App. 212, 755 S.W.2d 579 (1988). Upon revocation of his suspended sentence, the trial court sentenced appellant to ten years in the Arkansas Department of Correction and suspended the imposition of an additional sentence for ten years to run from the date of his release from prison. This sentence is within the appropriate range and therefore not excessive. Our previous discussion with respect to recusal disposes of appellant's argument that the sentence was the result of prejudice.

As his eighth and last point appellant argues that the trial court was clearly erroneous in revoking appellant's suspension. We disagree. Evidence that may not be sufficient to support a criminal conviction may be sufficient to demonstrate the violation of the conditions of suspension. *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996). We will not reverse the trial court unless its findings are clearly against the preponderance of the evidence, giving due regard to the trial court's superior posi-

tion to determine the credibility of the witnesses and the weight to be given to their testimony. *Id.*

Appellant's argument under this point essentially challenges the trial court's credibility determinations. Decisions regarding credibility of witnesses are for the trier of fact. *Id.*; *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988). The evidence showed that appellant possessed marijuana, scales, and a firearm. The possession of these items constituted a violation of appellant's conditions of suspension. We hold that the trial court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence.

Affirmed.

BIRD, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I agree that we should affirm the revocation of appellant's suspended sentence, and write this concurring opinion to elaborate on the harm posed by appellant's counsel, Heather Patrice Hogrobrooks, in her persistent refusal to comply with the abstracting rule.

By my count, this is the fifth reported decision in two years where an appellate court has found Hogrobrooks to have filed a flagrantly deficient abstract. Four of the cases (including this one) involved criminal appeals; one appeal arose from a civil judgment. *See Allen v. Routon*, 57 Ark. App. 137, 943 S.W.2d 605 (1997). A lawyer who knowingly violates court rules so as to expose her clients to summary adverse consequences does a disservice to her clients and is harmful to the administration of justice. That Hogrobrooks did so in this case, given her history, while brazenly accusing the investigating officer, prosecutor, the magistrate who issued a search warrant, and the trial judge of misconduct, conspiracy to obstruct justice, and bias, is sheer hypocrisy.

I fully support the decision to again refer Hogrobrooks to the Supreme Court Committee on Professional Conduct because she knowingly refused to abstract properly, despite the adverse consequences to her clients and the judicial process. One wonders how

many trusting litigants must be victimized by her combative incompetence, and how long our disciplinary system will leave them at her whim.

C.R. ARGO *v.* James C. BUCK, Jr.

CA 97-366 954 S.W.2d 949

Court of Appeals of Arkansas
Division I
Opinion delivered November 19, 1997

Dover & Dixon, P.A., by: *Gary B. Rogers* and *Monte D. Estes*, for appellant.

Robert M. Abney, P.A., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant C. R. Argo ("Argo") appeals the decision of the Monroe County Chancery Court, which in effect ended a multi-year farmland lease of lands owned by appellee James C. Buck, Jr. ("Buck"). In December 1970, Argo entered into a three-year lease, 1971 through 1973, of 240 acres owned by Buck for a total lease price of $5,000. Buck, as lessor, was responsible for paying the taxes on the farmland under the terms of the initial lease. On May 3, 1972, the parties entered into an extension agreement, the terms of which are stated in their entirety:

> Extension of land lease, now in effect, between J. C. Buck, Jr. and C. R. Argo, for years beginning 1974 thru 1978 and/or longer. Terms of agreement are: $3,000 due Buck on November 1, 1972. Any and all land and/or levee taxes on this land are to be paid by C. R. Argo, and the lease extended after 1978 accordingly.

On July 19, 1973, the parties entered into another extension agreement. The parties contracted as follows:

> Extending the land lease now in effect between J. C. Buck Jr. and C. R. Argo beginning in crop year 1979 and extending thru year 1995. Terms of this extension are $5,000 and other considerations. Any and all land and/or levee taxes during time of lease will be paid by C. R. Argo and at the end of the time of this extension, Mr. Argo will continue the leasing of the land at the

> rate of $1,000 per year until he recaptures taxes he has paid on this land.

Buck filed a petition for declaratory judgment on October 30, 1995, asking the chancellor to declare the second extension illegal and unenforceable to the extent that appellant would be able to rent the farmland for $1,000 per year until all taxes that he paid on the land during the term of the second extension, 1979 through 1995, were recaptured. Argo stated that he had paid nearly $12,000 in taxes, but the documentation supported only $8,080.

Argo contended that the terms of the second extension entitled him to continue to rent and farm the land after 1995 at $1,000 per year until reimbursed for the taxes he paid, and that by the terms of the extension Buck was not permitted to reimburse Argo for these taxes in a lump sum. Furthermore, Argo argued that if during that time he had to pay taxes to prevent them from becoming delinquent, he would be entitled to continue the lease to recoup future taxes paid as well.

After an unrecorded hearing on the merits, the chancellor made several pertinent findings of fact: that every extension was initiated by Buck, the lessor; that Argo paid real estate and levee taxes during the first term of the lease since Buck had failed to do so; that the first extension contemplated Argo paying the taxes as part of the rental consideration; and that Argo paid the taxes during the second extension of the lease. Argo was entitled to reimbursement of approximately $8,080 in taxes. The chancellor further found that Argo was entitled to reimbursement for the taxes paid in 1979 through 1995 but that Buck could reimburse Argo in a lump sum. The chancellor interpreted the terms to mean that, if Buck did so, the lease would be terminated. The chancellor ruled that not to allow Buck to repay the taxes due in a lump sum would be unconscionable, and gave Buck the option of doing so by January 31, 1997. Buck chose to do so and paid the lump sum into the registry of the court. This appeal resulted.

■ On appellate review, we conduct a de novo review of the evidence, but findings of a chancellor will not be reversed unless they are clearly against the preponderance of the evidence. *Stallings v. Poteete*, 17 Ark. App. 62, 702 S.W.2d 831 (1986). The

question of a preponderance of the evidence turns largely on the credibility of the witnesses, and we defer to the superior position of the chancellor in determinations of credibility. *Id.*

It is well established that the abstract is the record for purposes of appeal. *Porter v. Porter*, 329 Ark. 42, 945 S.W.2d 376 (1997). Here, by mutual agreement, the parties waived a verbatim record of the proceedings, agreeing that there would be no record except for the chancellor's notes. We have no notes presented to us in appellant's abstract. We cannot determine upon what evidence or testimony the chancellor determined that the lease term was unconscionable except for the findings the chancellor made in his letter opinion. It is impossible to conduct a de novo review on what has been presented to us. We cannot surmise from what evidence or testimony the chancellor decided the parties contemplated more than one avenue to terminate the lease. Again, appellant is charged with demonstrating error, and he cannot do so without the evidence and testimony. *McGarrah v. McGarrah*, 325 Ark. 81, 924 S.W.2d 453 (1996). While an agreement to waive the record and rely on the chancellor's notes may be an efficient and economical procedure at the trial court level, it precludes a de novo appellate review. We are hard-pressed to find error by the chancellor when we do not know what evidence was presented to the court.

According to Rule 6(d) of the Arkansas Rules of Appellate Procedure—Civil, if no record of the evidence or proceedings is made, the appellant may prepare a statement of the evidence or proceedings from the best means available, and the appellee may respond with amendments or objections. The trial court then settles and approves the record. When there is no attempt to make a record in compliance with Rule 6(d), it is presumed that the matters presented in the unrecorded hearing support the trial court's findings. *Rush v. Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988). For these reasons we affirm.

ROGERS and NEAL, JJ., agree.

Lonezo PEETE and Cynthia Peete *v.* STATE of Arkansas

CA CR 96-1341 955 S.W.2d 708

Court of Appeals of Arkansas
Division I
Opinion delivered November 19, 1997

[redacted]

W. Ray Nickle, for appellants.

Winston Bryant, Att'y Gen., by: *Kelly Terry*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Lonezo and Cynthia Peete, husband and wife, were found guilty by a jury of workers' compensation fraud, a violation of Ark. Code Ann. § 11-9-106(a)(1) (Repl.

1996) and a class D felony, for which they both received sentences of four years and eight months in prison. On appeal, appellants mount separate challenges to the sufficiency of the evidence to support their convictions, and they both contend that the trial court erred in denying their motion to dismiss based on the alleged violation of their right to a speedy trial. We hold that there was substantial evidence to support the verdicts of guilt and that no infringement of their right to a speedy trial occurred. Consequently, we affirm.

In January of 1993, appellant, Lonezo Peete, was hired as a lancer at Heckett Multiservice, a metal service company. On November 19 of that year, he sustained an injury compensable under the laws of workers' compensation when a bucket of hot metal that he was transporting exploded, resulting in burns to his legs, buttocks, and back. Mr. Peete was first treated at an emergency room and was released that night. He was subsequently seen for follow-up treatment by Dr. John Williams, the company doctor. Dr. Williams released Mr. Peete to return to work without restrictions on February 14, 1994, at which time the employer's insurance carrier ceased payment of temporary total compensation benefits. Mr. Peete did not report back to work as scheduled and was terminated effective February 22, 1994.

Mr. Peete thereafter pursued claims before the Workers' Compensation Commission seeking a change of physician to a psychologist and the continuing payment of temporary total disability benefits, contending that he suffered debilitating emotional damage as a result of the work-related injury. His claims were submitted by the employer's insurance carrier to the Workers' Compensation Fraud Investigation Unit.

Appellants were first arrested on May 26, 1994, but the charges were dismissed by the court without prejudice on June 25, 1995. The State reinstated the charges on July 12, 1995, and appellants' jury trial commenced on April 10, 1996.

Appellants first argue that the trial court erred in denying their motions for a directed verdict. A motion for a directed verdict is a challege to the sufficiency of the evidence. *Bradford v. State,* 325 Ark. 278, 927 S.W.2d 329 (1996). In reviewing the

sufficiency of the evidence, we consider the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the verdict. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). Substantial evidence is that which is forceful enough to compel a conclusion one way or the other and which goes beyond speculation and conjecture. *Davis v. State*, 325 Ark. 96, 924 S.W.2d 452 (1996).

Appellants' convictions are based on Ark. Code Ann. § 11-9-106(a)(1) (Repl. 1996), which provides as follows:

> Any person or entity who willfully and knowingly makes any material false statement or representation for the purpose of obtaining any benefit or payment, or for the purpose of defeating or wrongfully increasing or wrongfully decreasing any claim for benefit or payment or obtaining or avoiding workers' compensation coverage or avoiding payment of the proper insurance premium, or who aids and abets for either of said purposes, under the chapter shall be guilty of a Class D felony.

At trial, John Schmalzreid, Mr. Peete's supervisor, testified that it was his initial impression that Peete had only been burned in the accident, and he became suspicious when he heard reports that Peete was not able to move or function. According to Schmalzreid, his suspicions were also heightened by what he considered to be an excessive amount of medical supplies being ordered for Peete. He questioned the delivery person for the medical supply company as to whether Peete was "laid up," and was told that he was not, but that he had been seen "pacing." Mr. Schmalzreid notified his superiors of his concerns, and a private investigator was hired. Schmalzreid participated in the surveillance of the appellants on January 25, 1994, by videotaping a portion of their activities.

Mr. Schmalzreid testified that he had sent a letter to Mr. Peete on February 14, 1994, informing him that he had been released by Dr. Williams to return to work without any restrictions and that he was scheduled to work on February 19. He said that Peete did not report for work and that it was company policy to consider an employee as having voluntarily terminated his employment if no response is received from the employee within three days of scheduled work. He said that he sent Mr. Peete a

notice of termination on February 22. He also testified that he had several conversations with appellant, Cynthia Peete. Mr. Schmalzreid testified that she told him that she did not know how her husband could return to work because he was in a lot of pain. He said that she also complained that he was being treated with disrespect by his physicians.

Tom Meins, an investigator with Crockett Adjustment, gave testimony concerning the video footage of appellants taken by him and Mr. Schmalzreid on January 25, 1994. The tape was played for the jury and Mr. Meins described what it portrayed. He said that it first showed Mr. Peete coming out of his home on crutches and getting into the passenger side of a car. Ms. Peete then takes the crutches inside the home and returns to drive away in the car. Next, they arrive at Dr. Williams's office where Ms. Peete gets a wheelchair for Mr. Peete, and she pushes him across the parking lot and into the office. Later, they emerge from the doctor's office and Mr. Peete is placed in the car with the help of Dr. Williams's nurses. Last, the tape shows their return home. Mr. Peete gets out of the car unassisted, walks to the front of the vehicle, bends down to pet a dog, looks around, and then runs into the house.

Dr. John Williams, Mr. Peete's treating physician, testified that he first saw Peete the day after the accident and that he treated him on a regular basis until February 14, 1994. He said that Peete had sustained first- and second-degree burns primarily to his buttocks and right inner thigh, as well as a couple of small burns on his lower back. He stated that Mr. Peete's injuries were not life-threatening and described the worst injury as being a second-degree burn to the inner thigh that was the size of a videotape box. He said that the burns healed in about a month. Dr. Williams testified that Peete was ambulatory at the first visit but that he came to the office in a wheelchair for every other visit. He said that Peete complained of "chronic, horrible, intractable" back pain and asserted that he could not move his legs or bear weight on them. Dr. Williams testified that he could find no physical explanation for these complaints. He said that Peete's physical exams were normal and that results of x-rays, a lumbar CT scan, and an MRI were also normal. He also observed no sign of mus-

cle atrophy in Peete's legs, which would be indicative of disuse. Dr. Williams referred Mr. Peete to a neurologist for a second opinion. Still, no objective explanation was found to account for Peete's complaints. Williams said that he prescribed physical therapy because he could find no specific injury to Peete's back.

Dr. Williams also testified that Ms. Peete accompanied her husband to the office visits and that she would interject answers to questions when Peete did not respond directly. He also testified that Ms. Peete described her efforts in caring for Mr. Peete in this condition. She told him that family members helped but that she would lift him herself if necessary. Dr. Williams said that he questioned this because of her small stature and because moving him at the office was a chore that required the help of two nurses.

With regard to the office visit on January 25, the day the videotape was taken, Dr. Williams testified that Peete complained of back, neck, and wrist pain. Peete stated that this was the worst pain he had ever experienced and that therapy had not helped. Williams said that Peete would not get from the wheelchair onto the examination table because of the pain. Dr. Williams had viewed the videotape, and he testified that Mr. Peete's actions on the tape were not consistent with what appellants had represented Mr. Peete's abilities to be. It was his opinion that Mr. Peete was malingering.

In their defense, appellants offered the testimony of Dr. Russell Dixon, a clinical psychologist. He testified that Mr. Peete was referred to him for evaluation by Peete's attorney and that Ms. Peete was present during the interviews. He saw Peete on June 22 and July 13 of 1994, and on January 11, 1995. Dixon said that Mr. Peete was seated in a wheelchair during these sessions and that Peete indicated that he could not get out of the wheelchair because his back hurt. He testified that he had reviewed Peete's medical records and learned that there was no organic reason that would prevent him from walking. Because it was not clear to him why Mr. Peete could not walk, he considered the possibility that Peete was suffering from post-traumatic stress syndrome. Dixon explained that post-traumatic stress syndrome can occur when a person undergoes a traumatic event and said that fifty percent of

burn patients experience this condition. He described it as a "psychological numbing" that could cause a person to stop functioning. Dixon related that Mr. Peete was less verbally communicative during the second interview and that he appeared to be experiencing a great deal of anxiety. He said that Peete told him that he became more anxious when he recalled the accident. After this interview, Dixon could not say that Mr. Peete was suffering from post-traumatic stress syndrome, but he felt that it was worth further consideration. He testified, however, that the third interview was unproductive because Peete was even less communicative. He said that, although Peete gave him a fair amount of information during the first interview, Ms. Peete supplemented his answers to questions and that Ms. Peete spoke more as Peete became increasingly uncommunicative over the course of his evaluations. Dixon felt that Peete was depressed, but he could not make a conclusive diagnosis of post-traumatic stress syndrome.

