FARMERS COOPERATIVE *v.* Sidney BILES

CA 01-797 69 S.W.3d 899

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered March 20, 2002

Hart & Wren, LLP, by: *Neal L. Hart*, for appellant.

No response.

JOHN MAUZY PITTMAN, Judge. The appellee in this workers' compensation case was employed by appellant. His duties required him to load and unload trucks. While so engaged on approximately January 29, 2000, appellee tripped, fell from the loading dock into a truck tailgate, and injured his leg. Appellee promptly reported his injury to his supervisor, who treated his laceration. Appellee's leg became increasingly swollen and painful over the next few days, but appellant refused to provide the medical treatment that appellee requested. Appellee, who had no medical insurance, could not afford to pay for the treatment that he required. Appellee continued working, with difficulty, until he was terminated by appellant on June 23, 2000. Approximately one week after his termination, appellee consulted an attorney and was directed to a physician who would treat him without requiring immediate payment. Appellee filed a claim for medical and temporary total disability benefits, asserting that he sustained a compensable injury to his left knee while in appellant's employ. After a hearing, the Commission found that appellee suffered a compensable leg injury while employed by appellant; that appellant was responsible for all reasonable and necessary medical treatment provided in connection with that injury; and that appellee was entitled to temporary total disability benefits beginning June 24, 2000, and continuing through a date yet to be determined. From that decision, comes this appeal.

For reversal, appellant contends that the Commission's award of temporary total disability benefits is not supported by substantial evidence and ignores the legislature's mandate that the Workers' Compensation Act be strictly construed. We affirm.

■ ■ Our standard of review is well-settled: In determining the sufficiency of the evidence to support the findings of the Workers' Compensation Commission, 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 a reasonable mind might accept as adequate to support a conclusion. The determination of the

credibility and weight to be given a witness's testimony is within the sole province of 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. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998).

Appellant asserts that the evidence is not substantial because appellee's physician did not state that appellee was in a "healing period." We find this argument to be disingenuous. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Carroll General Hospital v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.* Here, although it is true that appellee's physician did not use the precise term of art "healing period," he did state that he was going to give appellee several weeks to work on improving his range of motion, and that if appellee's injury had not improved, appellee would require arthroscopic surgery. This, clearly, is substantial evidence that appellee is within his healing period.

Appellant also argues that the evidence is not substantial because the Commission ignored the fact that there are no "off-work" slips in the record, and ignored "credible" evidence that appellee had performed various types of labor on his farm after he was fired. We do not agree. These are matters of weight and credibility, and thus lie within the exclusive province of the Commission. *American Greetings Corp. v. Garey, supra.* Although it is true that appellee testified that he performed some isolated farm and household tasks following his injury, appellee's testimony, which the Commission found to be credible, was that he was in pain, that he required help to perform his farm chores, and that he did so slowly and with difficulty. Such activity is not a bar

to an award of temporary total disability benefits. If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total. *Pyles v. Triple F. Feeds of Texas,* 270 Ark. 729, 606 S.W.2d 146 (Ark. App. 1980).

Finally, appellant contends that the Commission erred by failing to strictly construe Ark. Code Ann. § 11-9-521(a) (Repl. 1996), which provides that employees who sustain scheduled injuries shall receive temporary disability benefits "during the healing period or until the employee returns to work, whichever occurs first." Appellant argues that, because appellee returned to work after his injury, he is barred from receiving temporary total disability benefits for the period following his termination by appellant. We do not agree. Although it is true that the Workers' Compensation Act must be strictly construed, Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996), even a strict construction of statutes requires that they be construed in their entirety, with each subsection relating to the same subject to be read in a harmonious manner. *Maxey v. Tyson Foods, Inc.,* 66 Ark. App. 301, 991 S.W.2d 624 (1999). Furthermore, construction of the Workers' Compensation Act must be done in light of the express purpose of that legislation, which is "to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force." Ark. Code Ann. §11-9-101(b) (Repl. 1996). In light of the legislative purpose, it would be ludicrous to assume that the legislature sought to penalize workers who sustain scheduled injuries, or to deter such workers from making a good-faith effort to return to the work force following such an injury. Section 11-9-521(a)'s brief reference to temporary disability benefits merely establishes the right of a worker who has sustained a scheduled injury to such benefits, and was clearly not intended to bar additional temporary total disability benefits following an unsuccessful attempt to return to the workforce. *See Roberson v. Waste Management,* 58 Ark. App. 11, 944 S.W.2d 858 (1997).

"Return to work" is not defined by the Act, and we think it would be a gross perversion of the purpose of the Workers' Compensation Act to hold that appellee "returned to work" pursuant to § 11-9-521(a) by continuing to report to work following his injury. In our view, appellee never left work. Appellee could not leave work — without being terminated for absenteeism — until he had been evaluated by a physician and given an off-work slip. Appellee requested medical care and evaluation, but appellant refused to provide it. No reasonable construction of the term "return to work" would permit an employer to coerce an injured worker to abandon his claim to temporary disability benefits by denying him reasonable and necessary medical treatment for an admittedly compensable injury.[1]

Affirmed.

BIRD, BAKER, and ROBBINS, JJ., agree.

NEAL, J., concurs.

ROAF, J., dissents.

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[1] As the dissent notes, *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001), recites the statutory language that an employee suffering a scheduled injury is entitled to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first. However, *Wheeler* says nothing about what constitutes a return to work, or whether a worker who returns to work unsuccessfully regains entitlement to temporary benefits during a second period of rehabilitation following an injury, and as such is simply not relevant to the very different circumstances that arise in the present case. It is ludicrous to suggest that we are carrying out the legislature's intent by affirming an award of benefits to Mr. Armstrong, who did not return to work simply because he was imprisoned, and reversing an award of benefits to the appellant in the present case, who requested but was refused the basic medical evaluation and treatment that would have permitted him to leave work without endangering his livelihood. Furthermore, while it is true that additional temporary benefits were ultimately denied in *Roberson v. Waste Management, supra*, that denial was based on the particular facts of the case. Insofar as the issue in the *Roberson* case was entitlement to additional temporary benefits following a return to work, and that the denial of those benefits was not grounded on a holding that such benefits are unavailable *per se*, but instead on a finding that Ms. Roberson's subsequent medical problems were not work-related, that case strongly suggests that additional temporary benefits are, in fact, available in a proper case following an unsuccessful attempt to return to the workplace.

OLLY NEAL, Judge, concurring. I concur in affirming this case. However, I write separately because the Commission and appellant have cited *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001), and I feel an analysis consistent with *Wheeler* is necessary for a fair resolution of the issue. *Wheeler* provides that where an employee suffers a scheduled injury, he may receive temporary total or temporary partial disability benefits if he establishes (1) that he is still in his healing period, or (2) he has failed to return to work, whichever occurs first.

Here, appellant does not dispute whether the appellee has suffered a scheduled injury. The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. *Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001). The determination of when the healing period has ended is a factual determination for the Commission, which is affirmed on appeal if supported by substantial evidence. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Dr. Duke Harris noted that if appellee's range of motion did not improve, appellee would require arthroscopic surgery. Furthermore, appellee testified that he's "limping all the time and can't bend [his] knee." Therefore, I agree with the majority's holding that there was substantial evidence that appellee was still in his healing period.

Having shown that he was still in his healing period, appellee must next show that he has not returned to work. Appellee testified that he continued to work after his accident. Upon injuring his leg, appellee reported his injury to the plant manager; and the manager's remedy was to simply put iodine on the injury. Appellee testified that in the days following his accident his leg "kept getting stiffer and stiffer." As his leg worsened, appellee informed his superior. He stated that on one occasion his superior complained that he was not working fast enough, and that he responded "I can't go any faster . . . . My knee, I can't walk hardly." His superior responded that they might have to send him to the doctor. Thus, appellee continued to work despite his injury because his employer failed to provide him reasonable and neces-

sary medical treatment. The majority holds, and I agree, that "no reasonable construction of the term 'return to work' would permit an employer to coerce an injured worker to abandon his claim to temporary disability benefits by denying him reasonable and necessary medical treatment for an admittedly compensable injury."

Appellee also testified that since his accident, he has performed several tasks around his farm. In order to perform these tasks, appellee had to work slower than his normal pace and required the assistance of a neighbor. The Commission found that this did not constitute a return to work, and I agree. Moreover, I agree that if while in his healing period an employee is unable to perform remunerative labor without pain or discomfort, then he is temporarily totally disabled. *See Pyles v. Triple F. Feeds of Texas Inc.*, 270 Ark. 729, 606 S.W.2d 146 (Ark. App. 1980). I believe there was substantial evidence to support a finding that appellee had not returned to work; thus, the requirements of *Wheeler* were satisfied.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse this case. The issue before us involves only the award of temporary total disability (TTD) benefits for a scheduled leg injury that occurred in 2000. While it is undisputed that appellee Sidney Biles suffered a compensable injury, I do not believe he has met the standard set forth in *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001), where a "scheduled" injury is involved, the case specifically relied on by both the Commission and by appellant in its argument for reversal. *Wheeler* provides that entitlement to TTD benefits continues as long as the claimant is within his healing period, or he has not returned to work, *whichever first occurs*. Here, Biles 1) returned to work after his injury; 2) continued to work for six months until he was apparently terminated by Farmers Cooperative (as reflected in the ALJ's opinion) for "alleged misconduct" (as recited in the Commission's opinion),[1] and 3) was fully performing his job prior

[1] There is no evidence in appellant's abstract concerning the termination or the reasons for it other than Biles's cryptic testimony, "They never told me I was fired. They just told me to go file my papers, and I left."

to his termination. However, in *Wheeler*, the claimant never returned to work at all before he was terminated for having become incarcerated; he "returned" to the workforce nine months later when he began working in the prison as a sewing machine operator. Wheeler's case was thus reversed for an award of TTD benefits during those nine months. In Biles's case, while he is clearly entitled to further medical treatment, *Wheeler* does not support the finding by the Commission that he is entitled to TTD benefits. Biles surely did not experience an "unsuccessful attempt to return to the workforce," as asserted in the majority opinion; neither did the claimant in *Roberson v. Waste Management,* 58 Ark. App. 11, 944 S.W.2d 858 (1997), the case the majority cites for this proposition. The Commission denied TTD benefits to Roberson because her healing period had ended, and this court affirmed. I do not take issue with the Commission's finding in the instant case that Biles remained in his healing period; it is their finding that Biles "has yet to return to work" that is not supported by the evidence in this case.

Moreover, the majority and concurring judges apparently worry that denying TTD benefits to an employee who continues working despite a failure to receive medical treatment for a compensable injury will somehow encourage employers to withhold medical treatment in order to "coerce" an employee to abandon a potential TTD claim. However, the fact remains that Biles did work continuously after his injury. By the strained interpretation of "returned to work" adopted by the majority, it is employers who should now be fearful of initially contesting the compensability of an employee's injury, as they will be obligated for additional, oftentimes undeserved TTD benefits where the employee continues to work, because there is no requirement that the employee demonstrate through medical evidence that he would have or should have been kept off work for a time. Certainly, Biles, who had the burden of establishing entitlement to TTD benefits, could have sought such an opinion from his physician.

As a final matter, although the parties and the Commission have treated Biles's leg injury as a scheduled injury throughout these proceedings, it is unclear from our workers' compensation statutory scheme when a mere injury to a limb is to be treated as a

scheduled injury. Arkansas Code Annotated §§ 11-9-521(b)(2)(e) and (f) provide that scheduled-injury benefits, absent an amputation, may be awarded only for "*permanent* total loss of use of a member" or "*permanent* partial loss of use of a member," and it remains to be seen at this early stage of Biles's treatment whether he will be awarded a permanent rating. With a scheduled injury, the claimant need not demonstrate that he is actually incapacitated from earning wages to receive TTD benefits. However, this is not an issue raised by appellant. In any event, Biles continued to work for six months after his injury, first saw a doctor six days after his termination, and, according to his physician's notes, his condition was "much better" one month later. I would reverse.