On cross-examination, Dixon acknowledged that he knew the meaning of the term "malingering," saying that it was faking something for gain, and he said that he was familiar with the guidelines on that subject contained in the Diagnostic and Statistical Manual on psychology. Dixon agreed that, according to the manual, malingering should be strongly suspected if any combination of four factors were noted. He conceded that Mr. Peete exhibited three of the four factors. First, Peete was referred to him by an attorney. Second, there was a marked discrepancy between the claims of stress or disability and the objective medical findings. Third, there was a lack of cooperation during the diagnostic evaluations. He could make no determination as to the fourth factor concerning the presence of anti-social personality disorder. Dixon said that he would find it hard to disagree with a physician's opinion that Mr. Peete was malingering. He stated that it would have been helpful to have had access to Peete's deposition and the videotape of him in making his evaluation.

In rebuttal, Dr. Tom Heisler testified for the prosecution. A clinical psychologist, he conducted a forensic evaluation of Mr. Peete in February of 1996 on behalf of the State. In arriving at an opinion, he reviewed the medical reports of various physicians who had examined Mr. Peete, the report of Dr. Dixon, Peete's

deposition, and the videotape. It was his opinion that Peete was competent to stand trial, that he possessed the ability to appreciate the wrongfulness of his conduct, and that he was malingering. He testified that the essential feature of malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives such as avoiding military duty or work, obtaining financial compensation, evading criminal prosecution, or obtaining medication. His opinion was based on the four factors noted in the Diagnostic and Statistical Manual with particular emphasis on the second and third components of that test. The medical reports he had read indicated that there was no organic cause for Peete's inability to walk, and there was a lack of cooperation by Peete during the evaluation. Heisler said that he was also persuaded by the differences between Peete's verbal responses during his evaluation and Peete's testimony by deposition. He said that, during the deposition taken six months after the accident, Peete was articulate and that he gave detailed and often lengthy answers to questions. He said that, by contrast, Peete would utter one or two sentences or did not respond at all to twenty or thirty questions during his interview with Peete and that Ms. Peete had to tell him about the accident. By way of further example, Heisler related that Peete remained silent and answered none of the questions from the Welchler IQ test, such as identifying the shape of a ball or the colors of the American flag. He said that he did not know what to make of it at the time and was surprised when he later read the deposition in which Peete freely responded to questioning. He said that his opinion was also influenced by his review of the videotape, which depicted Mr. Peete walking. He said that it was a revelation to him because Peete was in a wheelchair during the interview, and he had observed Peete getting a drink from a water fountain, a task that took ten minutes to complete with the use of crutches supplied by Ms. Peete.

The deposition of Mr. Peete given in May of 1994 was read to the jury in its entirety. In it, Peete described the accident and the continuing difficulties he was experiencing from it. He said that, although Dr. Williams had released him to return to work without any restrictions, the pain was so bad that he thought he

was dying. He claimed that Dr. Williams had put him through pain, torture, and torment by prescribing physical therapy. He said that he had been using a wheelchair since the accident but that he had attempted to walk with the help of his wife. He asserted that his knees "give out" when he tries to walk and that pain shoots from his feet, legs, and back all the way to his head. Peete related that he was unable to sleep and that he had nightmares. He said his life was like a living hell and that he saw stuff blowing up and burning, which scared him. He described feeling "real, high-intensive" burning sensations, even though he knew that he was not burning. During the deposition, he was confronted with the videotape.

As his argument that the evidence was insufficient, Mr. Peete contends that there is no evidence that he made any false representations after January 25, 1994, the date the videotape was taken, or that he received any workers' compensation benefits after that date. We cannot agree.

■ There was substantial evidence from which the jury could conclude that appellant was not suffering from the debilitating effects of post-traumatic stress syndrome but that instead he was feigning this emotional condition and the inability to walk in an effort to obtain further workers' compensation benefits. Appellant's argument ignores the evidence that appellant presented himself in a wheelchair claiming that he was unable to walk soon after the accident and that he continued to make these representations, as reflected in his deposition and the sessions with Drs. Dixon and Heisler, all of which took place after January 25, 1994. Contrary to appellant's argument, the statute setting out this offense requires only that false statements or representations be made "for the purpose of obtaining any benefit or payment." It is not necessary for the accused to actually accomplish that goal. Here, it was shown that appellant pursued claims for additional benefits on the basis of these false representations. We thus cannot say that there is no substantial evidence to support his conviction.

■ ■ Ms. Peete's sufficiency argument is that there is no evidence that she knowingly made any false representations for the purpose of aiding or abetting her husband to obtain benefits.

However, there was testimony demonstrating that she was an active participant in this scheme. She escorted her husband in a wheelchair; she described his supposed physical limitations to others; and she answered questions put to him when he was unresponsive. She was also in a position to observe her husband's dash into the house that was depicted in the videotape. As the jury was instructed, an accomplice is one who, with the purpose of promoting or facilitating the commission of an offense, either aids, agrees to aid, or attempts to aid the other person in planning or committing the offense, or having a legal duty to prevent the offense, fails to make a proper effort to do so. Ark. Code Ann. § 5-2-403 (Repl. 1993); *Choate v. State*, 326 Ark. 251, 925 S.W.2d 409 (1996). There is substantial evidence supporting her conviction.

Appellants' final argument is that they were denied the right to a speedy trial and that the trial court erred in denying their motion to dismiss. Appellants contend that, because they were first arrested on May 25, 1994, their trial on April 10, 1996, exceeded the one-year limitations period found in Rule 28.1(c) of the Arkansas Rules of Criminal Procedure. In their argument, they maintain that only the periods between March 29, 1995, and June 5, 1995, and between June 5, 1995, and July 25, 1995, are subject to exclusion. Appellants' argument is without merit. Although they were arrested for this offense on May 25, 1994, the trial court dismissed the charges without prejudice on June 25, 1995. The record reflects that this dismissal was achieved on motion of the defense based on a defective referral from the Workers' Compensation Fraud Investigative Unit.

Rule 28.2 provides that:

> The time for trial shall commence running, without demand by the defendant, from the following dates:
>
> (b) when the charge is dismissed upon motion of the defendant and subsequently the dismissed charged [sic] is reinstated, or the defendant is arrested and charged with the same offense, the time for trial shall commence running from the date the dismissed charge is reinstated or the defendant is subsequently arrested or charged, whichever is earlier.

According to this rule, the time for trial commenced running on July 12, 1995, the date the charges were reinstated. Therefore, the trial on April 10, 1996, did not exceed the speedy-trial period.

Affirmed.

ROBBINS, C.J., and NEAL, J., agree.

Brenda COLEMAN, et al. *v.* Agnes COLEMAN, et al.

CA 97-11 955 S.W.2d 713

Court of Appeals of Arkansas
Division III
Opinion delivered November 19, 1997

Charles J. Lincoln, for appellants.

Willie E. Perkins, Jr., for appellees.

JOHN F. STROUD, JR., Judge. This case involves a controversy over entitlement to the property of the late Quincy Coleman. Appellant/cross-appellee Brenda Coleman is the widow of

Armnee Coleman, one of Quincy's sons. Appellees/cross-appellants are the other eight children of Quincy Coleman. During Quincy's lifetime, he placed Armnee's name on his checking and savings accounts and on the title to his vehicle. Additionally, he deeded his house to "Armnee Coleman, Trustee." When Quincy died in 1995, Armnee claimed ownership of the accounts, the vehicle, and the house. The other eight children alleged that Armnee had gained his purported ownership of the property through deception and coercion. On November 9, 1995, they filed a petition in Garland County Chancery Court seeking the imposition of a constructive trust. Armnee Coleman died during the pendency of the action and his wife, Brenda Coleman, was substituted as a party individually, as next friend of her daughter, Haley, and as executrix of Armnee's estate.

After a hearing, the chancellor found that it was not necessary to decide whether a constructive trust should be imposed on the bank accounts because Quincy Coleman lacked the mental capacity to enter into the depositor's contract whereby he placed Armnee's name on the accounts. She further found that it had not been proven that Quincy, in placing Armnee's name on the accounts, intended to make a gift to Armnee. She therefore ordered that the $72,181.78 in the accounts at the time of Quincy's death be returned to Quincy's estate. Regarding the house and the vehicle, the chancellor found that they should be awarded to Armnee's wife and daughter on the grounds that appellees/cross-appellants failed to prove by clear and convincing evidence that a constructive trust should be imposed. Appellants/cross-appellees appeal from that part of the chancellor's order pertaining to the bank accounts. Appellees/cross-appellants appeal from that part of the order pertaining to the house and the vehicle. We reverse and remand on direct appeal and affirm on cross-appeal.

Direct Appeal

Quincy and Lois Coleman were the parents of nine children. Lois Coleman died on December 13, 1987. Shortly after her death, Quincy Coleman, accompanied by Armnee, removed Lois's name from their checking and savings accounts and changed

the accounts to reflect "Quincy Coleman or Armnee Coleman" as joint owners. Within a few days after this transaction, Quincy was admitted to the hospital suffering from grief reaction along with probable malnutrition and associated delirium. He remained hospitalized until January 10, 1988. According to various neighbors and relatives, Quincy was distraught over his wife's death and suffered from depression and confusion. The youngest of the Coleman children, Bernard, returned home from college to take care of his father for several months. Bernard likened his task to taking care of a two-year-old. However, he stated that Quincy was back to normal by the summer of 1988.

In 1990 or 1991, Bernard Coleman had a discussion with his father regarding the bank accounts. He learned that Armnee's name had been placed on the accounts. He told his father that he foresaw a family fight over the money and that "as far as I'm concerned I could care less about the money, they can stick it." According to Bernard, his father told him not to be that way and that the money was as much his as anyone else's. On another occasion, Quincy told Bernard that the only reason he didn't put his name on the checking account was that he was still in college.

In 1992, Quincy inherited over $96,000 from his sister. He deposited the money into the checking and savings accounts bearing his and Armnee's names. A few days later, approximately $20,000 was withdrawn from the savings account and used to purchase a new car. The car was titled in the names of Quincy or Armnee Coleman.

On appeal, appellants concede that Quincy Coleman was mentally incompetent at the time he placed Armnee's name on the bank accounts. However, they argue that subsequent events, *i.e.*, Quincy's acknowledgment to Bernard that Armnee's name was on the accounts, Quincy's deposit of the inheritance money into the accounts, the purchase of the jointly owned vehicle with funds from the accounts, along with the fact that bank statements bearing both names were sent monthly to Quincy's residence, constitute a ratification of Quincy's previously invalid action.

We review chancery cases *de novo* on the record and do not reverse a chancellor's finding unless it is clearly erroneous.

Smith v. Whitener, 42 Ark. App. 225, 856 S.W.2d 328 (1993). A finding is clearly erroneous if, upon our review, we are left with the firm conviction that a mistake has been committed. *Id.* Our review in this case leaves us with the firm conviction that the chancellor erred in disregarding the appellant's ratification argument. It is well established that a person who commits an act while lacking the mental capacity to do so may nevertheless affirm or ratify that act once he regains his capacity. *Heskett v. Bryant*, 247 Ark. 790, 447 S.W.2d 849 (1969); *Antrim v. McKelroy*, 229 Ark. 870, 319 S.W.2d 209 (1958); *Brandon v. Bryeans*, 203 Ark. 1117, 160 S.W.2d 205 (1942). We have also recognized that silence or acquiescence in a contract for any considerable length of time amounts to ratification. *Kinkead v. Union Nat'l Bank*, 51 Ark. App. 4, 907 S.W.2d 154 (1995). In this case, testimony by one of the appellees, Bernard Coleman, reveals that Quincy Coleman had regained his mental capacity by the summer of 1988. Certainly, for the chancellor to be consistent in her ruling, Quincy was mentally competent by August of 1990, the date on which he deeded his house to Armnee. The chancellor found no lack of capacity in that transaction. Quincy did not die until May 1995, which means that he lived in a competent state between five and seven years without removing Armnee's name from his accounts. Further, he transferred other property to Armnee during that period and acknowledged to Bernard in 1990 or 1991 his awareness that Armnee's name was on the accounts. Finally, Quincy placed a great deal of money into the accounts in 1992, a time when, according to Bernard's testimony, he was aware that Armnee's name was on the accounts. With this evidence in mind, we must hold that the chancellor's failure to find that Quincy Coleman ratified his transaction was clearly erroneous.

The chancellor also erred in finding that appellants were not entitled to the accounts because Quincy did not intend to make a gift of the accounts to Armnee. One requirement of an *inter vivos* gift is that the donor must unconditionally release all future dominion and control over the property. *See Estate of Sabbs v. Cole*, 57 Ark. App. 179, 944 S.W.2d 123 (1997). We recognize that Brenda Coleman testified that, while Quincy was alive, Armnee never took money from the accounts without Quincy's

permission. However, appellants do not claim their right to ownership of the accounts by virtue of an *inter vivos* gift from Quincy to Armnee; their claim is based upon Armnee's survivorship right as a joint tenant. Therefore, the chancellor was wrong in denying appellants' claim on the grounds that they did not prove the requirements of an *inter vivos* gift.

Since we reverse on direct appeal, we do not find it necessary to reach appellants' second argument regarding an award of attorney fees and calculation of the amount to be paid to the estate of Quincy Coleman.

Cross-Appeal

On cross-appeal, it is argued that the chancellor erred in failing to impose a constructive trust on the house that Quincy deeded to Armnee and on the car that was titled in both Quincy's and Armnee's names. Quincy executed the deed to the house in August 1990. According to attorney Richard Wootton, Armnee contacted him and told him Quincy wanted to transact some business regarding his real property. Shortly thereafter, Armnee and Quincy visited Wootton at his office. According to Wootton, he was not sure at first what Quincy wanted to do with the house; Quincy kept mentioning the word "trust." Wootton explained to him that a trust would entail the drafting of a separate trust document. Quincy did not want such a document, so Wootton told him he could prepare a deed conveying the property to "Armnee Coleman, Trustee." However, he explained to Quincy that the use of the word "trustee" would have no legal effect; the deed would operate as an outright conveyance to Armnee. According to Wootton, he spent an hour to an hour and a half with Quincy on the matter. Quincy indicated he understood that Armnee would have full title to the property.

There is no evidence in the record regarding the circumstances surrounding the placement of Armnee's name on the car title other than the fact that Quincy paid cash for the car with money withdrawn from his and Armnee's joint accounts.

Again, we acknowledge that our review is *de novo* and that we will not reverse a finding by the chancellor unless it is

clearly erroneous. *Smith v. Whitener, supra.* We find no error on cross-appeal. Cross-appellants argue that evidence of undue influence exercised by Armnee mandates imposition of a constructive trust. However, the record supports the chancellor's finding that no undue influence was proven with regard to either of these transactions. Attorney Wootton's testimony reveals that he fully explained to Quincy the legal ineffectiveness of the use of the word "trustee" in the deed and that, as a result, title to the property would pass to Armnee. Further, there was testimony by other witnesses that Quincy wanted Armnee to have the house because Armnee had done so much to take care of him. Cross-appellants attack the credibility of these witnesses, but we defer to the superior position of the chancellor on credibility questions. *O'Flarity v. O'Flarity*, 42 Ark. App. 5, 852 S.W.2d 150 (1993). Regarding the car title, as we have already noted, there was virtually no evidence regarding the placement of Armnee's name on the title.

Finally, cross-appellants ask us to "judicially repeal" Ark. Code Ann. § 18-12-604 (1987), the statute which provides that the appearance of the word "trustee" in a deed, without other language showing a trust, shall simply vest title in the grantee. Cross-appellants point to no constitutional infirmity in the statute, nor do they offer any authority for their argument. Assignments of error unsupported by convincing argument or authority will not be considered on appeal. *Rogers v. Rogers*, 46 Ark. App. 136, 877 S.W.2d 936 (1994).