Ron MORRIS and Kandi Morris *v.* Ben RUSH, Jo Anne Rush, and Lyman Lumber Company

CA 01-672 69 S.W.3d 876

Court of Appeals of Arkansas
Division IV
Opinion delivered January 9, 2002

Henry & Cullen, L.L.P., by: *Timothy J. Cullen*, for appellants.

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *Patrick W. McAlpine*, for appellees Ben and Jo Anne Rush.

Frye, Boyce & Lucy, P.A., by: *Brian P. Boyce*, for appellee Lyman Lamb Lumber Co.

JOHN B. ROBBINS, Judge. Appellants Ron and Kandi Morris purchased a home from appellees Ben and Jo Anne Rush in August 1996 for $445,000.00. In October 1998, the Morrises filed a complaint against the Rushes, alleging breach of contract, fraud in the inducement to enter into the contract, and breach of implied warranty of fitness for habitation. The complaint specifically alleged that there were numerous problems and

defects with the house, including but not limited to the fact that the foundation is not sufficient to support the house, which has resulted in excessive settling, cracked walls, and uneven floors. In their complaint, the Morrises further alleged that the Rushes were aware of the problems and defects at the time the parties entered into the purchase contract, but failed to disclose them.

The Rushes filed a third-party complaint against appellee Lyman Lamb Lumber Company, alleging that Lyman Lamb Lumber is liable for any damages incurred by the Rushes, as a result of Lyman Lamb Lumber's faulty architectural design. The Rushes subsequently filed a motion for summary judgment, asserting that the contract at issue provided that the Morrises would accept the property "as is" and disclaim any reliance upon any warranties or representations. In their motion, the Rushes alleged that the Morrises relied on their own inspectors, and that the Morrises admitted that they were not aware of any misrepresentations of fact on the part of the Rushes.

The trial court granted the Rushes' motion for summary judgment, and in its order disposed of all claims, including the third-party complaint against Lyman Lamb Lumber. The Morrises now appeal.

The Morrises raise three arguments for reversal. First, they argue that the trial court erred in granting summary judgment because a material issue of fact existed as to whether the Rushes concealed the severe defects regarding the foundation of the house. Next, they assert that the trial court erred because a material issue of fact existed as to whether the "as is" clause applied. Finally, the Morrises contend that the trial court erred in excluding the Rushes as builder-vendors, and that as builder-vendors the Rushes impliedly warranted that the house was fit for habitation. We affirm.

■ ■ Arkansas Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of sustaining a motion

for summary judgment; once the moving party meets this burden, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997). On appeal, we view the evidence in the light most favorable to the opposing party and resolve all questions and ambiguities against the moving party. *Elder v. Security Bank*, 68 Ark. App. 132, 5 S.W.3d 78 (1999).

The contract between the Rushes and Morrises contained a "Buyers Disclaimer of Reliance," that provided that the buyer inspected or had someone else inspect the property and that the buyer was not relying on any other representations. The contract also provided that the buyer agreed to accept the property "as is," subject to a list of items being in working order.

Prior to closing on the house, the Morrises had two inspections performed. GQ Inspection Service inspected the home, and its inspection report revealed no major problems. Ryan Howard of Engineering Consultants also conducted an inspection to determine the structural integrity of the house, and he indicated in his report that he found evidence of minor settlement in the house, which included cracks above the doors, as well as evidence of potential structural problems.

About nine months after buying the house, the Morrises began to notice cracks in the walls, molding pulling away from the ceiling, and sinking floors. As a result, they hired Edgar Riddick III, an engineer, to inspect their home. In October 1997, Mr. Riddick reported that in his professional opinion the home was not constructed in a way that would be acceptable by normal construction standards. In his report, he stated:

> The floor joist of the home was not properly supported by enough pillars. The pillars that do exist are not properly completed. This has caused the home to settle prematurely and has caused damage to the home. If the "shim" problem is not fixed the structure would continue to settle. This movement would cause further cracking of sheet-rock walls, further deterioration of millwork and doorjambs, etc.
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> . . . .

> I do believe that a trained eye *should have* spotted the "shim" problem under the house.
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> . . . .
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> I do not believe that an untrained eye would have necessarily spotted the potential problems of the "shims." Thus, the Morris family would not have any forewarning before purchasing the home. It is my understanding, [that] the cracking and problems in the millwork and crown moldings, noted earlier in the report, were *not* present at the time of sale. These problems occurred within months of the Morris family occupying the home. Mr. and Mrs. Morris tell me that they began to see evidence of this settling shortly after moving in. I believe the previous occupants of the house should have noticed evidence of the settling. There were attempts by someone to paint over some of these defects prior to the Morris' moving in.

In his deposition, Mr. Morris testified that he initially told his wife that he did not think buying the house was "the thing to do." He stated that he had some misgivings about the house, and to reassure himself he obtained inspections from professionals. He stated that, based on the fact that the professionals' reports "checked out," they went forward with the purchase. Mr. Morris testified that, "I relied upon the inspection reports," and that he "thought the inspectors would have more of a trained eye than I would." Mr. Morris did not contend that the Rushes ever lied or told him anything that later turned out to be untrue.

Mrs. Morris also gave a deposition, and she stated that she has a real estate license and brokers' license and was a realtor for a couple of years during the 1990s. She acknowledged that she has a "pretty good understanding" of what is involved in buying and selling a home. However, she testified that because she and her husband are not professionals, they relied on the opinions of the inspector and structural engineer in making the final decision to purchase the house.

Mr. Rush testified that he and his wife built the home and began living in it in December 1994. However, he stated that they did not build the home with the intention of selling it to the public, and that neither he nor his wife is in the construction business. Mr. Rush testified that he never had any conversations with

the Morrises prior to their purchase of the home because his real estate agent handled all of the negotiations. He stated that he made no representations or statements to the Morrises about the quality of the home prior to the purchase date.

The appellants' first point on appeal is that the trial court erred in finding that no material issue of fact existed as to whether the Rushes concealed the severe defects regarding the foundation of the house. The appellants rely on the report of Mr. Riddick, which indicates that the Rushes should have noticed evidence of settling, and that there were attempts by someone to paint over some of the defects prior to the sale. The appellants submit that a significant issue of fact exists as to whether the Rushes intentionally concealed the fact that the house was prematurely settling, which caused severe damage to the house, and that the issue of whether the Rushes fraudulently induced them to enter into the contract is an issue to be decided by a jury.

The elements of a cause of action for fraud were set out in *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997), as follows:

> (1) a false representation of a material fact;
> (2) knowledge or belief on the part of the person making the representation that the representation is false;
> (3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation;
> (4) a justifiable reliance by the other party; and
> (5) resulting damages.

Id. at 316, 942 S.W.2d at 857 (citation omitted). Representations are considered fraudulent when the one making them either knows them to be false or, not knowing, asserts them to be true. *O'Mara v. Dykema, supra.* A grant of summary judgment on a claim of misrepresentation is appropriate when a plaintiff does not produce specific facts that the defendant knew his representations were false. *Rosser v. Columbia Mut. Ins. Co.*, 55 Ark. App. 77, 928 S.W.2d 813 (1996).

We hold that, in the instant case, the trial court did not err in ruling as a matter of law that the Rushes did not fraudulently induce the Morrises. In their depositions, neither Mr.

Morris nor Mrs. Morris alleged that the Rushes made any false representations. Furthermore, the contract and the Morrises' depositions demonstrate that they were relying on their own professional inspectors, and not any representation by the Rushes. The report of Ryan Howard indicated both interior and exterior cracking that appeared to be caused by minor settling. Thus, even if the Rushes attempted to conceal signs of settlement, the Morrises had notice of the cracking and evidence of settlement before the contract became final. On the undisputed facts, the Morrises were not fraudulently induced by the Rushes to enter into the contract of sale.

The appellants next argue that the trial court erred in concluding that no material fact existed as to whether the "as is" contract clause applied to this case. That clause provides:

> Buyer agrees to accept the Property "as is," in its present condition, provided that the following items shall be in normal working order at closing: electrical, plumbing and septic systems, heating and air systems, dishwashers, disposals, trash compactors, ranges, exhaust and ceiling fans, water heaters, garage door openers, remote controls and any and all components and all improvements, structures and components thereof, on or about the property (collectively the "Inspection Items").

The report prepared by Mr. Riddick indicated that the problem with the foundation was that the floor was not supported by enough pillars, and that the pillars that existed were not properly completed. The appellants assert that these pillars constitute an "improvement, structure, and component" of the house under the terms of the "as is" clause, and that due to the general collapsing of the home soon after they moved in there is a material issue as to whether the foundation and pillars were in "normal working order at closing."

The trial court did not err in ruling, as a matter of law, that the "as is" clause was of no avail to the appellants' action. The clause is unambiguous and susceptible to only one logical interpretation. The "as is" exceptions do not include, as appellants suggest, problems with the pillars and foundation. Clearly, the phrase "improvements, structures, and components thereof" relates only to the individual inspection items, and not to the

house itself. Otherwise the "as is" clause would be completely swallowed up by the exceptions. Therefore, the issue of whether the pillars and foundation were in "normal working order at closing" is immaterial.

The appellants' remaining argument is that the trial court erroneously excluded the Rushes as builder-vendors. They assert that the Rushes were builder-vendors because Mr. Rush was the general contractor for the house, and they sold it shortly after it was built. Appellants cite *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970), for the proposition that when a person who sells a house was also the builder, and that person sells the new house to its first intended occupant, he impliedly warrants that the foundations are secure and firm and that the house is safe for the buyer to live in. In that case, our supreme court quoted *House v. Thornton*, 457 P.2d 199, 76 Wash.2d 428 (1969), as follows:

> As between vendor and purchaser, the builder-vendors, even though exercising reasonable care to construct a sound building, had by far the better opportunity to examine the stability of the site and to determine the kind of foundation to install. Although hindsight, it is frequently said, is 20-20 and defendants used reasonable prudence in selecting the site and designing and constructing the building, their position throughout the process of selection, planning and construction was markedly superior to that of their first purchaser-occupant. To borrow an idea from equity, of the innocent parties who suffered, it was the builder-vendor who made the harm possible. If there is a comparative standard of innocence, as well as of culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer. Thus, the old rule of caveat emptor has little relevance to the sale of a brand-new house by a vendor-builder to a first buyer for purposes of occupancy.

Wawak v. Stewart, 247 Ark. at 1097, 449 S.W.2d at 924. The appellants argue that, while they did not buy a brand-new house, liability should still be on the Rushes because of their opportunity to examine the stability of the site and determine the kind of foundation that was necessary.

The instant case is clearly distinguishable from *Wawak v. Stewart, supra*, because in that case the appellant was a professional house builder and built the house at issue in the course of his business. It is undisputed that the Rushes, on the other hand, are not professional builders. The appellants have cited no cases, and we know of none, which hold that an individual who builds his own house, lives in it, and later sells it, qualifies as a builder-vendor. For this reason alone appellants' final argument fails. Moreover, their argument would fail even if the Rushes had been builder-vendors because an implied warranty of habitability is waived when the buyer purchases the property "as is." *See O'Mara v. Dykema, supra.*

We hold that the trial court committed no error in finding that there were no genuine issues of material fact and the appellees were entitled to judgment as a matter of law. Therefore, we affirm the trial court's order granting summary judgment.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Denaro Shatour COOK *v.* STATE of Arkansas

CA CR 01-368 73 S.W.3d 1

Court of Appeals of Arkansas
Division IV, I, and II
Opinion delivered March 20, 2002

[redacted]

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Arkansas Public Defender Comm'n, by: *Llewellyn J. Marczuk* and *Lott Rolfe, IV*, for appellant.