Reversed on direct appeal; affirmed on cross-appeal.

BIRD and GRIFFEN, JJ., agree.

Tim A. SHEA *v.* Pat M. RILEY, Sr.

CA 97-496 954 S.W.2d 951

Court of Appeals of Arkansas
Division IV
Opinion delivered November 19, 1997
[Petition for rehearing denied December 17, 1997.]

Wright, Lindsey & Jennings, by: *Alston Jennings*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Byron Freeland*, for appellee.

TERRY CRABTREE, Judge. Appellee, Pat M. Riley, Sr., purchased three lots near the Country Club of Little Rock from the estate of M.L. Dick for $660,000. Initially, Riley planned to have the lots re-platted into one lot and construct a new home on the site. In the course of his planning, Riley approached the neighbors on either side of the purchase and suggested selling

some of the frontage to each, thereby reducing the size of his consolidated lot and increasing the size of both neighbors' lots. Appellant, Tim A. Shea, is one of the adjacent property owners.

Appellant Shea and appellee Riley engaged in oral discussions about the sale from appellee to appellant of a twenty-foot strip of land along their common boundary. The conversations were memorialized in a series of correspondence that was introduced at trial and is the primary evidence in the case.

The first letter from Riley to Shea, dated September 29, 1995, informs Shea of Riley's purchase of the property, and states:

> We are selling 20 ft. to Tim Shea on the North to be added to his property and 20 ft. on the South to Scott Bellingrath to be added to his property . . . . [W]e will have to go back through the city and have it re-platted. At that point, we will probably ask for a waiver on the rear property set back which has been granted often in this neighborhood.

The September 29th letter also included a market analysis of Riley's current home in the area.

The second letter is addressed to both adjacent neighbors, "Scott and Tim," and dated November 20, 1995. This letter begins by saying that the re-platting must be done before the parties can "effectively conclude our transaction." Riley again mentioned the waivers he would seek from the city.

A third letter from Riley to Shea, dated November 22, 1995, informed Shea of Riley's plans for a house on the site and again mentioned the necessity for a waiver on the set-back line. No mention of the sale is present in this correspondence, although appellant's counsel suggested during oral argument that an attached site plan for the proposed house seems to illustrate the twenty-foot transfer to Shea by a line 20 feet inward from Shea's existing property line.

The fourth correspondence is a handwritten note from Shea to Riley dated November 28, 1995. In its entirety, it states:

> Thanks for sending me the tentative layout of your house. Pat before I can consider any waivers or setbacks on this project you must sell me the 20 feet of Mrs. M.L. Dick's property adjoining

> mine at your suggested price of $244 per front foot on Beechwood or give me assurance in writing that this transaction will take place.

Two days later Riley responded to Shea correcting the proposed price, which was $4,400 per foot instead of $244, and holding firm on the issue of waivers in stating:

> The price cleared up, be assured Tim that you will know I'll be committed on the sale at the time that you go along with our submission to the City. The only waiver you would look at is that we will be a little closer to the back line than is normal . . . .

The next correspondence in the record is dated December 3, 1995, from Shea to Riley. In his letter, Shea agreed that he had been mistaken on the proposed price. He stated further, "However, no mention was ever made of waivers and I can't look kindly to the sale of this aforementioned property being held hostage to my position on any so called waivers."

A final letter, dated February 5, 1996, from Riley to Shea summarized the facts from Riley's perspective as follows:

> As you know, we have held discussions reference the potential of my selling you some of the vacant lot I own next door to you on Beechwood.
>
> I sought to make you an offer, under certain conditions, whereby we could reach agreement.
>
> After this occurred, I met with you in your home on the morning of December 15, 1995.
>
> At this time you bluntly stated you would not agree with any of the conditions. In fact, you stated you wanted to place other unreasonable restrictions on plans I was developing to develop the property.
>
> It is clear you rejected my offer. It was therefore then and is now, withdrawn.

Two days later, on February 7, 1996, appellant sued, claiming the initial correspondence amounted to a contract for the sale of the twenty feet and requested specific performance. The trial court dismissed the complaint, holding that it failed to satisfy the statute of frauds and stating that the parties never achieved a meet-

ing of the minds. For his appeal, appellant urges this court to reverse the trial court and find that the series of letters includes all the necessary terms to satisfy the statute of frauds and bind the seller. However, we need not reach the issue due to our holding that the parties never manifested the objective indicators of mutual agreement necessary to form a contract.

■ In a chancery case, the standard of review is *de novo*, and we will not reverse unless the decision is clearly against the preponderance of the evidence. *Belue v. Belue*, 38 Ark. App. 81, 828 S.W.2d 855 (1992).

Appellee quotes the trial court's remarks at the conclusion of the hearing: "There was not a meeting of the minds as to all critical terms of the contract." Appellee uses this language to argue that the parties never reached the agreement necessary to constitute a binding contract. From the evidence adduced at the hearing, we agree with the substance of the chancellor's finding but not his choice of metaphor, and therefore affirm.

■ ■ "Meeting of the minds" is described as "objective manifestations of mutual assent for the formation of a contract." *Thurman v. Thurman*, 50 Ark. App. 93, 97, 900 S.W.2d 221, 223 (1995) (*citing Dziga v. Muradian Business Brokers, Inc.*, 28 Ark. App. 241, 773 S.W.2d 106 (1989)).

The phrase "meeting of the minds" is disfavored:

> As Professor Farnsworth points out, "Discussions of this topic would be improved if this much abused metaphor ['meeting of the minds'] were abandoned. (Citation omitted). Although this Court used the metaphor as late as last year, we were careful to point out that we meant, in more modern terminology, "objective indicator[s] of agreement." *Fort Smith Service Fin. Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990).

Crain Industries, Inc. v. Cass, 305 Ark. 566, 576, 810 S.W.2d 910, 916 (1991). However, the evidence, in the form of appellant's testimony as to his understanding of the agreement and appellee's language in his correspondence, supports the trial court's finding that the alleged transaction lacked the requisite objective indicators of agreement. In each of his five letters, appellee mentioned steps

that must be taken before the sale could be consummated, including the re-platting of the lots and the approval of set-back waivers. At oral argument appellant contended that such conditions were solely under the control of appellee and that he should not escape his contractual obligation because of his failure to follow through on the zoning issues. However, this analysis assumes a contract existed where none did. Absent agreement on these conditions, appellee did not intend to be bound by his ongoing negotiations with appellant, and therefore no contract between the parties ever existed.

Our *de novo* review reveals that the trial court's finding was not clearly against the preponderance of the evidence; therefore, we affirm.

AREY and ROAF, JJ., agree.

Charles DURDIN *v.* STATE of Arkansas

CA CR 97-308 955 S.W.2d 912

Court of Appeals of Arkansas
Division II
Opinion delivered November 19, 1997

Victoria Cochran-Morris, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

MARGARET MEADS, Judge. Appellant, Charles Durdin, was convicted in a jury trial of aggravated robbery and theft of property and sentenced to five years and thirty years respectively, to be

served concurrently in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion to dismiss for violation of his speedy-trial rights; that the Interstate Agreement on Detainers is not applicable in this case; and that the trial court erred in denying his motion for directed verdict due to insufficiency of the evidence. Because we find appellant's speedy trial and Interstate Agreement on Detainers arguments to be persuasive, we reverse and dismiss his convictions.

With regard to appellant's speedy-trial argument, Rule 28.1(c) of the Arkansas Rules of Criminal Procedure provides:

> Any defendant charged . . . in circuit court and held to bail, or otherwise lawfully set at liberty, . . . shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

For speedy-trial purposes, the time for bringing Durdin to trial began to run November 6, 1992, when a criminal information was filed and a bench warrant issued for appellant on charges of aggravated robbery and theft of property. Ark. R. Crim. P. 28.2(a). Thus, appellant should have been brought to trial no later than November 6, 1993, barring only periods of necessary delay. However, appellant was not tried on these charges until September 10, 1996. Once a defendant presents a prima facie case of a violation of his right to a speedy trial, the burden shifts to the State to show that the delay was legally justified or the result of defendant's conduct. *Bradford v. State*, 329 Ark. 620, 953 S.W.2d 549 (1997); *Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992).

Appellant's motion to dismiss was argued orally to the court prior to the commencement of trial, but no testimony or documentary evidence was offered by either party. At the time the information was filed on November 6, 1992, Durdin's whereabouts were unknown. The State asserted that appellant's location remained unknown until April 1, 1993, when it learned that he was in custody in Chicago and that he was fighting extradition. The State further asserted that it placed a detainer on appellant but

that on June 29, 1993, it received notice from Chicago that appellant had been released. After his release from custody in Chicago, appellant's whereabouts were unknown until December 16, 1993, when the outstanding bench warrant was served on him in Pine Bluff, Arkansas, and he was taken into custody. Appellant posted bond and was released sometime after December 16, 1993.

Appellant's first appearance before the court was January 3, 1994, at which time his case was continued until February 7, 1994. When appellant failed to appear for his February 7 court date, an alias warrant was issued for his arrest. His whereabouts remained unknown until November 4, 1994, when, according to the State, it was notified that appellant was serving time on unrelated charges in the Illinois Department of Correction and that he was waiving extradition. The State asserted that an officer was dispatched from the sheriff's department to retrieve appellant, only to be informed upon arrival that he had time remaining to be served on his sentence in Illinois and would not be released. The State asserted that a second detainer was placed on appellant at that time; however, it was not until November 3, 1995, that the State learned appellant was fighting extradition, and thus it began preparing governor's warrants to obtain appellant's presence for trial in Arkansas.

Appellant was returned to Arkansas on February 8, 1996, and his case was set for February 16, 1996; however, he was hospitalized at that time and unable to appear. Because of appellant's illness, the trial judge continued the case from February 16, 1996, until June 3, 1996; this is evidenced by an amended order filed of record on April 10, 1996. On June 20, 1996, an order was entered setting trial for August 29, 1996. On August 28, 1996, the State requested and received a continuance, and trial was rescheduled for September 10, 1996.

Portions of this time period are unquestionably chargeable to the State for purposes of calculating the time for speedy trial. From June 20, 1996 (when the judge set trial for August 29, 1996) until August 28, 1996 (when the State requested a continuance), and from August 28, 1996, until September 10, 1996, is a total of eighty-two days chargeable to the State and thus includ-

able in the speedy-trial calculation. Regarding the November 4, 1994, to November 3, 1995, interval, the State acknowledged at the pretrial hearing that it knew appellant was in the custody of Illinois authorities. Although the State asserted that it received several contacts concerning appellant from Illinois law enforcement officials and that detainers and governor's warrants were issued to return appellant to Arkansas, it presented no tangible proof in the record to document these assertions. Because statements and arguments of counsel are not evidence, *Robinson v. State*, 49 Ark. App. 58, 896 S.W.2d 442 (1995), we find that the State failed to meet its burden of proving that this period of time was excludable from the speedy-trial calculation under Ark. R. Crim. P. Rule 28.3. These two time periods alone place the State outside the requisite twelve-month period to bring appellant to trial. Because it would unnecessarily lengthen this opinion and is not necessary to the outcome, we do not address the other time intervals between November 6, 1992, and September 10, 1996.

In order to establish legal justification for periods of delay resulting from the absence or unavailability of appellant, the State could have offered the testimony of local or out-of-state law enforcement authorities, as in *Caulkins v. Crabtree*, 319 Ark. 686, 894 S.W.2d 138 (1995), and *Nelson v. State*, 297 Ark. 58, 759 S.W.2d 215 (1988); or the testimony of the prosecuting attorney, as in *Wilson v. State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983). It could have introduced copies of the detainers which were purportedly issued, or extradition materials as in *Gooden v. State*, 295 Ark. 385, 749 S.W.2d 657 (1988). Because the record is devoid of the requisite proof, appellant's conviction must be reversed and the charges against him dismissed.

The State further argued that the Interstate Agreement on Detainers, Ark. Code Ann. §§ 16-95-101—107 (1987), applies and that appellant's time for a speedy trial did not begin to run until his return to Arkansas on February 8, 1996. This agreement provides, in pertinent part:

> 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, infor-

> mation, 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 . . . .

Ark. Code Ann. § 16-95-101, Art. III(a) (emphasis added). The State contends, citing *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991), that because appellant did not affirmatively request trial, his right to a speedy trial did not begin to run until his actual return to Arkansas on February 8, 1996.

This argument must fail. The Arkansas Supreme Court has held that an accused in prison in another state, for a different crime, must affirmatively request trial in order to activate the speedy-trial rule. *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992); *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991); *Dukes v. State*, 271 Ark. 674, 609 S.W.2d 924 (1981). Yet, it is also incumbent upon the prosecutor to promptly file a detainer upon learning that an accused is imprisoned elsewhere and to request that the official having custody of the accused advise the prisoner of the filing of the detainer and of the prisoner's right to demand trial. Ark. R. Crim. P. 29.1(b); *Dukes v. State*, 271 Ark. at 677, 609 S.W.2d at 925. The prisoner *then* has the right to demand trial, and such trial must be had within 180 days unless there is good cause for a delay. *Id.*

There is no proof in the record that the State filed a detainer or that appellant was served with a detainer while incarcerated in Illinois; therefore, we find that the Interstate Agreement on Detainers was never triggered.

Because we find that appellant's motion to dismiss based on lack of speedy trial should have been granted, we do not address the sufficiency-of-the-evidence argument. *Horn v. State*, 294 Ark. 464, 743 S.W.2d 814 (1988).

Reversed and dismissed.

PITTMAN and JENNINGS, JJ., agree.

Kenneth FERREN *v.* DIRECTOR, Employment Security Department, and J W Bailey Landscaping

E 97-48 956 S.W.2d 198

Court of Appeals of Arkansas
Division IV
Opinion delivered December 3, 1997

No briefs filed.

D. FRANKLIN AREY, III, Judge. The Board of Review affirmed the denial of unemployment insurance benefits to the appellant, Kenneth Ferren, on the basis that he left his last work voluntarily and without good cause connected with the work. The Board also affirmed a decision not to reopen the scheduled

hearing, upon appellant's failure to show good cause for not appearing at the hearing. Appellant brings this appeal challenging the Board's decisions. We must reverse and remand the Board's decision on the merits, because it did not set forth the findings of fact upon which it relied in reaching its conclusion. However, we affirm the Board's determination that the hearing should not be reopened.

Appellant's challenge to the Board's denial of benefits requires a review of the Board's findings. The Employment Security Department denied appellant's claim for benefits. The Arkansas Appeal Tribunal affirmed the department's decision. The Appeal Tribunal's discussion of the merits in its written decision consists of the following:

> After a study of the record in this case, the Appeal Tribunal finds that all interested parties have been afforded a reasonable opportunity for a fair hearing and that the determination of the Employment Security Department is supported by the record. Therefore, the determination of the Employment Security Department denying the claimant benefits is affirmed.

The Appeal Tribunal did not identify any evidence or facts it relied on in making this decision.

Appellant then appealed to the Board of Review; the Board affirmed the Appeal Tribunal. Its discussion was also limited:

> Also after a consideration of the evidence of record, the Board of Review finds that the decision of the Tribunal which affirmed the Department determination disqualifying the claimant from receiving benefits under Ark. Code Ann. § 11-10-513(a) is supported by the record. That Tribunal decision is hereby adopted as part of the decision of the Board of Review. Therefore, the decision of the Appeal Tribunal which left in effect the Department's determination is affirmed on the finding that the claimant left last work voluntarily and without good cause connected with the work.

The Board did not recite the factual basis for its decision; it did not otherwise discuss the evidence before it.