Mark Pryor, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Denaro Cook appeals from his convictions as an accomplice to first-degree murder, aggravated robbery, and misdemeanor theft of property. He argues that the trial court erred in 1) denying his motions for a

directed verdict on all charges; 2) failing to declare two witnesses as accomplices and in admitting their uncorroborated hearsay testimony; and 3) refusing to give jury instructions for the lesser included charges of robbery and felony manslaughter. We hold that any error committed by the trial court was harmless error, and affirm.

Appellant was charged as an accomplice to capital murder, aggravated robbery, and felony theft of property in connection with a murder that occurred during the April 13, 1999 robbery of Western Sizzlin', a restaurant located on Rodney Parham Road in Little Rock. Appellant and his brother, Torian, were employed as servers at the restaurant and were working on the night of the incident. It is undisputed that on April 13, the restaurant was robbed by their brother, Keyono Cook, also known as "Buck," and by a friend of appellant's, Frank Barnes. David Nichols, the manager of the restaurant, was shot and killed during the robbery.

Keyono Cook and Frank Barnes were former employees of the restaurant. On the evening of April 13, Frank, Rodney Barnes (Frank's brother), Nakia Hall (Frank's girlfriend), Tim Dillard, and Keyono met at Franke's, another restaurant located on Rodney Parham. Keyono drove appellant's car and Frank drove his own car. Keyono had a gun and a mask and indicated that he was going to rob Franke's. However, he abandoned that plan because he concluded the area was too well-lit. Their group then went to Western Sizzlin'.[1]

The testimony by appellant's co-workers and other witnesses established that the group arrived at the restaurant shortly before closing. Appellant went outside and talked to Keyono two times, and appellant at one point motioned for them to come in. Keyono and Frank subsequently entered the restaurant through the back door and took an undetermined amount of money in a bank bag. Keyono later dumped the gun and went to Frank's house to divide the money.

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[1] The witnesses' testimony conflicts with regard to which parties rode in which car to Western Sizzlin'. However, the testimony seems clear that after the robbery, Rodney Barnes remained at the restaurant, and the rest of these individuals left together in Frank's vehicle.

During the trial, appellant objected to Dillard's testimony. The State sought to have Dillard testify that after Keyono spoke with appellant the second time, he got back into his car and stated that appellant told him that everything was set up inside and that the back door was unlocked. Appellant objected that this was hearsay, and the trial court overruled his objection on the basis that it was admissible under Arkansas Rule of Evidence 801(d)(2)(v), as a declaration of a co-conspirator during the progress of a crime.

At the close of the State's evidence, appellant moved for a directed verdict on all charges, arguing that the testimony of Dillard and Rodney Barnes was not corroborated and that the State had no evidence to independently connect appellant with the crime. He also asked that the court declare Dillard and Barnes to be accomplices as a matter of law. The trial court reduced the felony theft of property charge to a misdemeanor. However, the court declined to rule Dillard and Barnes accomplices as a matter of law. It also denied the motions for a directed verdict with respect to the remaining charges. Appellant thereafter testified. He denied any participation in the planning or execution of the robbery and asserted that he tried to discourage his brother (Keyono Cook) from committing the robbery. He renewed his motions at the close of all of the evidence and requested that the trial court instruct the jury on the lesser-included offenses of robbery and felony manslaughter. Although the trial court denied these motions, it provided an instruction on the lesser charge of first-degree murder.

The jury found appellant guilty as an accomplice to aggravated robbery and to the reduced charges of first-degree murder and theft of property. He was sentenced to serve ten years on the murder charge, ten years on the aggravated robbery charge to run consecutively with the murder charge, and six months on the theft of property charge to run concurrently with the other two charges, for a total of twenty years in prison.[2]

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[2] The State filed a notice of cross-appeal with regard to the trial court's ruling sustaining appellant's objection to a *voir dire* question posed by the State during jury

I. Summary of the Testimony

Kyona Hyder was working at the restaurant the night of the robbery. She noticed that the back doors were unlocked, which she said was unusual. She witnessed Frank running at the side of the building toward the back of the building. When she asked appellant if he saw Frank running to the back of the restaurant, appellant told her that Frank had to use the restroom. Hyder also saw Frank and Keyono inside the restaurant by the utility closet in the back of the restaurant, near the manager's office. She said that Keyono had a ski mask on top of his head. When she asked what they were doing, Keyono gestured for her to be quiet. She said that she asked appellant if he saw Keyono back there. Hyder said later in the evening appellant told her that he thought Keyono had killed Nichols. Because appellant had an apparent propensity for joking, he showed Hyder that his hands were shaking, so she would know he was "for real." She testified that either appellant or his brother, Torian, told her before she left the restaurant not to say anything regarding the robbery.

Sharronda Arnold, another coworker, testified that she saw Keyono and Frank Barnes pull up and park in two separate cars. She stated that Nakia and Rodney Barnes were also with Frank. According to Arnold, Torian went outside, then came back in and talked to appellant. When Torian came back in, he said that Keyono was going to rob the place and asked Torian if he robbed the place would anyone "snitch" on him.

Arnold further testified that after Torian came back inside and talked to appellant, appellant then went outside and talked to Keyono for approximately ten minutes and made hand motions that appeared to her to be indicating, "Come in." Appellant then returned and walked to the back of the restaurant. Arnold stated that appellant told her they were going to rob the restaurant, but he was laughing and she thought he was kidding. After that, she saw Keyono and Frank walk to the side of the building where the back doors were located. She heard some loud bangs, but she

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selection. However, the State offers no argument in this regard in its brief. Therefore, we do not address this issue.

thought that someone had dropped trays. When she went toward the back of the restaurant, she saw Keyono running toward the back door and saw Frank going the opposite direction. She said that Keyono was wearing a black mask and was carrying a green money bag and carried something that looked like a gun. Arnold further stated that Rodney Barnes came inside the restaurant while the employees were looking for Nichols. She said that appellant told her that they had killed Nichols. While they were waiting for the police, appellant told her to tell the police that she did not know anything.

Tim Dillard testified that he, Frank, Nakia, and Keyono rode together to the restaurant and that Rodney Barnes arrived in a separate vehicle. Dillard stated that it was Keyono's idea to go to Western Sizzlin'. He said that Keyono got out of his car and talked to Rodney, then appellant came outside two times and talked to Keyono. After the second time, Keyono got back inside the car and said that appellant told him that the back door was open, it was clear to go in, and business was slow. Then, Keyono got a gun and a mask and went into the back of the restaurant.

Dillard further testified that Frank came out through the front door. When Frank got into his car, he said that Keyono shot someone. Frank proceeded to drive away, but stopped to pick up Keyono, who had come out of the restaurant and was waving the bank bag behind him. Dillard stated that Frank stopped the car and picked up Keyono, who dumped the gun in a sewer on 15th and Pulaski Street, behind Church's Fried Chicken. After Keyono dumped the gun, they had trouble getting the car started again. Dillard said that he steered the car while others pushed the car to get it started again. When they got the car started again, they then went to Frank's house to count the money. According to Dillard, Keyono took the money out of the bag and counted out approximately $1,800 to $2,100. He said that Keyono gave Frank a "lump sum" of money and kept the rest. Dillard denied that he received any money. He said that Keyono threatened to "take care" of anyone who told the police what happened. He also said that appellant later told him that he was going to "handle" him because he "snitched."

Rodney Barnes testified that he rode to Western Sizzlin' with Keyono in appellant's car. He said that Frank arrived in a separate car. He said that Torian came outside first and Keyono told him that they were going to rob the restaurant. Rodney stated that Torian tried to discourage Keyono and Keyono seemed to agree that it was a bad idea. Rodney said that appellant came outside then and told Keyono that the back door was open, that the manager was in the office counting the money, and to go on in. According to Rodney, Keyono was "all hyped up" and "did not hesitate" after appellant spoke with him. He said that Keyono got a mask and a gun, and went in the back of the building, with Frank following thereafter. About fifteen minutes later, Frank came out the front doors and left in his car. At this point, Rodney went inside. He said when he got inside, appellant told him, "Don't say nothing." Rodney testified that Arnold stated, "If we just got robbed, David will come out and call the police. He might be dead," to which appellant responded, "I don't care. We got to pay our rent."

Rodney further testified that he accompanied Keyono to Andrew O'Conner's house a few days prior to the robbery, to get a mask. Rodney stated, "He got the mask so he can rob somebody. I knew Buck was going to rob somebody." However, he testified that appellant never saw the gun or the mask, because they were in the trunk when appellant came outside to talk to Keyono.

Joseph Williams testified that early on April 14, 1999, Keyono was at his house and appellant, Torian, and Rodney Barnes came over. Williams testified that Rodney requested his share of the money.

Nakia Hall, Frank Barnes's girlfriend, testified that Frank and Tim picked her up from work at K-Mart that night. She said that when the car stopped after the robbery, Frank, Dillard, and Keyono pushed the car to get it started again. She also stated that Dillard was present when the money was counted.

Testimony by other witnesses established that a money bag containing checks stolen during the robbery and a mask were

recovered at Interstate Park and the gun was recovered in a storm drain at 15th and Pulaski.

Dr. Stephen Erickson, an associate medical examiner from the Arkansas Crime Laboratory, testified that Nichols received two gunshot wounds, one in the chest and one which went through his right wrist to his abdomen. He said that Nichols's right wrist had stippling marks, indicating that it was within six inches to one foot of the gun when it was discharged. However, the bullet wound to the chest showed no evidence of close range of fire. Erickson could not state definitively whether the stippling marks on Nichols's wrist indicated that he was in an aggressive or defensive posture when the gun was discharged.

Appellant also testified. He denied participating in any way in the robbery or the murder. He admitted that he knew the back doors were unlocked, but he assumed that the manager knew they were unlocked. He testified that when he went outside the first time, he told Keyono that he would be out after they rolled some more silverware. He said that while he was talking to Arnold, Torian came in and told him that Keyono was wondering if they would get caught if they robbed the restaurant and suggested that appellant go talk to him. Appellant said that he told Keyono that he would get caught and that Keyono should leave his car there and leave the premises. He maintained that at this point, he went into the back of the store to talk to one of the dishwashers and did not see Keyono any more. Appellant said that after he talked to the dishwasher, he told Arnold that Keyono "and them" were "talking about robbing the place." He admitted that he told Arnold not to tell anyone because he assumed his brother would get into trouble by merely talking about committing a robbery. He also admitted that he heard the gunshots and told Arnold that he thought Keyono and Frank had killed Nichols.

Appellant remained at the restaurant until after the police came. On his way home, Keyono paged him to come to Joe Williams's house. When he entered Williams's house, he said Keyono asked him, "Did dude die?" Appellant denied threatening anyone and denied telling Keyono that he could slip in the back of the

restaurant. To the contrary, he asserted that he was the "hero" because he tried to prevent the robbery.

II. Sufficiency of the Evidence

Appellant first argues that no substantial evidence supports his convictions because the only evidence used against him was based on the uncorroborated testimony of Barnes and Dillard, whom he asserts should have been declared accomplices as a matter of law. We consider the sufficiency of the evidence before evidentiary errors in order to protect a defendant's right to be free from double jeopardy. *See, e.g., Goodman v. State*, 74 Ark. App. 1, 45 S.W.3d 399 (2001). In conducting this review, we examine all of the evidence, including that evidence allegedly admitted erroneously, and review the evidence in the light most favorable to the State. *See, e.g., Willingham v. State*, 60 Ark. App. 132, 959 S.W.2d 74 (1998). A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, whether direct or circumstantial. *See Killian v. State*, 60 Ark. App. 127, 959 S.W.2d 432 (1998). We will affirm if there is substantial evidence to support a verdict. *See Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Evidence is sufficient to support a verdict if it is forceful enough to compel a conclusion one way or another. *See Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993).