■ Did the Board make sufficient findings of fact to permit meaningful appellate review of its decision? It is instructive to

review comparable workers' compensation law on this question. In both areas of the law it is the responsibility of the respective agencies to make findings of fact. *Compare Lawrence v. Everett*, 9 Ark. App. 138, 653 S.W.2d 140 (1983) (matter remanded to Board of Review in light of its failure to make a finding on an issue), *with Wright v. American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986)(case reversed and remanded upon Workers' Compensation Commission's failure to make findings of fact). Our supreme court drew upon workers' compensation law to establish the scope of judicial review in employment security cases. *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978). Likewise, our supreme court referred to its practice in workers' compensation cases when it determined that the Board's failure to make findings of fact required remand of the matter at hand. *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950). Our court has followed this practice of supplying rules in employment security cases by looking to comparable workers' compensation law. *See City of Fayetteville v. Daniels*, 1 Ark. App. 258, 614 S.W.2d 680 (1981).

In the workers' compensation law context, we have provided some guidance as to what constitutes a sufficient finding of fact:

> A satisfactory, sufficient finding of fact must contain all of the specific facts relevant to the contested issue or issues so that the reviewing court may determine whether the Commission has resolved these issues in conformity with the law. The Commission must find as facts the basic component elements on which its conclusion is based. . . .
>
> A finding of fact sufficient to permit meaningful review is a "simple straightforward statement of what happened."

Lowe v. Car Care Mktg., 53 Ark. App. 100, 102, 919 S.W.2d 520, 521 (1996)(citations omitted). A conclusory statement that does not detail or analyze the facts upon which it is based is not sufficient. *Cagle Fabricating & Steel, Inc. v. Patterson*, 309 Ark. 365, 369, 830 S.W.2d 857, 859 (1992).

Under these standards, it is apparent that the Board of Review's decision in this case does not set forth sufficient findings

of fact upon which it relied in reaching its conclusion. We are presented with a conclusory statement, labeled a "finding," that the appellant "left last work voluntarily and without good cause connected with the work." The Board did not detail or analyze the facts upon which this "finding" was based. *See Cagle Fabricating & Steel, Inc.*, 309 Ark. App. at 369, 830 S.W.2d at 859. The Board failed to provide a simple straightforward statement of what happened; in the absence of such a statement, we cannot determine whether the Board applied Ark. Code Ann. § 11-10-513(a) (Repl. 1996) in conformity with the law.

We note that the Board adopted the Appeal Tribunal's decision as its own. If the Appeal Tribunal had made findings of fact and conclusions of law sufficient to allow meaningful review, this would have been acceptable. *See, e.g.*, *Cowan v. Director*, 56 Ark. App. 17, 936 S.W.2d 766 (1997)(where the Board adopted the Appeal Tribunal's findings of fact and conclusions of law, we reviewed those findings and conclusions under the applicable standard of review); *cf. Lowe*, 53 Ark. App. at 102, 919 S.W.2d at 521 ("[w]hile the Commission may specifically adopt the findings of fact made by the administrative law judge, it is necessary under such circumstances that the administrative law judge have made sufficient findings"). As the excerpt quoted above indicates, the Appeal Tribunal did not make sufficient findings of fact to permit review.

Because we are unable to determine the facts upon which the Board relied in reaching its conclusion, we reverse and remand for the Board to make specific findings of fact.

For his second point, appellant challenges the Board's decision not to reopen his hearing. Again, the Board adopted the Appeal Tribunal's decision as its own. The Appeal Tribunal found that its file contained two call-in slips for the appellant; both slips contained a phone number for a church. The Appeal Tribunal also called the phone number of appellant's grandmother that was contained in the file. Appellant was not at either of these numbers. Appellant denied leaving the church's number, and mentioned at the hearing on the reopening issue that he had heard that the employer was bragging about having someone else call in pre-

tending to be appellant. The Appeal Tribunal noted that the church's number was the only number called in for the appellant; if the employer called that number in, then there was no record of the appellant having called in a correct number at all. The Appeal Tribunal thought it was unlikely that the appellant's number was copied down incorrectly twice. The Appeal Tribunal concluded that it was more likely that appellant called in the wrong number by mistake; it did not believe that this was good cause for failing to appear.

Our standard of review is well settled:

> The findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it.

Cowan v. Director, 56 Ark. App. 17, 18-19, 936 S.W.2d 766, 767 (1997) (citations omitted). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Carraro v. Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996).

The Board's decision is supported by substantial evidence. Therefore, the Board's decision on this point is affirmed.

Affirmed in part; reversed and remanded in part.

CRABTREE and ROAF, JJ., agree.

CITY of FOUKE *v.* Patsy BUTTRUM

CA 97-474 956 S.W.2d 193

Court of Appeals of Arkansas
Division I
Opinion delivered December 3, 1997
[Petition for rehearing denied January 14, 1998.]

J. Chris Bradley, for appellant.

Craig L. Henry, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's decision finding that Act 796 of 1993 did not apply to this case and that appellee proved by a preponderance of the credible evidence that she sustained a compensable injury and was entitled to temporary total disability benefits from December 1, 1994, through a date yet to be determined. On appeal, appellant argues that the Commission erred in determining that Act 796 of 1993 did not apply and that there was no substantial evidence to support the Commission's decision. We disagree and affirm.

First, appellant argues that the Commission erred in determining that appellee's claim was not governed by Act 796 of 1993. Appellant contends that appellee did not sustain her injury until after Act 796 was in effect because she did not suffer a loss in earnings until December 1, 1994. Appellant cites *Hall's Cleaners v. Wortham*, 38 Ark. App. 86, 829 S.W.2d 424 (1992), in support of its proposition. We find appellant's reliance on *Hall's Cleaners* misplaced. In *Hall's Cleaners*, we said that, for purposes of the running of the statute of limitations, the statute does not begin to run until the true extent of the injury manifests and causes an incapacity to earn the wages that the employee was receiving at the time of the accident. The issue in that case involved only the question of when does an injury become *compensable* so as to

activate the running of the statute of limitations. In this case, on the other hand, we are determining, as a prerequisite, which act governs this particular claim. We are not deciding an issue that would already be governed by one of the acts, i.e., when the injury became compensable for statute of limitations purposes.

In our case of *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W.2d 897 (1996), we made it clear that the provisions of Act 796 of 1993 shall apply *only to injuries that occur* after July 1, 1993. There is no indication in Act 796 or our opinion in *Atkins Nursing Home* that "injury" means compensable injury for purposes of when Act 796 becomes effective. In *Atkins*, we affirmed the Commission's finding that the claimant suffered a recurrence on August 20, 1993. If we had determined that the claimant had not suffered a recurrence, but a new injury, then Act 796 would have been applicable to the facts of that case.

Here, the Commission determined that:

> [w]here a claimant demonstrates the manifestation of an obvious and unresolved physical injury prior to the effective date of Act 796, which we find below that claimant in the instant case has done, the same logic as that relied on in *Atkins* ought to be applicable (regardless of whether a claim was previously filed). With regard to relevant statutory provisions, Act 796 itself provides that it "shall apply only to those injuries which occur after July 1, 1993"(See "effective dates" section preceding Ark. Code Ann. § 11-9-101 (Repl. 1996). There is no accompanying provision stating or implying that an "injury", for purposes of determining whether the Act applies, is deemed to have occurred only upon a loss of wages. Nor can we impose such a rule in light of our statutory duty to strictly construe the new Act.

We cannot say that the Commission erred in determining that Act 796 of 1993 did not apply to this case because it is uncontradicted that appellee's injury was objectively confirmed as carpal tunnel syndrome on June 7, 1993. Thus, the date that appellee's injury occurred was before Act 796 became effective. Based on our resolution of this issue, we need not address appellant's remaining arguments that involve Act 796 of 1993.

Appellant does argue under the old act, however, that there is no substantial evidence to support the Commission's finding that appellee's injury arose out of and in the course of her employment. Appellant contends that there is no substantial evidence to support a finding that appellee's inability to work after November 30, 1994, was related to her employment with appellant. Also, appellant argues that appellee was not entitled to temporary total disability benefits.

We review decisions of the Workers' Compensation Commission to see if they are supported by substantial evidence. *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948 S.W.2d 100 (1997). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). The Commission's decision will be affirmed unless fair-minded persons presented with the same facts could not have arrived at the conclusion reached by the Commission. *Id.*

The record reveals that appellee worked for eleven and a half years, read water meters four to five hours a day, and wrote, in duplicate by hand, 250 to 300 water bills and receipts for each payment. During the last two years of her employment, appellee used a computer to enter all of the data. Appellee testified that she began experiencing pain in her hands in 1988, and that she mentioned it to at least two people, one being her supervisor at work. Appellee's condition grew worse. Mayor Jane Roberts, appellee's supervisor, testified that she saw appellee's hands and said that they were "swelled, bad, and I said, Pat, what is that, and what caused that, and she it [sic] was carpal. . .tunnel syndrome." Appellee testified that her hands hurt so badly that she thought she had suffered a stroke. She also said that her right hand was completely "dead" and had no feeling and that her left hand ached at night.

As early as July 20, 1992, Dr. Sam Brown believed that appellee was suffering from carpal tunnel syndrome. He prescribed medication and a splint, and he noted that a conduction test could be required in the future. Subsequently, Dr. Brown diagnosed appellee with carpal tunnel syndrome on June 7, 1993. He noted that the result of her NCV was positive for carpal tunnel, and it

was his impression that she had bilateral carpal tunnel syndrome. He referred appellee to Dr. Richard Hilborn. On June 18, 1993, appellee saw Dr. Hilborn, who found that appellee was a candidate for bilateral carpal tunnel release. Dr. Charles Hollingsworth saw appellee and noted that appellee did have bilateral carpal tunnel syndrome and that she had "irreversible damage and permanent sensory loss." He related appellee's carpal tunnel to her job duties with the city. He said, "I certainly feel that this patient's symptoms arose during her employment at Fouke City Hall and her job duties appear to have been the major instigating source of her problems." Dr. Hilborn also noted that, based on appellee's work history, it was certainly possible that her present condition was related to her former job.

Drs. Hilborn and Hollingsworth both recommended that appellee undergo corrective surgery. In its decision, the Commission noted that surgery had yet to be performed because of appellant had controverted appellee's claim. The Commission, consequently, found appellee temporarily totally disabled based on appellee's credible testimony that she could work if it were not for her hands, and also recognizing the need to protect appellee from increased damage to her condition, which Dr. Hollingsworth opined was already "irreversible." Based on the medical evidence, which indicates severe carpal tunnel syndrome related to appellee's work, and appellee's testimony that she had no feeling in her right hand and that she cannot work, we cannot say that the Commission's decision is not supported by substantial evidence.

Affirmed.

ROBBINS, C.J., and NEAL, J., agree.

CHAMBER DOOR INDUSTRIES, INC., and Fireman's Fund Insurance Company *v.* Larry GRAHAM

CA 97-510 956 S.W.2d 196

Court of Appeals of Arkansas
Division II
Opinion delivered December 3, 1997

[redacted]

Barber, McCaskill, Jones & Hale, P.A., by: *Michael L. Alexander* and *Wendy S. Wood*, for appellants.

Lane, Muse, Arman & Pullen, by: *Donald C. Pullen*, for appellee.

JOHN F. STROUD, JR., Judge. Larry Graham, a twenty-five-year employee of Chamber Door Industries, Inc., sustained a compensable cervical injury in November 1993. He was seen by orthopedic surgeon Robert Kleinhenz, who recommended a pain clinic or a rehabilitation specialist after epidural steroid injections were given and an MRI showed no need for surgery. Mr. Graham's case manager sent him to Dr. Reginald Rutherford at the Pain Care Center. Dr. Rutherford released him to return to work on May 16, 1994. He sought follow-up care after finding it difficult to perform his job, but Chamber Door's insurance carrier told him that his problems were not related to employment. On July 10, 1995, he returned at his own expense to Dr. Kleinhenz. Dr. Kleinhenz referred him to Dr. Donald Boos for pain management, and Dr. Boos later referred him to Dr. Thomas Ward for rehabilitation. Dr. Ward released him to return to light duty work on January 3, 1996.

Claimant petitioned for additional temporary total disability benefits and payment of additional medical expenses. A hearing was held in January 1996, and the administrative law judge reinstated temporary total disability benefits from July 24, 1995, through at least January 3, 1996. The ALJ also found that all medical and related expenses from Dr. Kleinhenz and subsequent referrals were reasonable and necessary, as well as related to employment; and ordered the carrier to pay for those expenses

and to remain responsible for continued reasonable and necessary medical treatment. On appeal the Commission affirmed the decision of the law judge, finding that the claimant was entitled to additional temporary total disability benefits, and that medical treatment rendered by Dr. Kleinhenz and others was both reasonable and necessary. Chamber Door and its carrier appeal, contending that there was not sufficient evidence to support the Commission's findings. We disagree and affirm.

In determining the sufficiency of the evidence to sustain the Commission's factual findings, we review the evidence in the light most favorable to those findings, and we must affirm if there is any substantial evidence to support them. *Pilgrims Pride Corp. v. Caldarera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, *id.*, and its resolution of the medical evidence has the force and effect of a jury verdict. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989). We may reverse the Commission's findings only when we are convinced that fair-minded people with the same facts before them could not have arrived at the conclusion reached by the Commission. *Id.*

Appellants contend that the claimant's healing period ended on May 17, 1994, and that he is entitled to no additional benefits. They argue that no objective medical findings underlie his complaints of pain and that treatments from July 1995 forward have addressed only these exaggerated complaints. They point to entries in the medical records referring to chronic pain syndrome and symptom magnification and to the testimony of a private investigator concerning the claimant's activities.

The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a factual determination to

be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

At the hearing, the claimant testified about going back to work after Dr. Rutherford released him. He said that he could not perform tasks such as lifting glass without help from his co-workers, that he "just couldn't deal with the pain," and that his situation became "more and more difficult." The medical records show that he was kept off work most of the time after returning to his initial treating physician: Dr. Kleinhenz took him off work from July 24, 1995, until he was treated by Dr. Boos; Dr. Boos continued him off work for seven more weeks, noting improvement due to cold laser treatments and rotator cuff exercises; and Dr. Ward did not allow him to return to light duty until January 3, 1996.

Appellants ask us to hold that a claimant must offer objective medical evidence to prove not only the existence of an injury, but also to show that his healing period continues. We decline to do so, just as we recently refused to require a claimant to offer objective medical evidence to prove the circumstances under which an injury was sustained. *See Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997). The evidence summarized above was sufficient to support the Commission's findings that the claimant was entitled to additional temporary total disability benefits after his release by Dr. Rutherford and that medical treatment rendered by Dr. Kleinhenz and others was reasonable and necessary.

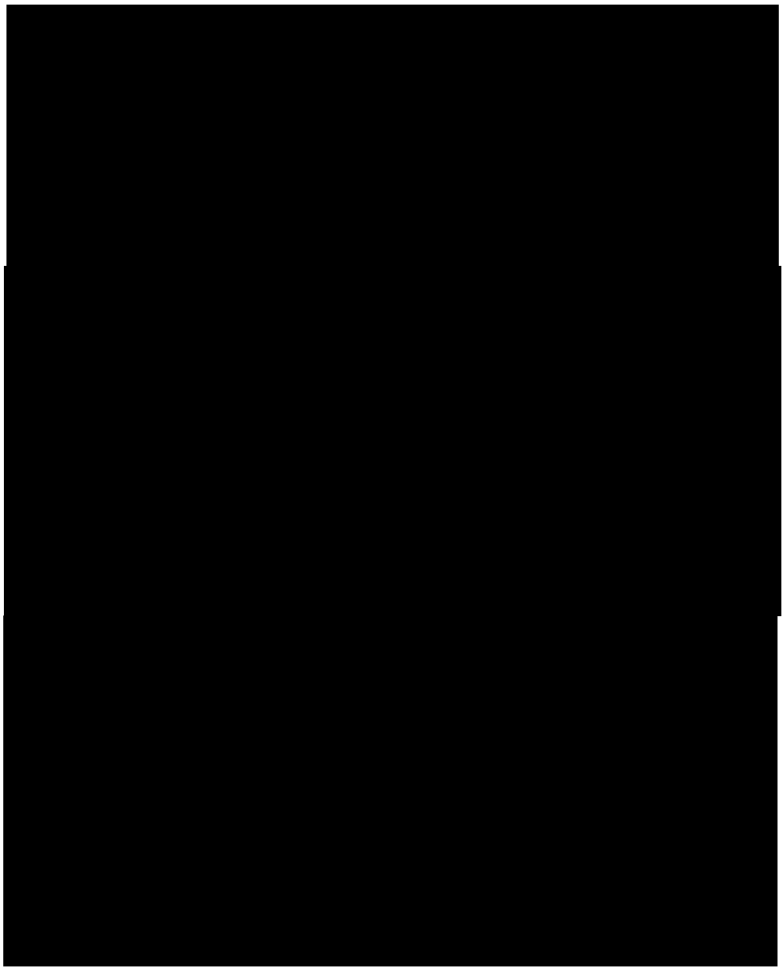
Affirmed.

AREY and JENNINGS, JJ., agree.

M & M BONDING COMPANY *v.* STATE of Arkansas

CA 96-1329 955 S.W.2d 521

Court of Appeals of Arkansas
Division IV
Opinion delivered December 3, 1997



Sexton & Fields, P.L.L.C., for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

TERRY CRABTREE, Judge. M & M Bonding Company, Inc., appeals from a decision of the circuit court that ordered forfeiture of a $25,000.00 bail bond posted by M & M Bonding for Manuel DeLopez. Appellant argues five points on appeal. First, appellant asserts that the trial court improperly permitted a default judgment ordering the bond forfeiture to be entered against it without any proof of the State's compliance with Arkansas Code Annotated § 16-84-201(b) (Supp. 1995). Second, that the trial court erred in finding that the defendant failed to appear on October 12, 1995. Appellant also contends that the trial court erred in finding that there was no evidence that the defendant was apprehended or surrendered to law-enforcement authorities before March 1, 1996. Fourth, appellant asserts that the trial court's finding that appellant was properly served with notice of the bond-forfeiture hearing was clearly erroneous. Finally, appellant argues that the trial court abused its discretion in failing to exonerate a reasonable amount of appellant's liability under the bail bond.

The State argues that the order forfeiting bond was not a default judgment, that appellant's motion to vacate the judgment was not timely made, and that the appeal should, therefore, be dismissed. We find the State's argument on this point persuasive.

On August 28, 1995, bail was given by M & M Bonding for Manuel DeLopez in the amount of $25,000. On September 27, 1995, the State sent a letter to M & M Bonding requesting that it have DeLopez in court on October 12, 1997, for a hearing. On October 3, 1995, DeLopez's attorney, a public defender, made a motion to be relieved as attorney for the defendant. The court granted the motion.

DeLopez did not appear at the October 12 hearing, and the trial court issued an order directing appellant to appear on January 18, 1996, to show cause why the bond should not be forfeited. The court directed that appellant be notified of the January 18 hearing by certified mail, restricted delivery. Further, as a result of

the defendant's failure to appear, the trial court ordered a warrant issued for the defendant.

On January 18, 1996, M & M Bonding failed to appear and show cause why the bond should not be forfeited. The court forfeited the $25,000.00 bond and entered judgment against M & M Bonding. The judgment was sent to appellant and a return receipt filed with the court. On February 14, 1996, the State filed a motion for Citation for Contempt against appellant for failure to pay the required amount to the clerk. A second show-cause hearing was set on the same day; appellant was ordered to appear and show cause on February 22, 1996.

On February 15, 1996, Paul Hoover entered his appearance as attorney for Manuel DeLopez. The defendant appeared with counsel on February 22, 1996, and was released pending bail in the amount of $10,000. On May 9, 1996, appellant filed a motion to vacate the order whereby the bail was forfeited. Because appellant's motion to vacate was not filed within the time prescribed by law, we affirm. *See* Ark. R. Civ. P. 60(b) (1997).

In the trial court's order, the court referred to the forfeiture judgment entered against appellant as a default judgment. No doubt this was an inadvertent statement by the trial court. A surety bond is posted by qualified individuals to insure the appearance of a criminal defendant at subsequent hearings. The surety bond itself is considered adequate security. Arkansas Code Annotated § 16-84-201 provides:

> (a)(1)(A) If the defendant fails to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, *the court may direct the fact to be entered on the minutes, and shall promptly issue an order requiring the surety to appear,* on a date set by the court not less than ninety (90) days nor more than one hundred twenty (120) days after the issuance of the order, to show cause why the sum specified in the bail bond or the money deposited in lieu of bail should not be forfeited.
>
> (B) The one hundred twenty-day period begins to *run from the date notice is sent by certified mail to the surety company at the address shown on the bond, whether or not it is received by the surety.* (emphasis added).

Appellant was notified that the defendant had failed to appear at the hearing of October 12, 1995, on October 19, 1995.[1] The trial court set the hearing for the bond forfeiture on January 18, 1996, — more than ninety days from the time appellant was notified of the defendant's failure to appear. One-hundred twenty days from the date appellant received notice of the defendant's failure to appear was February 17, 1996. The defendant appeared in court on February 22, 1996, — more than one-hundred twenty days from the date appellant received the notice. Accordingly, the trial court correctly forfeited the bond pursuant to the statute, and not as a default judgment.

Appellant asserts that it could have asked the court to vacate the judgment pursuant to Rule 55 of the Arkansas Rules of Civil Procedure. That rule provides in pertinent part:

> (c) Setting Aside Default Judgments. The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

Appellant's reliance on Rule 55(c) is misplaced. The rule contemplates that an opposing party request a default judgment against another party. In a bond-forfeiture case, the money or other sufficient surety has been deposited with the court. Once the defendant has failed to appear, the entire amount of the bond is subject to forfeiture. The surety is given the opportunity to present evidence why the bond should not be forfeited, or why the full amount of the bond should not be forfeited, but the bond-forfeiture procedure is separate and apart from the Rules of Civil Procedure.

In *Bryce Bail Bonds, Inc. v. State*, we stated:

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[1] The order was dated October 16, 1995, and filed of record on October 17, 1995. Appellant's agent signed a postal receipt on October 19, 1995.

Our review of cases dealing with bail bonds discloses several settled rules with regard to forfeiture and principles and guidelines governing remission which are to be applied on a case by case basis. Most of these cases are collected and discussed in *Tri-State Bonding Co. v. State*, 263 Ark. 620, 567 S.W.2d 937 (1978); *Craig & Schaaf v. State*, 257 Ark. 112, 514 S.W.2d 383 (1974); and *Allied Ins. Co. v. State*, 268 Ark. 934, 597 S.W.2d 115 (Ark. App. 1980). These cases recognize that in determining a forfeiture of bail, the underlying basis for admitting one to bail must be considered. The defendant, rather than being held in custody by the State, is released to the surety who assumes custody of him and is responsible to the court for his appearance at any time. The defendant is regarded as being in the custody of his surety from the time of execution of the bond until he is discharged and his bail is considered a jailer of his own choosing. Although the surety is not expected to keep the principal in physical restraint he is expected to keep close track of his whereabouts and keep him within this state subject to the jurisdiction of the court. *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 38 (1880).

The surety is not released from forfeiture except where an act of God, the State, or of a public enemy, or actual duress prevents appearance by the accused at the time fixed in the bond. Absent one of those excuses the failure of an accused to appear at the time fixed is sufficient basis for forfeiture.

Proceedings after forfeiture are summary ones. The order to show cause pursuant to Ark. Stat. Ann. 43-729 (Repl. 1977) *merely affords the bondsman an opportunity to be heard with respect to remission of all or some part of the forfeiture. Craig v. State*, 257 Ark. 112, 514 S.W.2d 383 (1974).

Where the principal does not appear there is no exoneration from liability under the bond, regardless of the extent of the search by the surety, if the surety shows no more than a disappearance of the principal. The trial court's authority to remit a forfeiture when the accused is subsequently surrendered by the surety is discretionary and that discretion will not be interfered with unless it is arbitrary or abused. It devolves upon the bail bondsman to establish facts which justify favorable action in the exercise of the trial court's discretion, and the failure to allow him even his expenses in this matter is not necessarily an abuse of the court's discretion. The mere fact that the bail takes the accused into custody after the forfeiture and surrenders him to

> the authorities, even during the same term of court, does not entitle the bail to a right to remission of the penalty, even though the return of the principal was at the expense of the surety. *Hickey v. State*, 150 Ark. 304, 234 S.W.2d 168 (1921).

8 Ark. App. 85, 88-9, 648 S.W.2d 832, 834 (1983) (emphasis added).

An order of a circuit court may be modified or set aside on the motion of the court or any party within ninety days of its filing with the clerk. Ark. R. Civ. P. 60(b) (1997). When a circuit court does not modify or vacate an order within ninety days, it loses all power to act. *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988). If a party fails to move within ninety days that an order of the circuit court be set aside or modified, that party is barred from further action. *See Summers v. Griffith*, 317 Ark. 404, 878 S.W.2d 401 (1994). In the present case, the order forfeiting the bond was entered on January 18, 1996. Appellant waited one-hundred eleven days to file a motion to vacate that order.

Appellant relies heavily on *AAA Bail Bond Co. v. State*, 319 Ark. 327, 891 S.W.2d 362 (1995), for the proposition that the trial court erred in forfeiting the bond posted on behalf of the defendant. Appellant's reliance on the *AAA Bail Bond* case is misplaced. In that case, the surety was not notified of the non-appearance of the defendant until several months after the defendant failed to appear, and the surety produced the defendant within a few weeks of being notified of the failure to appear. In this case, M & M Bonding was notified of the date of the defendant's scheduled appearance, but did not advise the defendant. Even after appellant was notified of the failure of the defendant to appear and the date of the show-cause hearing, appellant failed to appear to produce the defendant or to submit evidence to the court that part of the bond amount should be remitted. It was not until the State moved the court for a citation for contempt that the appellant attempted to locate the defendant.

Appellant's motion to vacate the forfeiture judgment was untimely. Accordingly, the trial court's judgment in the amount of $25,000 is affirmed.

Affirmed.

BIRD and ROGERS, JJ., agree.

Michael W. LOVELACE *v.* OFFICE OF CHILD SUPPORT ENFORCEMENT

CA 97-65 955 S.W.2d 915

Court of Appeals of Arkansas
Division III
Opinion delivered December 3, 1997

Appellant, pro se.

Juliane Henderson, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Michael Lovelace was found to be the father of a child who had reached majority, and was ordered to pay three years of back child support. He appeals *pro se* and challenges both the amount of the judgment and the weekly payment amount ordered. We affirm.

On July 17, 1996, this case was heard by the chancellor to determine paternity and establish support for a child who had reached majority at the time of the hearing. Lovelace also represented himself before the trial court. The DNA test established a 99.93% probability of paternity and the court, based on the mother's testimony and the paternity test results, found Lovelace to be the father of the child. Lovelace did not contest paternity.

At the hearing, the appellee, Office of Child Support Enforcement (OCSE), presented the testimony of a representative who testified as to the back support owed by Lovelace and his current earnings. She testified that his average weekly take-home pay was $348.04 (based upon Employment Security Division records) and that the arrearages dating back three years prior to the

child's eighteenth birthday totaled $8214. Again, Lovelace made no objections to the testimony and asked no questions of the representative.

Lovelace presented no evidence of his own. The chancellor determined that, since the child was no longer a minor, there was no need to discuss or establish visitation or custody. The court then awarded judgment for $8214, without objection by Lovelace. However, when the court stated that the weekly payment amount would be $64, based on Lovelace's current earnings and the child-support chart, Lovelace stated, "I can't pay it." Lovelace argued that $64 per week was too much and that it would create a hardship because he had four children at home. He stated that he could afford $50 every two weeks. The attorney for OCSE stated that they would not be opposed to a downward deviation from the support chart since the judgment was to reimburse the State. The court, noting that Lovelace had stated that he could pay $50 biweekly (or $25 weekly), said that Lovelace would be required to pay $40 weekly. She reasoned that $25 per week was the chart minimum and that amount was indicated when the payor was unemployed. The court also ordered Lovelace to reimburse OCSE for the cost of the paternity testing and to pay the wage assignment fee of $24.

On appeal, Lovelace argues that the trial court should be reversed because: (1) no affidavit of financial means was introduced for him and his net income was miscalculated; (2) undue hardships were created on his other dependents due to the trial court's failure to consider those dependents; and (3) no AFDC payment history was introduced to prove the back support which appellant was charged with reimbursing.

Because Lovelace only mentioned one of his arguments (point 2) below, this court is precluded from addressing the other two arguments on appeal. It is well established that this court will not reverse on an issue not presented to the trial court. *Arkansas Office of Child Support v. House*, 320 Ark. 423, 897 S.W.2d 565 (1995); *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993). The court will not consider arguments raised for the first time on appeal or where a ruling from the trial court has not been obtained. *Mobley v. Harmon*, 313 Ark. 361, 854 S.W.2d 348 (1993).

With regard to Lovelace's second point, whether or not the trial court considered the hardship on his children living at home in establishing the weekly payment, the applicable standard of review is abuse of discretion. The amount of child support lies within the sound discretion of the chancellor, and her finding will not be disturbed on appeal, absent a showing that she abused her discretion. *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990); *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996).

Reference to the child-support chart is mandatory where there is a current duty to support, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by express findings stating why the chart amount is unjust or inappropriate. *See Black v. Black*, 306 Ark. 209, 214, 812 S.W.2d 480 (1991). Likewise, in a case such as this where there is no current duty to support due to the child's reaching majority, Arkansas Code Annotated § 9-14-235 (Supp. 1995) states that:

> [T]he obligor shall continue to pay an amount . . . to be determined by a court based on the application of guidelines for child support under the family support chart, until such time as the child support arrearage or judgment has been satisfied.

The chancellor, in her discretion, is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case, and this court will not disturb the chancellor's decision to do so absent an abuse of discretion. *Jones v. Jones*, 43 Ark. App. 7, 12, 858 S.W.2d 130 (1993).

In the present case, the chancellor clearly indicated that she was considering the hardship on Lovelace's other children in her determination of the amount of his scheduled payments. In addition, she did not order Lovelace to pay the amount prescribed by the child-support chart, but rather departed downward as Lovelace requested. The mere fact that she did not reduce the payment to the amount he requested cannot be said to amount to an abuse of discretion.

Affirmed.

ROBBINS, C.J., and MEADS, J., agree.

Randy CARRUTHERS *v.* STATE of Arkansas

CA CR 97-216 956 S.W.2d 201

Court of Appeals of Arkansas
Division II
Opinion delivered December 10, 1997

W. Ray Nickle, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case pled guilty to possession of a controlled substance and was sentenced to ten years' probation. During the probationary period, the State filed a petition for revocation alleging that appellant violated the conditions of his probation by possessing cocaine with the intent to deliver and by possessing drug paraphernalia. After a hearing, the trial court revoked appellant's probation and sentenced him to five years' imprisonment followed by five years' suspended imposition of sentence. From that decision, comes this appeal.

For reversal, appellant contends that the trial judge erred in finding that he violated the conditions of his probation. We agree, and we reverse.

In order to revoke probation, the trial court must find by a preponderance of the evidence that the defendant failed to comply with the conditions of his probation; this decision will not be reversed on appeal unless it is clearly against the preponderance of the evidence. *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991).