Appellant was convicted of acting as an accomplice to first-degree murder because the murder took place in furtherance of an underlying felony, an aggravated robbery. He was also charged with misdemeanor theft. We hold that substantial evidence supports that appellant acted as an accomplice in committing each of these crimes.

A person commits robbery if he, with the purpose of committing a felony or misdemeanor theft employs or threatens to employ physical force upon another person. *See* Ark. Code Ann. § 5-12-101(a) (Repl. 1997). A person commits aggravated robbery if he commits robbery and he is armed with a deadly weapon or represents by word or conduct that he is so armed; or inflicts or

attempts to inflict death or serious physical injury upon another person. *See* Ark. Code Ann. § 5-12-103 (Repl. 1997). Although there were no witnesses to the actual robbery, we hold that the various witnesses' testimony provided substantial evidence that the culprits were armed. Various witnesses saw Keyono take a gun into the restaurant, two witnesses heard loud banging noises, the manager was shot and killed, and witnesses testified that Keyono dumped the gun in a sewer, where it was later recovered. Further, Keyono was seen running out of the restaurant carrying a money bag and later counting money from the money bag. Therefore, substantial evidence supports that an aggravated robbery took place.

This same evidence supports a conviction for first-degree murder. Pursuant to Arkansas Code Annotated section 5-10-102(a)(1) (Repl. 1997):

> (a) A person commits murder in the first degree if:
>
> (1) Acting alone or with one (1) or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.

It is undisputed in this case that Nichols, the manager of the restaurant, was killed during the robbery attempt. The testimony of the witnesses supports that Keyono Cook shot Nichols and is sufficient to demonstrate that the offense of first-degree murder was committed.

The evidence is also sufficient to support the reduced charge of misdemeanor theft. Pursuant to Arkansas Code Annotated section 5-36-103 (Repl. 1997):

> (a) A person commits theft of property if he:
>
> (1) Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof; or

> (2) Knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof.
>
> . . .
>
> (b)(4) Theft of property is a Class A misdemeanor if the value of the property is $500 or less.

Several witnesses testified that Keyono had a money bag when he left the restaurant. Further, Dillard testified that Keyono removed the money from the bag and counted between $1,800 and $2,100. Based on this testimony, the trial court found could have properly found that the evidence was sufficient to prove that an amount under $500 was taken. We find no error in this regard.

The next issue is whether there was sufficient evidence to find appellant guilty as an accomplice to these crimes. An accomplice is one who directly participates in the commission of an offense or who, with the purpose of promoting or facilitating the commission of the offense, aids, agrees to aid, or attempts to aid the other person in the planning or committing of the offense. *See* Ark. Code Ann. §§ 5-2-403(a)(1)-(2) (Repl. 1997). When two or more persons assist each other in the commission of a crime, each is an accomplice and is criminally liable for his own conduct as well as that of the other person's conduct, even though he did not personally take part in every act. *See Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986). The relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in the proximity of the crime, the opportunity to commit the crime, and an association with a person involved in the crime in a manner suggestive of joint participation. *See id.*

Here, viewing the evidence in the light favorable to the State (as the prevailing party at trial) and giving deference to the jury's apparent findings of witness credibility, there was overwhelming evidence that appellant acted as an accomplice. Appellant's brother, one of the culprits, drove appellant's car to the crime scene. Appellant verified for his brother that the back door was open, and informed him that the business was slow, the manager was counting the money, and that he should come in. He

also instructed or warned other witnesses not to talk to the police. Finally, he believed that the proceeds of the robbery would be partially used for his benefit, to pay the rent. On these facts, we hold that the trial court did not err in denying appellant's motions for a directed verdict with respect to each charge.

III. Corroboration of Accomplice Liability

Appellant's next argument is that the trial court erred in not declaring Dillard and Rodney to be accomplices, and in admitting their uncorroborated hearsay testimony. A conviction cannot be had in any felony case upon the testimony of an accomplice unless other evidence tending to connect the defendant with the commission of the offense corroborates the accomplice's testimony. *See* Ark. Code Ann. § 16-89-111(e)(1) (1987). The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. *See* Ark. Code Ann. § 16-89-111(e)(1) (1987). The test for determining the sufficiency of corroborating evidence is whether the remaining evidence independently establishes the crime and tends to connect the accused with its commission. *See Meeks v. State*, 317 Ark. 411, 878 S.W.2d 403 (1994).

First, we note that appellant offered no objection to Rodney's testimony when Rodney testified. Instead, he merely waited until the close of the evidence and requested that the court declare Rodney to be an accomplice. Therefore, he waived his objection to Rodney's testimony in this regard. *See Harris v. State*, 262 Ark. 506, 558 S.W.2d 143 (1977) (holding issue of the sufficiency of corroborating testimony of accomplice was waived where the requirement of corroboration was not raised to the trial court).

Second, even if the trial court erred in not declaring Dillard and Rodney to be accomplices, the error is harmless, because the remaining evidence is sufficient to independently establish the crime and to connect appellant with its commission. We may affirm where evidence of guilt is overwhelming and the error is slight. *See Bledsoe v. State,* 344 Ark. 86, 39 S.W.3d 760 (2001). It is true that the remaining evidence does not cor-

roborate that appellant made the inculpatory statements attributed to him by Dillard and Rodney. However, the testimony by Hyder, Arnold, appellant, and the remaining witnesses independently corroborates the evidence establishing that the offenses were committed and establishing appellant's connection to the commission of those offenses.

Similarly, because the remaining evidence is sufficient to support the charges, the trial court committed harmless error in admitting Dillard's testimony as a co-conspirator pursuant to Arkansas Rule of Evidence 801(d)(2)(v) without declaring him to be an co-conspirator.

IV. Jury Instructions

Appellant was originally charged as an accomplice to capital felony murder and aggravated robbery. He was found guilty of aggravated robbery and of the reduced charge of first-degree murder. His final argument is that the trial court erred in denying his request for jury instructions on the lesser included offenses of robbery and felony manslaughter. He maintains that the trial court erred because there was evidence from which a jury could have found him guilty of these lesser charges. We disagree.

A. First-Degree Felony Manslaughter

At trial, appellant proffered instructions on first-degree felony manslaughter on the theory that a jury could have determined that Keyono could have acted negligently in causing Nichols's death because there was evidence to support that he was shot when the gun was discharged during a struggle.

A trial court's ruling on whether to submit jury instructions will not be reversed absent an abuse of discretion. *See Hill v. State,* 344 Ark. 216, 40 S.W.3d 751 (2001). It is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence. *See Britt v. State,* 344 Ark. 13, 38 S.W.3d 363 (2001). We will affirm a trial court's decision to exclude an instruction on a lesser-included offense only if there is no rational basis for giving the instruction. *See id.* Where the defendant relies on the defense of

complete denial, there is no rational basis for giving instructions on lesser-included offenses and the trial court is correct to refuse such instructions. *See Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Martin v. State*, 46 Ark. App. 276, 879 S.W.2d 470 (1994).

A person commits capital murder if he commits robbery and in furtherance of the robbery, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. *See* Ark. Code Ann. § 5-10-101(a)(1) (Repl. 1997). A person commits murder in the first degree if he commits a felony, and in the course of and in the furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. *See* Ark. Code Ann. § 5-10-101(a)(1). A person commits felony manslaughter if he commits a felony and in the course of and in furtherance or the felony or in immediate flight therefrom he or an accomplice negligently causes the death of any person. *See* Ark. Code Ann. 5-10-104(a)(4).

Appellant maintains that in *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2000), the Arkansas Supreme Court held that felony manslaughter is a lesser-included offense of capital felony murder and first-degree felony murder, and can be submitted as a lesser instruction if the evidence presented would support a finding that the defendant, or an accomplice acted negligently. Citing *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984), he argues that to sustain the charge of capital murder, first-degree murder or felony manslaughter, the State must prove two culpable states — one for the underlying felony and one for the death that occurred. He further asserts that felony manslaughter contains essentially the same language, but has a lower degree of culpability as it relates to death.

Appellant's argument is unpersuasive. First, he denies any involvement in the crime; therefore, there is no rational basis for the trial court to provide an instruction on the lesser-included offense. *See Vickers v. State*, *supra*; *Martin v. State*, *supra*. Second, as the State notes, the Arkansas Supreme Court has recently

rejected appellant's argument in *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001). In *Hill, supra*, our supreme court held that felony manslaughter adds an additional element to felony murder relating to the perpetration of the murder itself and therefore, is not a lesser-included offense of capital murder or first-degree murder.

In *Hill*, the defendant was charged with aggravated robbery and attempted capital murder. The *Hill* defendant, like appellant here, received a jury instruction on capital murder and first-degree murder. The *Hill* defendant also requested an jury instruction on felony manslaughter on the theory that he had negligently caused the death of the victim. *See id.*

The *Hill* court affirmed the trial court's refusal to issue the instruction on felony manslaughter, holding that the only culpable mental state where the murder is committed during a felony relates to the crime of the underlying felony and not to the murder itself. That is, to sustain a conviction for capital murder or first-degree felony murder, the State must only prove the mental state relating to the underlying felony. *See id.* Therefore, the *Hill* court found that felony manslaughter, in which a death is negligently committed in the course of a felony, is not a lesser-included offense of capital murder or first-degree murder because it adds an additional element to the crime charged — the mental state relating to the commission of the murder. *See id.* The *Hill* court also stated that felony manslaughter did not represent a less serious injury to the victim because death still results. Finally, the *Hill* court stated that felony manslaughter did not represent a lesser culpable mental state because the mental state to perpetrate robbery is the same for capital felony murder and manslaughter.[3] Therefore, pursuant to *Hill*, appellant was not entitled to a jury instruction on the theory that his accomplice acted negligently.

Finally, appellant's reliance upon *Britt v. State, supra*, is misplaced. The defendant in that case was charged with attempted

[3] Moreover, as the State notes, to hold as appellant urges would lead to an absurd result, because a person who negligently caused the death of another person would be guilty of only a Class C felony, while the armed robber who does not cause death would guilty of a Class Y felony.

first-degree felony murder and first-degree murder. He argued the trial court erred in not providing instructions on second-degree murder and manslaughter. The *Britt* court did not state that a defendant charged with first-degree felony murder is entitled to an instruction on felony manslaughter. The *Britt* court merely found that there was no rational basis for giving the instruction in that case because there was no evidence that the defendant acted under extreme emotional disturbance, or acted recklessly or negligently.[4]

Based on these authorities, we hold that the trial court did not err in denying appellant's request for an instruction on felony manslaughter.

B. Aggravated Robbery

Finally, we hold that the trial court did not err in denying an instruction on the lesser-included offense of robbery. Appellant maintains that he was entitled to such an instruction because a jury could have found that he did not know that Keyono had a gun. The State counters that appellant denied any participation in the robbery; therefore, an instruction on a lesser-included charge was not warranted. The State further asserts that where it is undisputed that an armed robbery took place, the lesser-included instruction on robbery is not necessary. *See Young v. State*, 283 Ark. 435, 678 S.W.2d 329 (1984).

Robbery occurs when a person, with the intent of committing theft or resisting apprehension, uses or threatens to immediately use physical force upon someone. *See* Ark. Code Ann. section 5-12-102(a) (Repl. 1997). A person commits the offense of aggravated robbery when he commits robbery and is armed with a deadly weapon or represents to his victim by word or conduct that he is armed. *See* Ark. Code Ann. § 5-12-103(a)(1) (1993). It is clear under our case law that robbery is a

[4] However, we note that the *Britt* holding implies that a defendant who presented such evidence might be entitled to such an instruction. While the supreme court in *Hill* did not state that it was overruling *Britt*, because *Hill* was decided subsequent to *Britt*, it would seem that to the extent that *Britt* is inconsistent with *Hill*, it would be overruled by implication.

lesser-included offense of aggravated robbery. *See Lovelace v. State*, 276 Ark. 462, 637 S.W.2d 548 (1982).

The State's reliance on *Young v. State, supra,* is misplaced. Our law clearly recognizes that a person charged as an accomplice to aggravated robbery may be entitled to an instruction on the lesser-included offense of robbery, even where it is undisputed that a weapon was used. *See, e.g., Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983). Although a defendant's liability may be limited to that of an accomplice to mere robbery if the other person, without the defendant's knowledge, commits a robbery using a weapon, *see Savannah v. State, supra,* that is not the case here. Appellant did not assert that he agreed to participate in a robbery and that unbeknownst to him, Keyono and Frank used a gun. Rather, he denies *any and all* participation in the robbery and even argues that he is a "hero" because he tried to prevent the robbery.

As previously noted, it is reversible error to refuse to give an instruction on a lesser included offense when the instruction is supported by even the slightest evidence, and we will affirm a trial court's decision to exclude an instruction on a lesser-included offense where there is no rational basis for giving the instruction. *See Britt v. State, supra.* Given this standard, we hold that the trial court did not err in refusing to give an instruction on the lesser-included-offense of robbery. First, the court did not err because appellant denied any participation in the robbery. *See Vickers v. State, supra; Martin v. State, supra.*

Second, appellant's reliance upon *Waggle v. State*, 50 Ark. App. 198, 901 S.W.2d 862 (1995), is misplaced. In *Waggle*, the defendant admitted that she participated in the robbery. However, she denied that she knew the defendant had a gun. The *Waggle* defendant aided her boyfriend in robbing a store, by going into the store two times on the pretext of purchasing candy, and then reporting to her boyfriend how many customers were in the store. *See id.* After he exited the store waving money and brandishing a pistol, she complied with his orders to drive away. The defendant maintained that she did not know why her boyfriend wanted her to go into the store and report on the number of cus-

tomers. The *Waggle* court found that an instruction on robbery was warranted because a jury could believe that she assisted in the commission of the robbery, but that she was unaware that her boyfriend possessed a gun. *See id.*

Unlike the defendant in *Waggle*, appellant here denied any participation in the robbery. Therefore, the trial court had a rational basis for denying his motion for a lesser-included instruction on robbery and did not abuse its discretion.

Affirmed.

STROUD, C.J., JENNINGS, VAUGHT, and ROAF, JJ., agree.

PITTMAN, HART, ROBBINS, and NEAL, JJ., concurring in part and dissenting in part.

JOHN B. ROBBINS, Judge, concurring in part; dissenting in part. I agree with the majority that the trial court committed no error in denying appellant's motions for directed verdicts, in refusing to declare two witnesses as accomplices and in admitting their testimony, and in refusing to instruct the jury on felony manslaughter. However, I agree with appellant's argument that the trial court erred in failing to give a jury instruction for the lesser-included offense of robbery. Therefore, I concur with the majority in affirming appellant's convictions as an accomplice to first-degree murder and misdemeanor theft of property, but I would reverse and remand his conviction for aggravated robbery.

The majority holds that because appellant completely denied any involvement in the crime, he was not entitled to a lesser-included instruction on robbery. I disagree. Stated affirmatively, this rationale would require a defendant to confess to criminal involvement in order to be entitled to a lesser-included offense instruction. Surely, such is not the law, and should not be the law if it is.

Appellant's argument is supported by *Waggle v. State*, 50 Ark. App. 198, 901 S.W.2d 862 (1995). In that case the appellant was convicted as an accomplice of aggravated robbery after she participated with her boyfriend in robbing a convenience store. Although the appellant denied assisting with the robbery, we

reversed the trial court and held that there was a rational basis for a robbery instruction. We stated:

> Ms. Waggle denied having any knowledge that her boyfriend was going to rob the convenience store, and further stated that she was unaware that he possessed a gun. The trier of fact has the right to resolve inconsistencies in the testimony of a witness and may believe or disbelieve any portion of that testimony. *See Oller v. Andrews*, 233 Ark. 1017, 350 S.W.2d 167 (1961). In the case at bar, the jury was entitled to believe Ms. Waggle's assertion that she did not know her boyfriend was carrying a gun, while disbelieving her claim that she did not assist in the commission of the robbery. Therefore, the trial court erred in refusing to give an instruction on robbery.

Waggle v. State, 50 Ark. App. at 202, 901 S.W.2d at 864. In the case at bar, there was no evidence that appellant ever saw a gun or knew his brother intended to use one in committing the crime. Therefore, there was a rational basis from which the jury could have concluded that he committed only robbery.

The majority distinguishes this case from *Waggle v. State, supra*, because, unlike the defendant in that case, appellant here denied any participation in the robbery. I do not agree that such a distinction exists because, while the appellant in each case gave testimony from which a jury could infer criminal activity, neither admitted to any crime. As the majority opinion indicates, while the appellant in *Waggle v. State, supra*, admitted to entering the convenience store to count customers, she maintained in her testimony that she did not know why her boyfriend had asked her to do this. In the instant case, appellant admitted some involvement in that he admonished others to withhold information about the robbery and was not truthful when questioned by the police, but he, too, denied any willing participation in the robbery.

In *Brown v. State*, 321 Ark. 413, 903 S.W.2d 160 (1995), our supreme court held that it is not error to refuse or fail to instruct on the lower offense where the evidence clearly shows that the defendant is either guilty of the greater offense charged or innocent. Such was the case in *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993), and *Martin v. State*, 46 Ark. App. 276, 879 S.W.2d 470 (1994), cited by the majority. In each of those cases

the appellant was convicted as a principal of first-degree murder, each appellant completely denied committing the murder, and there was no evidence to support the commission of a lesser crime. In *Vickers v. State, supra,* and *Martin v. State, supra,* it was an "all or nothing situation," so there was no rational basis to give the proferred instructions on lesser homicide offenses.

The case at hand is far from an "all or nothing" situation as regards appellant's aggravated robbery conviction. Not only was there a lack of evidence that appellant knew his brother was armed prior to the robbery, there was affirmative testimony that he did not know. Rodney Barnes indicated that, after appellant told Keyono the back door was open, appellant went back in the restaurant and remained there until after the robbery was committed. Rodney further testified that appellant could not have seen the gun because it was retrieved from the trunk after appellant had reentered the restaurant.

An instruction on a lesser-included offense should be given when the instruction is supported by even the slightest evidence, but we will affirm a trial court's decision to exclude an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Ellis v. State,* 345 Ark. 415, 47 S.W.3d 259 (2001). In this case, there was more than the "slightest evidence" to support a finding that appellant was an accomplice to robbery, but not to aggravated robbery. The jury alone determines credibility of witnesses, apportions weight to be given to evidence, and resolves any questions of conflicting testimony and inconsistent evidence. *Parker v. State,* 333 Ark. 137, 968 S.W.2d 592 (1998). In this case there was a rational basis for giving the robbery instruction because the testimony of Rodney Barnes, if believed by the jury, demonstrated that while appellant may have conspired in the robbery, he was unaware that his brother was armed with a deadly weapon.

I am not unmindful of our supreme court's opinion in *Doby v. State,* 290 Ark. 408, 720 S.W.2d 694 (1986), where the appellant was denied lesser-offense instructions and was convicted of possession of a controlled substance with intent to deliver and theft by receiving a pistol. However, in that case the appellant testified

that he was unarmed and was not in possession of drugs when he was attacked by the police, and in affirming, the supreme court stated:

> Doby rested his entire defense on his credibility against that of the officers. So as a practical matter, it came down to whom should the jury believe. There would be no rational basis to find the officers lied in part in this case. Their testimony so sharply conflicted with Doby's that it would not be reasonable to expect a jury to pick and choose and come up with a finding of a lesser offense when to do so would require a finding that Doby was a liar and the officers liars in part. If Doby had admitted possessing the drugs, it might make sense to require the charge of the lesser offense. But his defense was that he was entirely innocent of any crime; he possessed nothing. Therefore, the jury only had one question to decide, whether he was guilty as charged.

Doby v. State, 290 Ark. at 412, 720 S.W.2d at 696.

In my view, there is a material distinction between *Doby v. State, supra*, and the case at bar. The instant case does not present a situation where the jury is left to decide between two sharply conflicting accounts. There was evidence, in the form of Rodney Barnes's testimony, that appellant was neither entirely innocent nor entirely guilty.

In *Savannah v. State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983), we held that where the evidence showed that appellant aided or advised another in planning or committing a robbery but that the other person committed the greater offense of aggravated robbery, appellant's liability is limited to the lesser offense of robbery. Because there was, at a minimum, the slightest evidence that Denaro Cook aided in committing a robbery but an aggravated robbery was thereafter committed, I would hold that the trial court abused its discretion in denying his request for a jury instruction on the lesser-included offense of robbery.

PITTMAN, HART, and NEAL, JJ., join in this opinion.

Donna Ruth GILBERT, *by and through her Guardian,*
Tracey Roberts *v.* Inez K. RAINEY

CA 01-990 71 S.W.3d 66

Court of Appeals of Arkansas
Division III
Opinion delivered March 20, 2002

[redacted]

Mark S. Carter, P.A., by: *Mark S. Carter*, for appellant.

Paul D. Capps and *Dale Grady*, for appellee.

WENDELL L. GRIFFEN, Judge. The case arises from the rescission of a support deed. Donna Gilbert appeals through her guardian, Tracey Roberts, Gilbert's daughter. Gilbert appeals from a chancery order rescinding a deed for real property given to her by her mother, Inez Rainey (Rainey), appellee, in exchange for Gilbert's promise to provide Rainey care and support for life. Because Gilbert is now incapacitated, the chancellor rescinded the deed based upon the failure of consideration. Gilbert argues that the evidence was insufficient to prove that the deed was a support deed and that the chancellor erred in admitting parol evidence to explain the consideration underlying the deed. We disagree and affirm.

On April 6, 1978, Rainey and Gilbert entered into an agreement whereby the parties agreed that when Rainey became unable to care for herself in the manner to which she had grown accustomed, Gilbert would provide that level of care and comfort. Gilbert also agreed to consult with her brothers, James and Charles Rainey, with respect to major decisions concerning Rainey's care. The consideration recited was "past and future love and affection which has been and will continue from my mother to me for due consideration in mother's will and for other good and valuable consideration." Gilbert maintained daily contact with her mother beginning in 1988, when Rainey began experiencing confusion and began forgetting where she placed common household items such as keys or her purse. On January 6, 1994, Rainey's attorney drafted a quitclaim deed on Lot 2, Block 23, Park Hill Addition to North Little Rock, under which all of Rainey's right, title, and interest in the real estate was given to Gilbert.

This deed recited that "for and in consideration of the sum of ten and no/100 Dollars ($10.00) and other good and valuable consideration to me in hand paid by Donna Gilbert, Grantee, the receipt of which is hereby acknowledged . . . ." Gilbert paid Rainey one dollar and the deed was executed. After this deed was executed, Gilbert managed Rainey's bank account and investments; painted Rainey's home; repaired a television and bought a new television; added a carport; and built a fence in the back yard. Gilbert moved in with Rainey for a short period in 1998 but moved out in October 1998, when she moved in with her boyfriend.