Chief of Police Ralph Hill testified that, on the day in question, he was conducting an undercover anti-drug operation at an establishment called Fat Daddy's. In connection with the undercover operation, teams of police officers were stationed nearby to assist in making arrests. One of the officers, Sergeant Griggs, reported that he saw three individuals running. These individuals were running when first seen by the police officers and were not suspected of doing anything illegal before that time. Furthermore, according to Chief Hill, there was nothing happening in connection with the anti-drug operation that would cause people to run and flee, and the individuals were not running away from Fat Daddy's, but were instead running from the front of appellant's house in a northeasterly direction along an old railroad bed. Nevertheless, these individuals were pursued, and by the time Chief Hill arrived on the scene two of them had been apprehended by Sergeant Griggs. When asked why they were running, they answered that they were "just running" and were released. Chief Hill searched for the third individual and saw appellant behind a

house near the old railroad bed. Appellant fled westward down an adjacent alley and was apprehended. A search of his person revealed that he was in possession of two pagers and approximately $1,000.00 in currency. Officers subsequently searched the alley and found a set of electronic scales, a bag of marijuana, and a bag of crack cocaine. These items were not found where appellant had been first observed or along the path of his westward flight. Instead, they were found in the opposite direction, near some trash cans approximately forty-five feet east of his initial location.

Appellant contends that the evidence is insufficient to prove that he violated the conditions of his probation by possessing the contraband. We agree. It is undisputed that no one saw appellant in possession of the contraband. The State's case therefore depends upon constructive possession, *i.e.*, the control or right to control contraband, which may be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Argo v. State*, 53 Ark. App. 103, 920 S.W.2d 18 (1996). In the case at bar, however, there is no evidence that appellant was seen at the location where the contraband was found, that appellant was seen throwing anything, or that the contraband was found along the chase route. *See Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990). Furthermore, fingerprint tests were conducted on the bags and no fingerprints matching appellant's were found. *See id.* Although we note that, unlike the appellant in *Argo*, *supra*, appellant in the case at bar was found with pagers and a large sum of money, we think that these facts are more relevant to an intent to deliver drugs than to one's possession of particular contraband. Because the State failed to show that appellant had the immediate and exclusive access to the contraband necessary to support a finding of constructive possession, we must reverse. *See*, *Knight v. State*, 51 Ark. App. 60, 908 S.W.2d 664 (1995).

Reversed and dismissed.

JENNINGS and MEADS, JJ., agree.

Sue PHILLIPS, Washington County Assessor *v.* MISSION FELLOWSHIP BIBLE CHURCH

CA 97-425 955 S.W.2d 917

Court of Appeals of Arkansas
Division III
Opinion delivered December 10, 1997

[redacted]

George E. Butler, Jr., and *Longino & Seymour, PLC*, by: *James H. Longino* and *Gary L. Seymour*, for appellant.

Donald C. Donner, for appellee.

ANDREE LAYTON ROAF, Judge. Washington County Assessor Sue Phillips (assessor) appeals a circuit court finding upholding a tax exemption for the appellee Mission Fellowship Bible Church (church) for a building and the 1.05-acre tract of land that it sits on. On appeal, the assessor argues that the circuit court erred in finding that the property was not the property of the church's pastor, Rev. Jay D. Cole, and his wife, Thelma G. Cole, or in the alternative, that the church was not entitled to a tax exemption for the entire 1.05 acres. We affirm.

The church has existed as a domestic nonprofit corporation since 1991. Under I.R.S. guidelines, it qualifies as a church for federal tax-exempt status. The church is governed by a three-member board, elected by the congregation upon the recommendation of Rev. Cole. At the time this matter was litigated, Rev. Cole was a board member. Rev. Cole is an ordained Baptist minister, and the church's congregation has some seventy "attendees."

Sunday worship service attendance varies between twenty-five and thirty-eight. All services are advertised and open to the public.

The property in question is a 1.05-acre tract upon which is situated the church building, a 6,800 square-foot structure that contains a sanctuary, chapel, Sunday School classrooms, a religious lending library, fellowship areas, administrative offices, and guest quarters for visiting pastors and missionaries. The balance of the property consists of landscaped grounds, approach roads, and a parking area. The 1.05-acre tract was part of a fifty-five-acre tract that was subject to a number of transactions between 1975 and 1992 involving the Coles as individual owners and Rev. Cole as an officer of a succession of nonprofit corporations engaged in religious activities.

Originally, the fifty-five-acre tract was acquired by Rev. and Mrs. Cole in November 1975, but was conveyed a month later by correction deed to United Missionary Aviation, Inc. The property was deeded back to the Coles in 1977 and was again deeded to United Missionary Aviation, Inc., in 1988. Since 1991, the fifty-five-acre tract has been owned by the church and is presently encumbered by a $750,000 mortgage to the Coles. The debt secured by the mortgage is the result of Rev. Cole's advancing to the church more than $100,000 per year to support its television ministry. The church has never made payments on this debt.

On October 11, 1994, at the suggestion of the Washington County Board of Equalization, which had apparently rejected the church's application for a tax exemption for the entire fifty-five-acre tract, a quitclaim deed signed by Rev. Cole on behalf of the church conveyed 1.05 acres including the church building to Rev. and Mrs. Cole. On the same day, the Coles conveyed the 1.05 acres back to the church. The Coles built and occupy a 3,000 square-foot residence on the portion of the fifty-five-acre tract not affected by the quitclaim deed. This residence is not tax-exempt.

The Washington County Board of Equalization approved a tax exemption for the church building and the 1.05-acre tract. The assessor appealed to the Washington County Court, which upheld the tax exemption. The assessor then appealed to the Washington County Circuit Court which, based on the pleadings

and stipulated facts submitted by the parties, also upheld the tax exemption. The assessor appeals from this ruling.

The assessor first argues that the trial court erred in finding that Rev. Cole and his wife were not the "de facto" owners of the church property because of Rev. Cole's "self-dealing" and "constructive fraud," which included the execution of a mortgage that is currently in default and could result in the property reverting back to the Coles at any time. Consequently, the assessor argues, if this court finds that the Coles actually own the property, it would not be "dedicated church property" as contemplated by Ark. Code Ann. § 26-3-301 (Supp. 1995) or a church "used as such" as required in Article 16, § 5, of the Arkansas Constitution.

It is well settled that tax exemptions must always be strictly construed against the exemption. *City of Fayetteville v. Phillips*, 320 Ark. 540, 899 S.W.2d 57 (1995). Moreover, the supreme court has said that, on appeal, all tax cases are reviewed *de novo* and the findings of the trial court are set aside only if clearly erroneous. *City of Little Rock v. McIntosh*, 319 Ark. 423, 892 S.W.2d 462 (1995); *Agape Church, Inc. v. Pulaski County*, 307 Ark. 420, 821 S.W.2d 21 (1991).

The Arkansas Constitution exempts "churches used as such" from county ad valorem taxes. Ark. Const. art. XVI, § 5(b). Arkansas case law has interpreted this section to require that the property satisfy two requirements: 1) the property must be part of a designated class of property, i.e., a church; *see Agape Church, supra* (holding that land where the church constructed a 700-foot broadcast tower to transmit Christian programming was not entitled to a tax exemption because the statute contemplated a building, and a radio tower was not a building); and 2) the property must be used exclusively for the purpose suggested by the classification. *Pulaski County v. First Baptist Church*, 86 Ark. 205, 207, 110 S.W. 1034, 1035 (1908) (denying a tax exemption for a separate church-owned lot where outhouses were located even though they were used exclusively by the congregation).

Ownership is not listed as a condition for tax-exempt status in either Article 16, section 5, or in Ark. Code Ann. § 26-3-301, and it has never been found to be dispositive in the case law

interpreting these sections where churches were concerned. Use, however, is determinative of entitlement to a tax exemption. *See*, *Burbridge v. Smyrna Baptist Church*, 212 Ark. 924, 927-28, 209 S.W.2d 685, 687-88 (1948) (abandoned church property subject to taxation except for a separately fenced cemetery which remained tax-exempt under a different clause in Article 16, section 5.); *see also*, *City of Fayetteville v. Phillips*, *supra*, (analogous clause of Ark. Const. art. XVI, § 5(b), regarding exemptions of property held for public purposes did not allow tax-exempt status for the publicly owned Walton Arts Center because it was not used exclusively for public purposes). Accordingly, even if this court were to be persuaded that Rev. and Mrs. Cole were the "de facto" owners of the property, there was no proof that the property was used for anything but church purposes.

Similarly unpersuasive is the balance of the assessor's argument, in which she asserts that the property was not "dedicated church property" as contemplated by Ark. Code Ann. § 26-3-301 (Supp. 1995). The statute provides in pertinent part that:

> All property described in this section, to the extent limited, shall be exempt from taxation:
>
> . . .
>
> (11)(A) Under the provisions of this section, all dedicated church property, including the church building used as a place of worship, buildings used for administrative or missional purpose, the land upon which the church buildings are located, all church parsonages, any church educational building operated in connection with the church, including a family life or activity center, a recreation center, a youth center, a church association building, a day care center, a kindergarten, or a private church school shall be exempt.

The circuit court made a specific finding of fact that the building is dedicated for use exclusively for worship and church-related matters. The assessor offered no proof to the contrary, nor did she even dispute the fact that the building was used exclusively for church purposes. Under the circumstances, we cannot say that the trial court's finding was clearly erroneous.

The assessor also argues that if the property is determined to be the property of the church, the trial court erred in finding that the entire 1.05 acres is entitled to exemption from taxes, and asks that this court remand the case to the trial court for a determination of the extent of the exemption to be allowed. She argues that the church building only occupies fifteen percent of the 1.05-acre tract, and the rest should be subject to taxation. She contends that the parking lot, connecting driveways, and landscaped areas are not the land on which the church building is located, as required by Ark. Code Ann. § 26-3-301 (Supp. 1995) or a church "used as such" as required in Article 16, § 5, of the Arkansas Constitution. This argument fails to persuade because the plain language of § 26-3-301 specifically grants an exemption to "all dedicated church property." Nowhere in the record is there proof that the adjacent land in the 1.05-acre plot was used for any other purpose.

On this point, the assessor urges this court to find dispositive *Pulaski County v. First Baptist Church, supra, Agape Church, Inc. v. Pulaski County, supra,* and *Burbridge v. Smyrna Baptist Church, supra.* However, her reliance on these authorities is misplaced, as they are easily distinguished from the instant case. At issue in *Pulaski County v. First Baptist Church, supra,* was not the land that the church was situated on, but a separate lot owned by the church on which a well and some outhouses were located. The instant case involves a single lot. Moreover, the court in *Pulaski County v. First Baptist Church* grounded its ruling in its concern that the use by a 1,500-member congregation of outhouses situated a distance from the church, instead of modern plumbing connected to city water and sewer mains, represented a health hazard.

Similarly, the land in *Agape Church, Inc. v. Pulaski County, supra,* was a separate twenty-six-acre tract located some distance from the church. Unlike the instant case where the church building itself is the only structure on the lot, a 700-foot transmission tower for broadcasting Christian programming was the only structure on the acreage.

As to *Burbridge v. Smyrna Baptist Church, supra,* this case involved the withdrawal of a tax exemption for eighteen of the

twenty acres of a tract where a church had burned down. However, the exemption was maintained, pursuant to a different clause in Article 16, § 5, for two acres used as a cemetery. In the instant case, there is an active church being used as such, and the grounds surrounding the church are but a fraction of the twenty-acre tract that was exempt in *Burbridge* prior to the fire.

We also find unpersuasive the authority from a foreign jurisdiction cited by the assessor to support her contention that the parking area and driveways should not be exempt. In *Second Church of Christ Scientist v. City of Philadelphia*, 157 A.2d 54 (Pa. 1959), the Pennsylvania Supreme Court construed a section of the Pennsylvania state constitution relating to tax exemptions for church property that was considerably more restrictive than Article 16, § 5, of the Arkansas Constitution. The pertinent section of the Pennsylvania Constitution allowed tax exemptions for only the "actual place of religious worship." Art. IX, § 1. The equivalent section of the Arkansas Constitution allows exemptions for "churches used as such."

Finally, in oral arguments, the assessor's counsel agreed that, based on the placement of the driveways and parking lot surrounding the church, he could not say that the 1.05-acre parcel could have been reduced in size. In sum, we cannot say that the trial court's finding that the church's property is exempt is clearly erroneous, and the judgment is affirmed.

Affirmed.

ROBBINS, C.J., and MEADS, J., agree.

Michael H. TURNER *v.* STATE of Arkansas

CA CR 97-161 956 S.W.2d 870

Court of Appeals of Arkansas
Division III
Opinion delivered December 17, 1997
[Petition for rehearing denied February 4, 1998.]

Boyd Tackett, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Michael H. Turner appeals his conviction for second-degree violation of a minor for which he received a sentence of six years in the Arkansas Department of Correction. He argues three points on appeal, none of which have merit.

In November 1994, the victim and her twin brother were staying with their aunt and uncle, the appellant. Their parents were out of state at the time preparing to move back to Arkansas. Their aunt left home one night for medical training, and appellant was left in charge of the children, including his own two younger children. Appellant abused the victim in a sexual manner after the younger children had been sent to bed, and the sufficiency of the evidence regarding this incident is not in issue. He argues that evidentiary rulings prejudiced his case and require reversal. We disagree and affirm.

■ ■ Appellant moved in limine to exclude evidence of subsequent bad acts of appellant toward the victim. Appellant argues that the trial court erred when it permitted the State to introduce evidence of subsequent bad acts of appellant that were directed toward the victim because the probative value was far outweighed by prejudice to the appellant. Those subsequent bad acts included:

> (1) appellant asking the victim to sleep with him for money;
>
> (2) appellant attempting to kiss her, putting his tongue in her mouth;
>
> (3) appellant being in his bed, asking the victim to make him a sandwich and bring it to his bed, followed by the statement, "come warm up the bed with me."

These incidents all occurred within two to three weeks after the November incident.

The evidentiary rule at issue is Rule 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The supreme court has said that testimony regarding similar acts with the same child or other children in the same household may be admitted when it is helpful in showing a proclivity toward these acts with a person or class of persons with whom the accused has an intimate relationship. *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987); *see also Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989); *Thrash v. State*, 291 Ark. 575, 726 S.W.2d 283 (1987). Prior sexual contact with the victim by the accused has been ruled admissible because such evidence helps in proving the depraved sexual instinct of the accused. *Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994); *Williams v. State*, 103 Ark. 70, 146 S.W. 471 (1912); *Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984). Generally, however, these other wrongs or acts have occurred prior to the incident for which the defendant is being tried.

The standard of review in weighing probative value versus prejudicial effect is whether the trial court abused its discretion. *Peters v. Pierce*, 314 Ark. 8, 858 S.W.2d 680 (1993). Admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Warren v. State*, 59 Ark. App. 155, 954 S.W.2d 298 (1997). We acknowledge that we stated in *Tharp v. State*, 20 Ark. App. 93, 724 S.W.2d 191 (1987), that evidence of a subsequent act of sexual abuse that occurred a week after the incident for which the appellant was charged was not logically relevant to show the antecedent relationship of the parties. However, we also recognize that the supreme court has effectively overruled that position in *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996). In *Douthitt*, the trial court denied appellant's motion to sever three rape counts that occurred between 1989 and 1991 from approximately sixty incest and violation-of-a-minor counts that occurred between 1993 and 1994. Appellant argued that the acts were not part of a scheme or plan and they should have been severed. Although some of these acts were subsequent to others, the supreme court upheld the trial court's ruling and stated:

> Here, the same evidence was admissible against Douthitt in each count of sexual abuse, so the trial court did not abuse its discretion in denying severance.

Id. at 800, 935 S.W.2d at 245; *see also Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). The trial court did not abuse its discretion in allowing evidence of these subsequent acts because they followed in close proximity and showed motive, intent, plan, or knowledge by appellant.

For appellant's second point on appeal he argues that the trial court erred when it failed to give the jury an instruction on the requirement of corroboration of a confession. However, neither the proffered instruction, the arguments of counsel, nor the trial court's ruling appear in the abstract. The record on appeal is confined to what is abstracted. *Carter v. State*, 326 Ark. 497, 932 S.W.2d 324 (1996); *Moncrief v. State*, 325 Ark. 173, 925 S.W.2d 777 (1996). It is the duty of an appellant to abstract such parts of the record as are material to the points argued in his brief.

Ark. Sup. Ct. R. 4-3(g); *Carter, supra.* Appellant's failure to abstract the material portions of the record precludes us from considering the merits of this argument.

Appellant lastly argues that the trial court erred in refusing to receive into evidence certain notes prepared by an employee of the North Arkansas Human Services System. Appellant sought to offer the notes to impeach this mental health employee, stating that they were not made for the purpose of diagnosis or treatment and would not be privileged under Arkansas Rule of Evidence 503. Appellant contends that these notes would evidence improper coaching of the victim. The State argues that we should not reach the merits of this argument since the notes are not abstracted. Although not abstracted, they were made part of the record. Appellant explains that he did not abstract the notes because the trial court had sealed the notes, and it was his intent to honor that seal. However, the record on appeal to this court is confined to the material abstracted. *Carter* and *Moncrief, supra.* While we appreciate appellant's efforts to respect the trial court's direction to seal these notes, our record does not reflect that appellant sought relief from us regarding the trial court's order. His failure to include in abstract form the notes that he asserts are so important to his case could preclude us from determining whether they were privileged or not.

While we could disregard these notes and appellant's argument concerning them, we may go to the record to affirm and in this case have reviewed these notes. The notes reveal that the mental health employee met with the victim for an hour and a half prior to the first trial in this matter. She reviewed with her what would be proper behavior for the courtroom and offered support. She encouraged her to tell the truth. They discussed who the victim should look at when answering questions and how she should speak to the judge, i.e., "yes, sir" and "no, sir." Only the mental health employee was allowed to stay in the courtroom while the victim was testifying and her notes reflect that the victim did very well on the stand even during cross-examination. She was asked to assist in informing the victim that the first trial had resulted in a mistrial and that she would have to testify again. "Support and encouragement was provided." Though this evi-

dence may have fallen outside the scope of the psychotherapist-patient privilege because it was not in furtherance of diagnosis or treatment, we cannot say that its exclusion was prejudicial error.

The information in these notes was brought out otherwise in the cross-examination of the victim:

Q. Well, some people have talked to you and suggested to you how to—how to testify.
A. The only thing people told me was to tell the truth.
Q. Okay. No one told you how to sit on the witness stand?
A. They just told me to sit tall and tell the truth.
Q. Okay. So somebody did tell you to sit—how to sit in the witness chair. They also told you that you should look at the jury at certain times, didn't they?
A. Yeah.
Q. Okay. [A]re there some people out here in the audience here to give you visual reassurance?
A. Yes, there is.

. . .

Q. No one has ever sat out here and indicated that, you know, if you get to a rough spot, look at me, and I might—I might help you out in some way?
A. No.

Upon further cross-examination, the victim again stated that all she had been told was to tell the truth. Appellant elicited virtually every piece of information in the mental health worker's notes. We will not reverse an evidentiary ruling absent a showing of prejudice. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996); *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996); *Robinson v. State*, 49 Ark. App. 58, 896 S.W.2d 442 (1995).

Affirmed.

MEADS and ROAF, JJ., agree.

Don E. RUMMEL, et al. *v.* DIRECTOR,
Arkansas Employment Security Department

E 96-4 957 S.W.2d 718

Court of Appeals of Arkansas
Division III
Opinion delivered December 17, 1997

James E. Nickels, for appellants.

Allan Pruitt and *Phyllis Edwards*, for appellee Director.

Cross, Gunter, Witherspoon, and Galchus, A Professional Limited Liability Company, by: *Allen C. Dobson*, for appellee Arkansas Power & Light Co.

JOHN E. JENNINGS, Judge. Don E. Rummel and seven others were employed by Arkansas Power and Light Company (AP&L) at its White Bluff facility. The employment of all eight workers was terminated by AP&L as part of a general reduction in its work force. Their last day to work was December 6, 1994.

Each employee received a severance package under an agreement negotiated between their union, the International Brotherhood of Electrical Workers, and AP&L. The agreement provided that each would receive "administrative leave pay," "separation pay," and "vacation pay."

Each of the employees filed a claim for unemployment benefits. The Agency initially denied the claims, but this decision was subsequently modified by the Appeal Tribunal. Finally, after an appeal to the Board of Review, the claims were once again denied.

On appeal to this court the claimants contend that the Board erred in concluding that they were not unemployed during the eight-week period in which they received administrative leave pay. In a second argument, which affects Mr. Rummel only, he contends that the Board improperly concluded that his receipt of vacation pay was disqualifying. We find no reversible error in the Board's determination and therefore affirm.

The negotiated agreement provided that each employee would receive "two months administrative leave with full base pay. Administrative leave begins as determined by the company. At the end of the two-months administrative leave, employment will be terminated. . . ." From the date he last reported to work in early December 1994, each claimant received his normal weekly wage based on a forty-hour work week, payable bi-weekly, as in the past. The claimants' insurance benefits and credit union benefits continued during the "administrative leave."

The parties agree that the primary issue on appeal is whether the claimant-appellants were unemployed during the two-month period designated as administrative leave. Arkansas Code Annotated section 11-10-214(a) (Repl. 1996) provides that an individual shall be deemed "unemployed" with respect to any week during which he performs no services and no wages are payable to him with respect to that week. The Board held that the administrative leave payments were wages. On the facts of this case we cannot say that the Board's conclusion is not supported by substantial evidence. While we agree with the appellants that *McVey v. Daniels*, 270 Ark. 409, 605 S.W.2d 483 (Ark. App. 1980), cited by the Board, is not directly on point, it is also of no help to the appellants. In *McVey*, we merely recognized that the statutory definition of unemployment contained two parts: that the employee performed no services, *and* that no wages were payable to him with respect to the week in question.

Appellants also contend that the Federal Worker Adjustment and Retraining Notification Act, 29 U.S.C.S. §§ 2101-09 (1990), requires the Board to reach a different conclusion. We disagree. The WARN Act requires that an employer provide a sixty-day written notice to employees before a plant

closing or mass layoff. Failure to provide such notice gives rise to employer liability for "back pay" up to a maximum of sixty days, reduced by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C.S. § 2104(a)(2)(B). Employees may enforce such liability by suing in Federal District Court.

In the case at bar it is not at all clear that the administrative leave payments were "WARN Act payments." Appellants rely on *Capital Castings, Inc. v. Arizona Dep't of Economic Security*, 828 P.2d 781 (Ariz. Ct. App. 1992); *Georgia-Pacific Corp. v. Unemployment Compensation Bd. of Review*, 630 A.2d 948 (Pa. Commw. Ct. 1993); and *Westinghouse Electric Corp. v. Callahan*, 658 A.2d 1112 (Md. Ct. Spec. App. 1995). These cases do tend to support appellants' position. *Labor & Indus. Relations Comm'n v. Division of Employment Sec.*, 856 S.W.2d 376 (Mo. Ct. App. E.D. 1993), and *Division of Employment Sec. v. Labor and Indus. Relations Comm'n*, 884 S.W.2d 399 (Mo. Ct. App. W.D. 1994), however, tend to support the Board's view in the case at bar. In any event it is clear that each of the cases involving the application of the WARN Act in the state unemployment benefits context was determined under the particular unemployment compensation law of the state where the decision was rendered. We agree with the conclusion of the court in *Capital Castings*, *supra*, that the federal description of payments for purposes of WARN does not control classification of the payments for the purposes of unemployment compensation eligibility. The Arizona Court of Appeals noted that neither in WARN itself nor in its legislative history did Congress express an intent to control eligibility for state unemployment compensation. *Capital Castings*, 828 P.2d at 785.

Appellants also argue that the Board did not follow the precedent established in an earlier ESD case, but we know of no authority for the proposition that the Board's earlier decisions constitute binding precedent upon itself. Although it hears appeals, the Board's position in these cases is analogous to that of a trial court in the sense that it functions as the trier of fact. *See Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988); *City of Fayetteville v. Daniels*, 1 Ark. App. 258, 614 S.W.2d 680 (1981).

Mr. Rummel alone contends that the Board erred in finding his receipt of certain vacation pay disqualified him from receiving unemployment benefits. Mr. Rummel received payment for unused 1994 vacation and pay for the vacation that he would have received in 1995 had his employment not been terminated. The applicable statute, Ark. Code Ann. § 11-10-517(5)(Repl. 1996), provides that a claimant shall be disqualified for benefits for any week with respect to which the claimant receives or has received remuneration in the form of vacation payments. The statute also provides:

> However, [the claimant] shall be paid, with respect to the week in which the vacation period occurred, an amount equal to the weekly benefit amount less that part of the vacation pay, if any, payable to him, or in which he has been paid or will be paid at a later date with respect to such week, which is in excess of forty percent (40%) of [the claimant's] weekly benefit amount, rounded to the nearest lower full dollar amount. For the purpose of this subdivision, the employer shall promptly report the week or weeks involved in the vacation period as well as the corresponding amount of vacation pay with respect to such week or weeks[.]

On this issue the Board held:

> With regard to the vacation pay issue, there was no dispute concerning the amount of vacation pay which the Department found the claimant to have received. Further, the Board of Review interprets § 11-10-517(5) to require that accrued vacation pay, paid at separation from employment, be allocated, until exhaustion, to the weeks immediately following the separation. Also, there was no dispute with regard to the Department's calculations which resulted in allocation of the claimant's vacation pay to four benefit weeks, and the Board finds those calculations to be accurate. As a result, the Board finds the Department's allocation of the vacation pay to the weeks ending February 11 through 25 and March 4, 1995, to be appropriate.

In support of his argument, appellant Rummel relies on several cases which were decided under prior law. Arkansas Code Annotated section 11-10-517 deals with the receipt of certain remunerations by a claimant and their disqualifying effect. Remu-

nerations in the form of separation payments, bonus payments, and vacation payments are included as disqualifying under the statute. Ark. Code Ann. § 11-10-517(1), (5), (6). In the instances where separation payments or bonus payments are made in one lump sum, the statute specifically provides that the payment will only be disqualifying for the week it is received. No such provision is found under vacation payment.

Thus, the Board of Review interpreted the statute to require that vacation pay, paid at separation from employment, be allocated, until exhaustion, to the weeks immediately following the separation. We agree with appellee, the Arkansas Employment Security Department, that this is consistent with the intent of the legislature. Because the legislature chose to specifically address the issue of lump-sum payments with regard to separation and bonus payments, and did not do so with vacation payments, it seems apparent that they contemplated vacation pay to be allocated to specific weeks until exhaustion. AP&L notified appellant Rummel that he would receive payment for his accrued vacation time for 1994 and 1995. Rummel also testified that he received this vacation pay as part of the severance agreement. Therefore, we cannot say that the Board of Review erred in finding that the vacation pay disqualified Rummel from receiving benefits pursuant to section 11-10-517(5).

Affirmed.

MEADS and ROAF, JJ., agree.

AMLEASE, INC. *v.* Ronald KULIGOWSKI

CA 97-495 957 S.W.2d 715

Court of Appeals of Arkansas
Division IV
Opinion delivered December 17, 1997
[Petition for rehearing denied January 14, 1998.]

Barber, McCaskill, Jones & Hale, P.A., by: *Christopher Gomlicker*, for appellants.

Bartels Law Firm, by: *Anthony W. Bartels*, for appellee.

SAM BIRD, Judge. Amlease, Inc., appeals a decision of the Workers' Compensation Commission awarding the appellee, Ronald Kuligowski, benefits for treatment of his post-traumatic stress disorder.

On August 3, 1995, the claimant, a truck driver, was involved in an accident in which the brakes on the truck he was driving locked, he skidded into oncoming traffic, and was hit broadside in the passenger-side door by a van. The driver of the van was killed, and a teenager in the van was seriously injured. Appellant had several physical injuries, and he also experienced depression, diagnosed as post-traumatic stress disorder. The appellant controverted liability for the treatment related to post-traumatic stress disorder.

Dr. Galen Hutcheson testified that appellee sustained cervical strain and post-traumatic stress disorder related to "an affiliation of all the things that happened during the accident," and that "the death of the individual just made it more significant." He treated appellee physically and with medication for his depression, and he referred appellee to Dr. James A. Chaney, a psychologist, for counseling. Dr. Hutcheson said appellee was physically released to resume light duties on September 13, 1995. Dr. Chaney released appellee from his care on November 2, 1995.

Appellee has had a tragic family history: a brother was killed while riding an all-terrain vehicle; a house burned while appellee was moving in; appellee's grandfather ran over and killed his mother's two-year-old son; appellee's trailer burned; a truck fell on appellee's grandfather and killed him when appellee was eleven; appellee's aunt died in a head-on collision; appellee's uncle

was a prisoner of war in Vietnam; and another brother was hit and dragged by a car.

Dr. Chaney testified that the previous events probably contributed to appellee's post-traumatic stress disorder after his August 3, 1995, accident. Dr. Chaney said, "I think it made him more likely to have that." He said it was his opinion that appellee's post-traumatic stress disorder was caused by the sudden, unexpected, and unusual death of the other person in the traffic accident. He also said that while he was treating appellee, appellee was totally disabled from returning to work.

On this evidence the administrative law judge held that the appellee was entitled to payment for all medical expenses, including the treatment by Dr. Chaney, and temporary total disability benefits commencing with his last day of work through November 2, 1995. The Commission affirmed and adopted the decision of the law judge.

Appellant argues that the Commission's finding that appellee proved by a preponderance of the evidence that his post-traumatic stress disorder was causally related to his compensable injury of August 3, 1995, is not supported by substantial evidence and should be reversed. We agree, and therefore reverse.

Arkansas Code Annotated section 11-9-113 (Repl. 1996), provides in pertinent part:

> (a)(1) A mental injury or illness is not a compensable injury unless it is *caused by* physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence[.]

This language was the result of a complete legislative revision of our workers' compensation law in Act 796 of 1993. This language has not yet been reviewed by this court. Therefore, we must determine the meaning of the phrase "caused by" as it relates to compensable psychological injury. Although we are construing an act of the General Assembly, our jurisdiction is proper under Rule 1-2(a) of the Rules of the Supreme Court and Court of Appeals. In considering the meaning of a statute, we construe it

just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997); *Bill Fitts Auto Sales, Inc. v. Daniels*, 325 Ark. 51, 55, 922 S.W.2d 718, 720 (1996). The basic rule of statutory construction to which all other interpretive guides defer is to give effect to the intent of the legislature. *Vanderpool, supra*; *Bill Fitts Auto Sales, supra.*

Where the language of the statute is plain and unambiguous, the legislative intent is determined from the ordinary meaning of the language used. *American Casualty Co. v. Mason*, 312 Ark. 166, 848 S.W.2d 392 (1993). We also note that Ark. Code Ann. § 11-9-704 (Repl. 1996) requires administrative law judges, the Commission, and any reviewing courts to construe the provisions of the Act strictly.

Webster's College Dictionary 216 (1996) defines "cause" as "bring about," or "reason." *Black's Law Dictionary* 220 (6th ed. 1990) has several definitions, among them are: "To be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; something that precedes and brings about an effect or a result; a reason for an action or condition."

In *The Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997), the Arkansas Supreme Court stated:

> Ark. Code Ann. § 11-9-113(a)(1) (Repl. 1996), provides that a mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body. Clearly, these statutes set out a requirement that a physical injury precede and cause the mental injury in order for the mental injury to be compensable under the Workers' Compensation Act. See generally John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?*, 47 ARK. L. REV. 1, 16-19 (1994).

Although this statement was dictum, we find it enlightening, and we agree that this is what the plain language of the statute mandates.