In January 1999, Gilbert suffered brain damage from anoxic encephalopathy. Later that same year, Gilbert subsequently broke her hip, and her daughter, Roberts, was appointed as the permanent guardian of Gilbert's person and estate. Roberts thereafter made some effort to look after her grandmother by having Rainey's air conditioner serviced. However, Rainey and Roberts do not get along, and in May 1999, a mutual restraining order was issued against both parties.

On July 6, 1999, Rainey filed a complaint in chancery court seeking to set aside, rescind, and cancel the 1994 quitclaim deed. Rainey first alleged that Gilbert obtained the deed by fraud, undue influence, duress, temporary lack of capacity, and failure of consideration. However, she later amended her complaint and proceeded solely on the theory of failure of consideration. Rainey then filed a motion for summary judgment, which the court denied without a hearing. The case was tried on July 25, 2000, and August 18, 2000.

At the July hearing, over Gilbert's objection, the chancellor admitted parol evidence regarding the consideration for the 1994 quitclaim deed. At the conclusion of this hearing, Gilbert moved for a directed verdict. The chancellor denied the motion. At the conclusion of the evidence on August 18, 2000, Gilbert moved to amend her pleadings in conformity with the proof and sought alternative relief for compensation for $9,500.63 that she testified she spent in reliance on the 1994 deed.

The chancellor found that the deed was a support deed given in exchange for Gilbert supplying for life the comforts and necessities to which Rainey had become accustomed. Because of Gilbert's subsequent disability, the chancellor found there had been a failure of consideration. The chancellor determined that because the subject deed was a support deed, the true consideration of the deed may be proven by parol evidence. She noted that Roberts attempted to satisfy the obligations of support and caregiving to Rainey, but matters deteriorated to the point where a mutual restraining order was issued between them. The chancellor determined that the deed should be rescinded for failure of consideration, but asked the parties to find the evidence in the transcript of costs paid by Gilbert and to provide the information within ten days.

In a subsequent telephone conference with the parties' attorneys, the chancellor awarded Gilbert $127 for a ceiling fan that she paid for and installed. She found that Gilbert did not prove that the other improvements came from her personal funds as opposed to the funds of Rainey to which she had access, or that the improvements made enhanced the value of the residence. Therefore, the chancellor rescinded the deed. Gilbert appeals from this order. We affirm.

I. Failure of Consideration

Gilbert first argues that the chancellor erred in determining that the deed was a support deed subject to rescission for failure of consideration. We review chancery decisions *de novo* on the record and will not reverse unless the chancellor's findings are clearly erroneous or clearly against the preponderance of the evidence. *See* Ark. R. Civ. P. 52(a); *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). A finding is clearly erroneous if, although there is evidence to support the trial court's findings, on the entire evidence, we are left with the definite and firm conviction that a mistake has been committed. *See Balletti v. Muldoon*, 67 Ark. App. 25, 991 S.W.2d 33 (1999); *Guess v. Going*, 62 Ark. App. 19, 966 S.W.2d 930 (1998). Moreover, we give due regard to the trial court's judgment regarding the credibility of witnesses.

See Ark. R. Civ. P. 52(a); *First State Bank v. Phillips*, 13 Ark. App. 157, 681 S.W.2d 408 (1984).

Support deeds, by which property is granted in exchange for a promise by the grantee to care for the grantor for life, are valid in Arkansas. *See Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984). When a deed is executed in consideration of future support and maintenance and the grantee fails to fulfill the provisions of the deed, the grantor may sue at law for damages, or may sue in equity to cancel the deed for failure of consideration. *See Wood v. Swift*, 244 Ark. 929, 428 S.W.2d 77 (1968); *Welch v. Brewer*, 267 Ark. 763, 590 S.W.2d 325 (Ark. App. 1979). Evidence of failure of consideration to justify setting aside of a deed must be clear, cogent, and convincing. *See Bryant v. Bryant*, 239 Ark. 61, 387 S.W.2d 322 (1965).

Gilbert argues that Rainey was not required to deed the house to her in exchange for a promise to provide future personal services, because they had an agreement in place to that effect since 1978; and therefore, the chancellor erred in finding that the deed was a support deed. She further argues that in order to show entitlement to rescission of a support deed, the grantor must show that it was the grantee's intent to defraud the grantor from the outset. *See id.* Gilbert notes that the deed recites on its face that the consideration is ten dollars and other good and valuable consideration paid to Rainey; therefore, she asserts that the deed acknowledges that all of the consideration has been paid. Alternatively, she argues that there was no proof of failure of consideration because there was no evidence that she intentionally failed to support her mother, or intended to defraud her mother.

We hold that the chancellor did not err in finding that the deed was a support deed and that there had been a failure of consideration warranting rescission. Gilbert's argument that the 1978 agreement was a support agreement would be more compelling had she lived with her mother since that time. However, that was not the case, and the 1978 agreement notwithstanding, the evidence demonstrates that the deed was a support deed.

Gilbert and Rainey testified that the 1994 deed was given in exchange for Gilbert's promise to take care of Rainey. Charles

Rainey, Gilbert's brother, testified that Gilbert told him after she became sick that she wanted to give the house back to Rainey because she (Gilbert) was hospitalized and could no longer care for Rainey. Gilbert also testified by deposition that she wished to give the house back to her mother, although she recanted this testimony during the actual hearing. Further, the evidence demonstrates that Gilbert provided support to Rainey and lived with her for a brief period during 1998.

Further, the testimony regarding the failure of consideration is also clear. Gilbert is now unable to care for herself and lives with Roberts, who is her legal guardian. Roberts testified that Gilbert is unable to perform simple tasks such as showering herself or brushing her teeth and that she (Roberts) cares for her full-time.[1]

Moreover, despite Gilbert's argument to the contrary, it is not necessary for the grantor to show that the grantee intended to defraud the grantor. While a grantee's intentional failure to support is grounds for rescission based on fraud, *see Millwee v. Wilburn*, 6 Ark. App. 280, 640 S.W.2d 813 (1982), the grantor is not *required* to show that the failure to support was intentional in order to obtain a rescission based on failure of consideration. *See, e.g., Welch v. Brewer, supra* (affirming a chancery order rescinding support deed where the grantees thought they were only obligated to care for the grantor for as long as they were able); *see, e.g., Euin v. Faubus*, 217 Ark. 238, 229 S.W.2d 244 (1950) (reversing and remanding for rescission where the grantee remarried after the support deed was given and could not thereafter continue to support her mother-in-law due to inadequate finances). Giving due deference to the chancellor's superior position to assess the evidence and weigh the credibility of the witnesses, we hold that the evidence in this case was sufficient to support a finding that the deed was a support deed and that the deed was properly rescinded due to Gilbert's inability to care for her mother. *See Euin v. Faubus, supra.*

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[1] Appellee does not challenge Gilbert's competency to testify.

II. Parol Evidence

Appellant further asserts that parol evidence may not be used to show that the deed was without consideration and that the failure of consideration alone is not sufficient to cancel a deed. *See Bryant v. Bryant*, 239 Ark. 61, 387 S.W.2d 322 (1965). Again, we find no error.

Here, the chancellor initially sustained Gilbert's objection to the introduction of parol evidence to prove the basis for the consideration to the deed. In reversing its initial ruling, the court stated that it would admit the parol evidence to establish that additional consideration was given that was not recited in the deed. Charles Rainey thereafter testified that when Gilbert was hospitalized with her broken hip, she told him that she wanted to give the house back to Rainey, because she was no longer able to care for Rainey.

Gilbert maintains this testimony was improper because testimony tending to alter, vary, or contradict a written contract is only admissible if it tends to prove a term of the agreement about which the written agreement is silent. *See Cate v. Irvin*, 44 Ark. App. 39, 866 S.W.2d 423 (1993). She notes that the deed did not recite future support as consideration, but stated that the consideration had been paid in full; therefore, she asserts, the deed was not silent with regard to consideration. Finally, she asserts that parol evidence cannot be used to disprove consideration recited on the face of the deed, for the purpose of defeating the conveyance, unless fraud is alleged, and here, no fraud has been alleged. *See Bryant v. Bryant, supra.*

Appellant's reliance on *Bryant, supra* and *Cate, supra* is misplaced. It is true that where a conveyance is voluntary and absolute on its face, the question of the adequacy of consideration is not grounds for setting aside a voluntary conveyance. *See Millwee v. Wilburn, supra.* However, that is not the issue in this case. Further, the parol evidence in this case was not used to disprove the consideration cited on the face of the deed; therefore, no finding of fraud was necessary in order for the chancellor to find that rescission was proper.

While parol evidence may not be used to contradict recitals of consideration in a deed, it may be allowed to show that the consideration has not been paid as recited or to establish that other consideration not recited in the deed was agreed to be paid if it does not contradict the terms of the writing. *See Bryant v. Bryant, supra.* Our courts have allowed parol evidence to be admitted to specifically prove that a deed was given in exchange for support for the duration of the grantor's life where the deed contained no language to that effect. *See, e.g., Welch v. Brewer, supra.*

As in *Brewer*, here the parol evidence was not proffered to vary or contradict the consideration recited on the face of the deed. Rather, it was offered to prove that Rainey gave the deed to Gilbert in exchange for a promise to provide care and support to Rainey for the remainder of her life. Therefore, we hold that the chancellor did not err in admitting the parol evidence in this case.

III. Reliance Expenditures

Gilbert's final argument is that the trial court erred in its determination that she was only entitled to be reimbursed $127. She maintains the evidence demonstrates that she spent $9,500.63 between November 1994 and September 1998 to provide for Rainey and in maintaining and improving the property on which she lived. Gilbert provided receipts for this amount and maintains that it is unrefuted that the money was spent on Rainey's property. Gilbert also testified that she personally paid for all of the expenditures and she notes there was no proof the money came from any other source.

We hold that the chancellor did not err in finding that Gilbert was only entitled to be reimbursed $127. A simple review of the receipts offered at the hearing supports the chancellor's finding that she was unable to determine which expenditures were made from Gilbert's personal funds as opposed to being taken from Rainey's funds to which Gilbert had access. There are receipts in both Rainey's name and Gilbert's name, but there is no indication as to where the money came from that was used to pay

for the expenditures. Even after the chancellor gave Gilbert additional time to prove that she personally incurred these expenses, the only proof offered was Gilbert's testimony that she paid for these expenses herself. The chancellor was not required to believe her testimony, particularly in light of the fact that she had difficulty remembering certain events, due to the brain damage she suffered as a result of her illness, and given that she recanted her testimony that she wished to give the house back to Rainey.

Further, it is not clear that all of these purchases were made for Rainey's benefit. For example, the chancellor noted that the television that was purchased can be removed as personal property. In addition, Roberts testified that Gilbert built the fence because she needed a place to keep her dogs. Moreover, Rainey already had a garage, and she testified that Gilbert built the carport and that "Tracey [Roberts] did that for herself." Finally, the chancellor found there was no evidence by which she could determine whether the improvements enhanced the value of the home, which would evince an intent to act for Rainey's benefit.

The chancellor stated: "I looked at the evidence that had been presented in this case and I don't think it's the role of the Court to try and fill in the amounts and try and determine how much something was worth . . . I really don't have that evidence in the record." She further stated that "[t]he only thing that I saw that I could reasonably find that [Gilbert] should be entitled to, would be $127.00 to hang the ceiling fans because obviously somebody hung ceiling fans that are there in the house now and they're still there in her mother's house."

Given the dearth of evidence concerning the source of funds from which the improvements were made and again deferring to the chancellor's superior position to weigh the evidence and assess the credibility of the witnesses, we cannot say that we are left with a definite and firm conviction that the chancellor erred in only awarding Gilbert $127.

Affirmed.

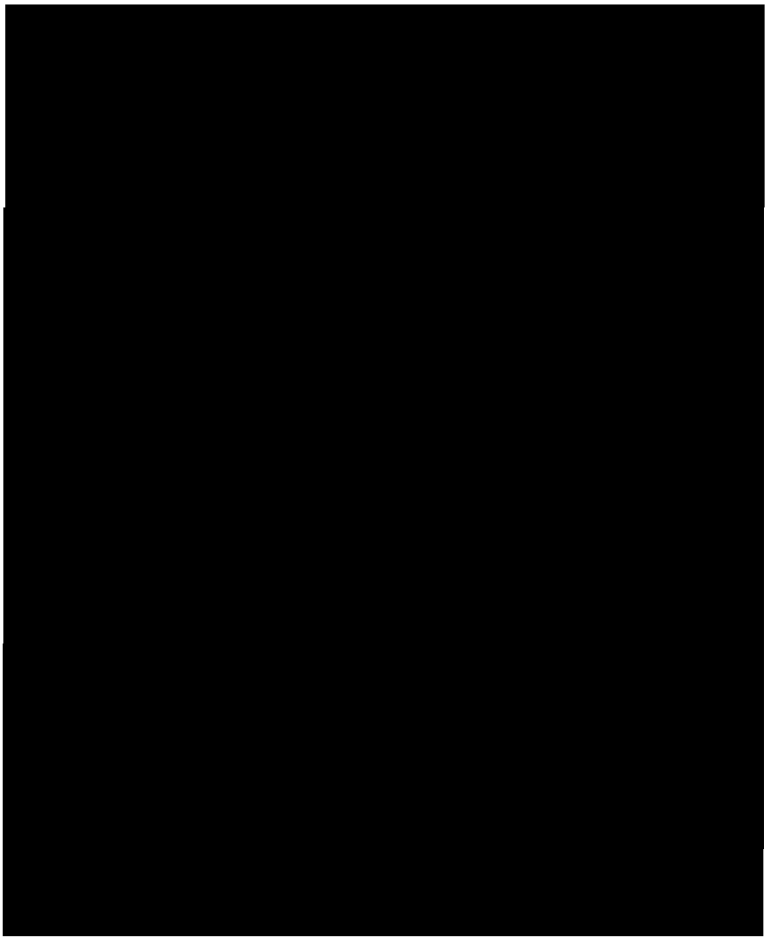
STROUD, C.J., and JENNINGS, J., agree.

Gregory LAMB *v.* STATE of Arkansas

CA CR 01-846 70 S.W.3d 397

Court of Appeals of Arkansas
Division III
Opinion delivered March 20, 2002

[Petition for rehearing denied May 1, 2002]



Mark Rees, for appellant.

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. This is an appeal from the denial of a motion to suppress in the Craighead County Circuit Court, after which appellant entered a conditional plea of guilty for possession of methamphetamine and reserved his right to appeal the suppression denial. In denying the motion, the court held that the seizure of appellant was unreasonable under Ark. R. Crim. P. 3.1, but was proper under Ark. R. Crim. P. 2.2. Lamb was sentenced to thirty-six months of supervised probation. On

appeal, appellant argues that the trial court erred when it held that his stop was valid and that his constitutional rights were not violated. We reverse and remand.

On July 17, 2000, at 11:45 p.m., Officer Cooper Taylor responded to a call at 1508 Overhill in Jonesboro, Arkansas. Mr. Ronnie Shaver reported a broken windshield on his vehicle. While taking the criminal mischief report at the home, the officer and Shaver noticed a slow-approaching truck, traveling southbound on Overhill, stop in the general vicinity of the intersection with Westwood. A passenger, later identified as appellant, stepped out of the vehicle and walked down the street going eastbound on Westwood. The time was approximately 12:15 a.m. on July 18, 2000.

Officer Taylor became suspicious when he noticed that appellant did not go directly into a residence. He testified that "Mr. Shaver spoke to me about some problems with a residence south of his on Overhill. He was complaining about suspicious activity, a large number of vehicles in and out at all hours of the day and night." Shaver indicated to Officer Taylor that he thought appellant could possibly have been involved with the mischief; therefore, the officer got into his vehicle and headed towards appellant to make contact. Taylor made contact with appellant, whereupon he requested to see some identification. Appellant, thereafter, produced a driver's license. Officer Taylor ran a local check, discovering that appellant had a warrant for failure to appear. He then placed appellant under arrest and performed a search incident to that arrest. He found appellant in possession of a controlled substance, namely methamphetamine.

Taylor testified at the suppression hearing that one of Shaver's neighbors, Mr. Thetford, heard a window break and saw a vehicle leave the scene. According to Thetford, there appeared to be two male passengers in a sports utility vehicle. Further, the officer testified that "I made contact with this individual because of a combination of my own observations and what Mr. Shaver had related to me. Due to the late hours, the reason I was there, Mr. Shaver's indications to me, that the person did not go directly into a residence, and he was walking down a street, are reasons I made con-

tact with this individual." Again on cross-examination, the officer stated that "I went up and detained Mr. Lamb because he got out of a vehicle and walked down the street, the time of night, it was a residential neighborhood, a crime had occurred prior to my contact with Mr. Lamb, and the statement that a male was involved."

The trial court, in ruling on the motion to suppress, held that Lamb's encounter with the police was not a valid stop under Arkansas Rule of Criminal Procedure 3.1. The trial court stated:

> the interesting aspect of this stop is the fact that you are talking about midnight in a private neighborhood, a crime has been committed, without question, a crime has been committed. The defendant is within three hundred yards of the area where the crime has been committed. You have officers there who don't know what happened. They have reports of two individuals about the crime. They have a bare suspicion by one of the persons that this gentleman may be involved, although there is really no basis for that.

Nevertheless, the court found that the officer had authority under Arkansas Rule of Criminal Procedure 2.2 (2001), "to do an investigatory stop of this defendant."

In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances and reverse only if the ruling is clearly against the preponderance of the evidence. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997); *McDaniel v. State*, 65 Ark. App. 41, 985 S.W.2d 320 (1999). Due deference is given to the trial court's findings in the resolution of evidentiary conflicts and determinations of credibility. *Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000).

Police-citizen encounters have been classified into three categories. The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997). Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the meaning of the Fourth Amendment. *Id.* Rule 2.2 of the Arkansas

Rules of Criminal Procedure allows an officer to make the non-seizure police-citizen encounter. The second permissible police-citizen encounter involves one where an officer justifiably restrains an individual who he or she has an "articulable suspicion" has committed or is about to commit a crime. Ark. R. Crim. P. 3.1 (2001); *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). The final category is the full-scale arrest, which must be based on probable cause. *Frette v. City of Springdale, supra.*

Although the trial court found the encounter impermissible under Rule 3.1, it nevertheless held appellant's encounter with Officer Cooper Taylor to be permissible under Rule 2.2. In part, Rule 2.2 provides:

> (a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

Ark. R. Crim. P. 2.2 (2001). The insertion of the word "otherwise" in the rule shows beyond question that the officer's request for information must be in aid of the investigation or prevention of crime. *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998); *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980). "Seizure" occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997). There is nothing in the Constitution that prevents the police from addressing questions to any individual; however, the approach of the citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom, with due consideration being given to the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. *McDaniel v. State*, 20 Ark. App. 201, 726 S.W.2d 688 (1987).

Based on the attending circumstances giving rise to the police-citizen encounter at hand, we hold that Ark. R. Crim. P.

2.2 is simply inapplicable in this situation, and that appellant's stop constituted an impermissible stop and detainment under Ark. R.Crim. P. 3.1.

Rule 3.1 of the Arkansas Rules of Criminal Procedure (2001) provides that a law enforcement officer may stop and detain any person he reasonably suspects is committing, has committed, or is about to commit a felony. For purposes of this rule, reasonable suspicion means a suspicion based upon facts or circumstances which give rise to more than a bare, imaginary, or purely conjectural suspicion. *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989). An officer does not have to witness the violation of a statute in order to stop a suspect. *Piercefield v. State*, 316 Ark. 128, 871 S.W.2d 348 (1994). The justification for an investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating a person or vehicle may be involved in criminal activity. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982), *cert. denied*, 459 U.S. 882 (1982).

Among the factors to consider in determining whether an officer has grounds to "reasonably suspect" are the time of day or night the suspect is observed; the particular streets and area involved; any information received from third persons, whether they are known or unknown; the suspect's proximity to known criminal conduct; and incidence of crime in the immediate neighborhood. Ark. Code Ann. § 16-81-203 (1987); *see also Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

The facts presented in this case are akin to those found in *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998). In *Stewart*, an officer pulled over to a curb and asked the appellant to approach his patrol car simply because she stood on the corner in a high-crime area late in the evening. The officer in *Stewart* was not investigating a nearby crime or a tip from an informant at the time of the encounter, and on appeal, the supreme court held the encounter impermissible under Rule 2.2.

We recognize that the difference in this case is that officer was investigating a nearby crime. However, the problem lies with weighing the government's interest for the intrusion against

Lamb's right to privacy and personal freedom, with due consideration being given to the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. Here, similar to the circumstances in *Stewart*, Officer Taylor drove up next to Lamb and asked him for his name and identification. Nowhere in the record is it evidenced that when Officer Taylor approached Lamb, he told appellant that he was investigating a nearby crime and wanted to see if Lamb could provide any information.

Based upon the totality of the circumstances, the trial court properly ruled that the stop was not one that fell under Rule 3 because, taking into consideration the applicable fourteen factors, the factors present here to support a determination that Sergeant Cooper Taylor had "reasonable suspicion" to stop Lamb were the time of day, his proximity to the crime, and the fact that a crime had happened earlier. Although no exact number of factors are dispositive on the issue of "reasonable suspicion," the facts suggest that the officer had no particularized, specific, or articulable reason to stop the appellant, but did so only based upon the fact that the victim, Shaver, who was in the house when the incident occurred, stated to the officer that the appellant could have "possibly" been involved. Further, the statement by the neighbor only indicates that there were two men in a red and tan sports utility vehicle near the scene when he heard the windshield break. The officer testified that he saw a pickup truck, not a sports utility vehicle, containing appellant stop near the scene of the incident, and appellant emerged and began to walk on foot down the sidewalk and went toward no particular residence.

Because the police-citizen encounter here amounted to an unreasonable seizure under Ark. R. Crim. P. 3.1 when Officer Taylor detained Lamb, requested his driver's license, and ran a local check on him, we reverse the trial court's denial of the motion to suppress as it was clearly against the preponderance of the evidence and remand for trial.

Reversed and remanded.

HART and JENNINGS, JJ., agree.

Tom ALFANO *v.* Kellie Dawn ALFANO

CA 01-1016 72 S.W.3d 104

Court of Appeals of Arkansas
Division I
Opinion delivered March 20, 2002

Williams & Anderson, by: *Clifford P. Block*, for appellant.

James Law Firm, by: *Patricia A. James* and *Clay T. Buchanan*, for appellee.

LARRY D. VAUGHT, Judge. Appellant, Tom Alfano, brings this appeal contending that the chancery court erred by setting child support at an amount that deviated from the presumptive amount set out in the child support guidelines without following the proper procedure. We agree and reverse.

The facts of this case are not in dispute. The parties were divorced on April 7, 1998. Custody of their minor child, Emily

Alfano, was awarded to appellee, Kellie Dawn Alfano. Pursuant to the property settlement agreement, which was incorporated into the divorce decree, the parties agreed to the amount of child support to be paid by appellant. The child-support provision of the property-settlement agreement provided in pertinent part:

> Husband will pay on the 1st day of each month beginning April 1, 1998 the sum of $750.00 per month as child support for the support, maintenance, and nurture of Emily until such time as he completes his residency program or June 1, 1999, whichever occurs first. Thereafter, Husband will pay to Wife on the 1st day of each month the sum equivalent to 17.5% of his income (after proper deductions consistent with the Supreme Court's latest Per Curiam Order) for the support, maintenance, and nurture of Emily.