Appellant contends that appellee failed to prove by a preponderance of the evidence that his post-traumatic stress disorder was caused by the physical injuries he sustained in the compensable

vehicle accident. In fact, the evidence is clear that appellee's psychological distress was not caused by his physical injuries.

Appellant cites *Dugan v. Jerry Sweetser, Inc.*, 54 Ark. App. 401, 928 S.W.2d 341 (1996), but that case did not require us to determine the precise issue presented here. The issue on appeal in *Dugan* was whether or not the appellant had sustained the requisite "physical injury" so that his psychological injury was compensable. We did say in that opinion that Act 796 clearly provides that proof of a physical injury is now required before a psychological injury can be compensable in Arkansas.

In the instant case, the testimony of Dr. Chaney and appellee's own testimony indicate that appellee's mental anguish was not the result of his physical injuries, but rather, was the result of the death of the man driving the van. When Dr. Chaney was asked if the "death of the deceased in the other vehicle" caused the appellee to suffer the post-traumatic stress disorder, he replied, "I believe so." Dr. Chaney also said, "I believe the trauma was that the person died." Appellee admitted that "part of" him felt responsible for the man's death. He said, "Another man was killed, and a teenager, . . . was hurt and may have messed up a soccer career, and I don't feel good about that, just because I was involved in it." He was asked, "Is it the death of the occupant of the vehicle and the teenager's injuries that, in your opinion, caused you to be depressed to the degree that you were?" Appellee answered, "I guess."

Interpreting the statute as we have, that the mental distress must be the result of the claimant's own physical injuries, we must reverse the decision of the Commission.

Reversed.

JENNINGS, J. agrees.

CRABTREE, J., concurs.

TERRY CRABTREE, Judge, concurring. I concur in the result reached in this case but write separately to note that Arkansas Code Annotated § 11-9-113 (Repl. 1996) makes a distinction between victims of criminal offenses and victims in cases such as

this where appellant apparently suffered emotional problems after being involved in a traffic accident that resulted in the death of another driver. The purpose of the most recent Workers' Compensation Act has been recited many times, and I need not recite it again. However, I cannot see the distinction between this case and another case where the employee has suffered post-traumatic-stress disorder as a result of being the victim of a criminal offense. It is difficult to identify a rational basis for the distinction between the two groups if both suffer a verifiable injury with resulting trauma, but because the distinction does exist and was not challenged below, I concur with the majority opinion.

Michael L. ANDERSON *v.* DIRECTOR, Employment Security Department

E 96-241 957 S.W.2d 712

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered December 17, 1997

No briefs filed.

JUDITH ROGERS, Judge. This is an appeal from a decision of the Board of Review in which it disallowed unemployment compensation benefits based on a finding that the appellant, Michael Anderson, voluntarily quit his job without good cause connected with the work. The sole issue on appeal in this unbriefed case is whether the Board's finding that appellant lacked good cause for quitting is supported by substantial evidence. We hold that it is and affirm.

The Board's decision in this case was made under the authority of Ark. Code Ann. § 11-10-513(a)(1) (1987), which provides that an individual shall be disqualified for benefits if he, voluntarily and without good cause connected with the work, left his last work. Good cause had been defined as a cause that would reasonably impel the average, able-bodied, qualified worker to give up his or her employment. *Carpenter v. Director*, 55 Ark. App. 39, 929 S.W.2d 177 (1996). It is dependent not only on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting, but also on the reaction of the average employee. *Id.* The question of what constitutes good cause is a question of fact for the Board to determine from the particular circumstances of each case. *Roberson v. Director*, 28 Ark. App. 337, 775 S.W.2d 82 (1989).

In unemployment compensation cases, the scope of review by this court is governed by the substantial evidence rule. *Haig v. Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983). This rule requires us to review the evidence in the light most favorable to the appellee, and if there is substantial evidence to support the decision made by the Board of Review, it must be affirmed. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Brown v. Director*, 54 Ark. App. 205, 924 S.W.2d 492 (1996). Even where there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision based upon the evidence before it. *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993). We are thus not permitted to hear the case *de novo* by substituting our findings for those of the Board; even where the evidence is undisputed, the drawing of inferences is for the Board, not this court. *See Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980).

The record discloses that appellant began working for Truck Transport, Inc., on January 22, 1996, as a truck driver. On April 24, 1996, he was involved in a serious accident when the truck he was driving rear-ended another vehicle that had stopped abruptly to make a turn. Both vehicles were heavily damaged, and appellant was injured in the wreck. Appellant was released by his physi-

cian to return to work on Friday, May 31; he tendered a letter of resignation the following Monday after speaking with his supervisor, Bill Williams.

In his testimony, appellant said that he understood that he had been placed on suspension following the accident and that he spoke with Williams that Monday to discuss his possible return to work. Appellant said that Williams told him that the company had not yet made a decision as to whether he would be terminated but that Williams suggested that he resign beforehand because it would look better in terms of obtaining future employment. He also testified that Williams gave him an ultimatum to either quit or be fired. He said that he resigned based on Williams's advice.

Ed Gawerecki testified on behalf of the employer. When asked by the hearing officer whether appellant would have been discharged, he responded that no decision had been made as of the time appellant resigned and that he could not say with certainty that appellant's discharge was inevitable. He explained that it was company policy to place a driver on suspension following an accident, pending the completion of an investigation. He said that, due to the severity of the accident, appellant had remained on suspension because not all of the information had been received from the federal and local agencies advising of their opinions concerning the accident. When asked if appellant would have been discharged if it were determined that the accident was his fault, Gawerecki said that "it could have gone either way." He stated that the company had no set policy calling for automatic termination and that any decision depended on the circumstances of each individual case. Gawerecki could not say whether Williams encouraged appellant to resign. He said, however, that Williams did not have the authority to discharge an employee but that such decisions were made by the corporate office.

The Board affirmed and adopted as its own the decision of the appeal tribunal, which denied benefits on a finding that appellant voluntarily quit his job without good cause connected with the work. In finding the absence of good cause, the Board did not accept appellant's claim that he quit in lieu of certain discharge. The Board was persuaded instead by the employer-

representative's testimony indicating that appellant was not confronted with a "Hobson's" choice because no decision had been made regarding his continuing employment. The credibility of the witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review. *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983). We cannot say that the Board's decision is not supported by substantial evidence.

With regard to the dissenting viewpoint, the issue here is whether appellant had good cause for voluntarily quitting his job. That he might have proved eligible for unemployment compensation benefits had he either remained on suspension or been fired does not logically translate into a finding of good cause. In fact, possible eligibility under those circumstances belies the dissent's position that appellant was caught in a "Catch-22 situation" by awaiting the employer's decision. Furthermore, there is no suggestion in this record that the employer's policy was unfair or that the employer had purposely delayed bringing this matter to a conclusion. Even though the suspension was of indefinite duration, any such probationary period is of a temporary nature, yet the fact remains that appellant resigned before the situation was resolved. Although the dissent maintains that termination was inevitable, the Board made a contrary finding that is supported by substantial evidence. The record supports the view that termination was not a certainty, and appellant's own testimony establishes that he was aware that the employer had not reached that decision. We thus cannot disagree with the Board's conclusion that good cause was not shown.

Affirmed.

AREY, JENNINGS, and BIRD, JJ., agree.

ROAF and GRIFFEN, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse the decision of the Board of Review in this case, and remand for an award of benefits. When Mr. Anderson returned to work more than thirty days after the accident, after being released by his workers' compensation treating physician, he learned he would not be allowed to work. According to his testimony, he was told

by his supervisor, Bill Williams, that "we got two ways we can go. We can terminate you or you can sign a resignation." Although Williams also told Anderson that a final decision had not yet been made, Anderson stated that Williams advised him that it would be better for him to resign because it would "look better" in securing other employment. Although the testimony of a party cannot be taken as undisputed, it cannot be arbitrarily disregarded; there must be some basis for disbelieving it. *See Timms v. Everett, Director*, 6 Ark. App. 163, 639 S.W.2d 368 (1982). Here, the employer did not produce Anderson's supervisor as a witness at the hearing, and Anderson's testimony that Williams procured his resignation was not refuted.

Although the record reflects that the employer reported the suspension in various documents as, initially, for thirty days and later, in a fax to the Board, for ninety days, by the time of the hearing the Director of Administration for the employer testified that "we don't have any set time for suspension," that he did not know how long the suspension would have lasted, and that he could not say whether Anderson would have been fired. He also testified that he did not know if Williams suggested to Anderson that he resign.

Thus, Anderson was faced with a "catch-22 situation." He could continue in limbo, with no pay, and await the employer's decision, or take his supervisor's advice and resign. Had Anderson been fired for being involved in an accident, pursuant to our case law, he would have been eligible to recover unemployment benefits. This court has made clear that there is an element of intent associated with misconduct, and that ordinary negligence in isolated instances is not sufficient. "There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design." *Rollins v. Director*, 58 Ark. App. 58, 945 S.W.2d 410 (1997); *Carraro v. Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996). Moreover, had Anderson remained on unpaid "suspension," it is clear that he would have been eligible to receive benefits. Pursuant to Ark. Code Ann. § 11-10-214 (a) (Repl. 1996), a person is deemed unemployed with respect to any week during which he "performed no services" and "no wages

are payable to him." Anderson would be neither "ineligible" to receive benefits or "disqualified" from receiving benefits during an unpaid "suspension" pursuant to our employment security law. *See* Ark. Code Ann. § 11-10-510 to -519 (Repl. 1996).

Clearly, an employer cannot defeat an employee's entitlement to benefits by keeping him on unpaid suspension for an indefinite and prolonged period of time until the employee is fired or resigns. However, in this instance Anderson, on the advice of his supervisor, resigned and as a result is denied the benefits to which he would have otherwise been entitled had he not followed this advice. Consequently, Mr. Anderson's resignation was, in all important respects, merely an acknowledgment that he would never again be gainfully employed by his employer. I would reverse.

GRIFFEN, J., joins.

Frank QUINN (Deceased) *v.* WEBB WHEEL PRODUCTS

CA 97-219 957 S.W.2d 187

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 17, 1997
[Petition for rehearing denied January 14, 1998.]

Tolley & Brooks, P.A., by: *Jay N. Tolley*, for appellant.

Michale H. Mashburn, for appellee.

Winston Bryant, Att'y Gen., by: *Leigh Anne Yeargan*, Asst. Att'y Gen., amicus curiae, for the Workers' Compensation Commission.

OLLY NEAL, Judge. This is the second appeal to this court of this workers' compensation matter. In *Quinn v. Webb Wheel*, 52 Ark. App. 208, 915 S.W.2d 740 (1996), we remanded for the Commission's consideration, the appellant's challenge to the constitutionality of Ark. Code Ann. § 11-9-201 (Repl. 1996). On remand, the Commission held that the composition of the Commission does not deny claimants due process of law. In the present appeal, appellant contends that Ark. Code Ann. § 11-9-201, must be found unconstitutional because the manner in which the Workers' Compensation Commission members are chosen denies litigants due process of law. For reasons discussed herein, we hold that Ark. Code Ann. § 11-9-201 is constitutional.

Appellant argues that the Commission should be abolished because at least two members are not impartial and independent, but instead are aligned and identified with respective interests. The Arkansas Workers' Compensation Commission is comprised

of three members who are appointed by the Governor for terms of six years, and are required to devote their entire time to the duties of the Commission. Ark. Code Ann. § 11-9-201(a) (Repl. 1996). One member must have been an attorney who has represented employers in workers' compensation matters for at least five years or an individual who has been an employer; one member must have represented employees for at least five years in workers' compensation matters; and the third member, the chairman of the Commission, must have been engaged in the active practice of law in the State of Arkansas for five years preceding his appointment. *See* Ark. Code Ann. § 11-9-201(a)(1)(2)(3) (Repl. 1996).

Appellant argues that the statute creating the Workers' Compensation Commission is unconstitutional because the affiliation of the commissioners to certain interests is violative of the Due Process Clauses of both the Arkansas and United States Constitutions. This argument assumes that at least two Commission members have inherent prejudices or biases stemming from their former business relationships. The particular issue is heretofore undecided by our courts. Therefore, we must look to other courts for guidance in this matter.

The United States Supreme Court has identified three factors to be considered when determining what type of due process is warranted. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). The factors to be considered are (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the government's interest, including fiscal and administrative burdens that the additional or substitute procedures would entail. *Id.* at 332. We have no difficulty in declaring that the private interest in workers' compensation disability benefits is considerable. Nor do we hesitate in concluding that additional or substitute procedures would not be unduly burdensome. However, even though additional procedures would not be unduly burdensome, appellant has failed to show that they would provide any additional protections. We therefore focus on the second *Matthews* factor, i.e., the risk of an erroneous deprivation of the protected interest through the procedures used.

We begin with the premise that an adjudicator is presumed to be unbiased, and to overcome that presumption, a litigant must make a showing of a conflict of interest or some other specific reason for disqualification. *See Withrow v. Larkin*, 421 U.S. 35, 37 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). In general, the test is whether the adjudicator's situation is one that might lead him not to hold the balance [between the parties] clear and true. *Tumey v. Ohio*, 273 U.S. 510 (1927).

In *Williams v. Hofley Mfg. Co.*, 424 N.W.2d 278 (Mich. 1988), the Supreme Court of Michigan held that the fact that members of the Workers' Compensation Appeal Board are designated as representatives of employer interests, of employee interests, or of the general public, did not create pecuniary interest and, the employer was not denied due process by a hearing before a two-member interest-designed panel. The court reasoned that although members were drawn from the ranks of attorneys representing divergent interests, members were forbidden by statute from engaging in any other business or professional activity and were required to devote their entire time to performing the duties of their office. The court reasoned further, that the statutory provisions for appointment, service, and removal of members of the Workers' Compensation Appeal Board did not require that members continue to advocate interests of a designated group, much less bind members to decide cases on the basis of the views of interest groups from which they were selected, and therefore, the employer was not denied procedural due process.

The findings made by the Commission reveal nothing that would support or indicate bias in the Commission's decisions. Similarly, there is nothing inherent in the composition of the Arkansas Workers' Compensation Commission that would make the manner in which its members are selected unconstitutional. The fact that the members of the Commission are selected based upon their status as former employers or employer representatives or as former employees or employee representatives does not in any way create the alleged inherent bias argued by appellant. The controversy seems to stem from members of the Commission being classed as representatives. Representative has been

defined as "standing or acting for another especially through delegated authority." *Webster's Ninth New Collegiate Dictionary*, 1000 (9th ed. 1990). Representative is also defined as "a typical example of a group, class, or quality." *Id.* We believe that the latter definition of "representative" more adequately expresses the true nature of the "representative" contemplated by the statute. Further, we believe that the designation of commissioners as employee or employer representative merely refers to the particularized knowledge that each commissioner possesses with respect to the divergent interests present in workers' compensation claims. Nowhere is this more clear than in the statutory requirement that commissioners have five years' experience in their respective fields to qualify for appointment to the Commission.

Members of the Commission are full-time commissioners. As such, they are required to devote their entire time to the duties of the Commission, and are not required to advocate the interests of a special group. Further, there is no pecuniary gain to the commissioners based upon the manner in which they vote, because their salary is determined by our state legislature and not private-interest groups. *See* Ark. Code Ann. § 11-9-201(3)(b) (Repl. 1996).

■ ■ It is well settled that an act by the legislature is entitled to a presumption of constitutionality. *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W.2d 108 (1997). The party challenging a statute has the burden of proving it unconstitutional. *See Lambert v. Baldor Elec.*, 44 Ark. App. 117, 868 S.W.2d 513 (1993). In the present case, appellant has not shown that the manner in which members of the Commission are appointed violates his due process rights.

Affirmed.

ROBBINS, CJ., and PITTMAN, JENNINGS, ROGERS, and MEADS, JJ., agree.

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