A review hearing of the child-support award was held on July 11, 2000, and appellant informed the court that he was relocating to Alaska and did not anticipate having any substantial income for six months while his patient charges were collected. In a September 15, 2000, order, the court found that there was sufficient evidence to impute income to appellant an amount sufficient to justify child support of $865, which was the amount appellant was already paying. The court ordered that the child-support issue was subject to adjustment at a review hearing to be held on February 1, 2001.

At the February 2, 2001, review hearing, the parties stipulated that appellant earned an average monthly income of $12,347.66. Appellant argued that the child-support amount should not be based on the 17.5 percent of his income agreed to in the property-settlement agreement, but should be reduced to 15 percent based on the presumptive amount set by the family-support chart, unless appellee justified an upward deviation. The chancellor ordered that appellant continue paying at the rate of 17.5 percent because the amount of support set by the child-support chart is a rebuttable presumption and the parties agreed to 17.5 percent. Based on the 17.5 percent rate, appellant was ordered to pay $2,160.84 in child support based on his average monthly income. From that decision comes this appeal.

The standard of review for an appeal from a child-support order has been recently set out in *McWhorter v. McWhorter*, 346 Ark. 475, 480, 58 S.W.3d 840, 843 (2001):

> We review chancery cases de novo on the record, and we will not reverse a finding of fact by the chancery court unless it is clearly erroneous. Ark. R. Civ. P. 52(a); *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999). In reviewing a chancery court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Hunt v. Hunt*, 341 Ark. 173, [15 S.W.3d 334]. As a rule, when the amount of child support is at issue, we will not reverse the chancellor absent an abuse of discretion. *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). However, a chancellor's conclusion of law is given no deference on appeal. *City of Lowell v. M & N Mobile Home Park Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996).

The child-support issue in this case began with an agreement by the parties incorporated into the divorce decree. While the general rule is that the court cannot modify the parties' contract that is incorporated into the decree, our courts have recognized an exception to this rule in child-custody and support matters and have held that provisions in such independent contracts are not binding. *Warren v. Kordsmeier*, 56 Ark. App. 52, 938 S.W.2d 237 (1997). The chancellor always retains jurisdiction over child support as a matter of public policy, and no matter what an independent contract states, either party has the right to request modification of a child support award. *Id.*

Appellant raises six issues on appeal in which he argues that the case should be reversed because the chancellor failed to follow the proper procedure in awarding child support by failing to refer to the most recent version of the family-support chart, to recognize the presumptive amount to be awarded pursuant to the chart, to make a written finding that the application of the chart is inappropriate or unjust, and to include a justification for the deviation.

The most recent version of the child-support chart, applicable to this case, is found at *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. Appx. 581 (1998).

Section I addresses the rebuttable presumption created by the chart:

> It is a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for divorce, separation, paternity, or child support. The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.
>
> It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interests of the child, is unjust or inappropriate. Findings that rebut the guidelines shall state the payor's income, recite the amount of support required under the guidelines, recite whether or not the Court deviated from the Family Support Chart and include a justification of why the order varies from the guidelines as may be permitted under SECTION V. hereinafter.

Id. at 582. Section V sets forth the relevant factors to be considered in determining the amount of support. Arkansas Code Annotated section 9-12-312(a)(2) (Repl. 2002) also sets forth guidelines to be followed in setting the amount of child support:

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.

Arkansas Code Annotated section 9-14-106 (Repl. 2002) contains language virtually identical to § 9-12-312(a)(2).

At the conclusion of the review hearing, the chancellor stated that the statute required the court to refer to the chart and

follow the chart unless it found that it would be inappropriate to do so. The court found that it would be inappropriate to follow the chart under the circumstances and ordered appellant to pay at the rate of 17.5 percent. The written order provided:

> The [appellant] argued that the 17.5% should be reduced to 15% based upon a presumption that the chart level of support should be applied unless [appellee] can show reasons for an upward adjustment in child support. That the Court finds the support set by the child support chart in the per curiam orders of the Arkansas Supreme Court are rebuttable presumptions and that since the parties' [sic] agreed to the 17.5% and it was not ordered by the Court, then the [appellant] shall be required to continue paying at the rate of 17.5%.

In setting child support in accordance with the parties' agreement, the chancellor failed to follow the correct procedures in deviating from the chart amount. The chancellor failed to make a specific written finding after considering all relevant factors, that the chart amount was inappropriate or unjust. Administrative Order No. 10 requires the chancellor to consider the deviation factors set out in Section V of Administrative Order No. 10 and include in his findings a justification of why the order varies from the guidelines. Instead, the chancellor relied solely on the agreement of the parties as to why the chart amount would be inappropriate. The provisions of the property settlement agreement with regard to child support do not compel a court to ignore the relevant factors to be used in arriving at a fair determination of support. While a chancellor may choose to base an award on the agreed amount, that decision must be made after following the proper procedure. Therefore, we must reverse because the chancellor did not strictly adhere to the requirements of the statute and Administrative Order No. 10. *See Black v. Black*, 306 Ark. 209, 812 S.W.2d 480 (1991)(reversing the chancellor's increase in child support where the appellate court was unable to determine whether the chancellor followed the correct procedure because there was no family support chart amount set out in the order and the order did not indicate whether the relevant deviation factors were considered). *See also Cochran v. Cochran*, 309 Ark. 604, 832 S.W.2d 252 (1992)(holding that reference to chart amount being

"unreasonable" was an insufficient explanation for rejecting chart amount since it is presumed to be reasonable).

Appellee contends that the chancellor was not required to make findings or reference the chart because appellant failed to prove a change of circumstances warranting a modification of child support. A party seeking modification of the child-support obligation has the burden of showing a change in circumstances sufficient to warrant the modification. *Weir v. Phillips*, 75 Ark. App. 208, 55 S.W.3d 804 (2001). There is a presumption that the chancellor correctly fixed the proper amount in the original divorce decree. *Ross v. Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989). In *Ross*, we stated that when support has been previously set in a decree, a change of circumstances must be found before the § 9-12-312 is applicable. Arkansas Code Annotated section § 9-14-107(c) (Repl. 2002) provides:

> (c) An inconsistency between the existent child support award and the amount of child support that results from application of the family support chart shall constitute a material change of circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support chart, after appropriate deductions, unless:
>
> (1) The inconsistency does not meet a reasonable quantitative standard established by the state, in accordance with subsection (a) of this section; or
>
> (2) The inconsistency is due to the fact that the amount of the current child support award resulted from a rebuttal of the guideline amount and there has not been a change of circumstances that resulted in the rebuttal of the guideline amount.

In *Tucker v. Tucker*, 74 Ark. App. 316, 49 S.W.3d 145 (2001), this court applied § 9-14-107(c) in upholding a modification of child support. Because the court found section (c) applicable and none of the exceptions applied, we could not say that the judge's finding of a material change of circumstances was clearly erroneous. In the instant case, because there was an inconsistency between the existent child-support award (17.5 percent of appellant's income) and the amount that resulted from the application of the chart (15 percent) and none of the exceptions applied, a material change of circumstances existed sufficient for appellant to petition

the court for review and adjustment of the child support, contrary to appellee's argument.

As a result of Ark. Code Ann. § 9-14-107(c), parties cannot with any security enter into agreements regarding child support that vary by even a small amount from the family-support chart. Although there are numerous reasons why parties would enter into such agreements, counsel for such parties should consider setting out in the support order reasons for the variance that would constitute a "rebuttal" of the chart and obtaining the approval of the trial court before entering into such agreements in the future.

We reverse and remand for the trial court to enter an order consistent with this opinion.

Reversed and remanded.

BIRD and ROAF, JJ., agree.

Jeffrey Michael KING *v.* STATE of Arkansas

CA CR 01-446 72 S.W.3d 109

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 2002

[redacted]

Orr, Scholtens, Willhite & Averitt, PCC, by: *M. Scott Willhite*, for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Jeffrey King entered a conditional plea of guilty to the crime of possession of methamphetamine with intent to deliver, subsequent to a search of his person that revealed 3.191 grams of methamphetamine. He was sentenced to ten years in prison, a $150 fine, and a six-month driver's license suspension. Appellant reserved his right to appeal the denial of his motion to suppress pursuant to Ark. R. Crim. P. 24.3(b) (2001). We affirm the denial of his motion to suppress.

On appeal from a trial court's ruling on a motion to suppress evidence, this court makes an independent determination based on the totality of the circumstances and reverses only if the trial court's ruling was clearly against the preponderance of the

evidence. *State v. Blevins*, 304 Ark. 388, 802 S.W.2d 465 (1991); *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989). Deference is given to the superior position of the trial judge on issues of the credibility of witnesses. *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979). As the United States Supreme Court has indicated, the Fourth Amendment does not forbid all searches and seizures but only "unreasonable searches and seizures." *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Freely given consent to search must be proven by clear and convincing evidence. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999).

The facts as developed before the White County Circuit Court at the suppression hearing were that on May 8, 2000, at approximately 1:00 a.m., police officers from the city of Bradford, Arkansas, were looking for Joe Robinson, a suspect in a hit-and-run accident who had an outstanding felony warrant. Robinson was observed running toward appellant's trailer from an abandoned house, and officers approached the trailer, seeing fresh footprints in the dew on the wooden steps leading up to the trailer door. Appellant answered their knocks at the door and granted consent for the officers to look for Robinson in his trailer. At no time did appellant contest that he granted the officers permission to look for this man inside his trailer. Investigator Hydron, from the White County Sheriff's Office, was present in the house.

The other officers went in search of Robinson while Hydron stayed with appellant. While talking to appellant about Robinson and Robinson's whereabouts, Hydron thought that appellant was acting nervous. The police had previously received information, which was relayed to Hydron, that appellant and Vickie Sterling were selling methamphetamine from the trailer. Hydron repeatedly asked appellant to take his hands out of his pockets, which appellant finally did. However, appellant was fidgeting, he would cross his arms, and then his hand would return to his right front pocket. Due to appellant's behavior, Hydron recited the *Miranda* rights to appellant and then asked if he understood his rights, and appellant said that he did. After being Mirandized, appellant was asked if Robinson was hiding in the trailer, to which appellant replied that he had not seen Robinson in two or three days. Hydron then asked appellant if he had "any meth, guns, or

whatever" in his pockets, and appellant replied that he had "a little meth." Hydron asked if appellant wanted to get it or if appellant wanted Hydron to get it. Appellant raised his arms and told Hydron to get it. Methamphetamine was found in appellant's right front pants pocket, and appellant was arrested. A motion to suppress followed, and a hearing on this motion was held.

The trial judge found that appellant voluntarily consented to the officers' entry into his home, that the officers were entitled to ask for cooperation in their search for Robinson, that the officers' opinion of appellant's nervousness and appellant's resistance to keeping his hands out of his pockets in contravention of a direction by the officer was credible, that Hydron administered *Miranda* warnings, and that appellant voluntarily admitted to possessing methamphetamine leading to his arrest. The trial court determined that appellant was not seized pursuant to reasonable suspicion of crime under Ark. R. Crim. P. 3.1. Based upon this assessment of the facts, the trial judge denied the motion to suppress the methamphetamine.

Appellant concedes, as he did at the suppression hearing, that he granted consent to the officers to enter the trailer and look for Robinson. Thus, the initial encounter was lawful. Appellant's argument is that the investigator exceeded the scope of that consent when he began questioning appellant about possessing drugs or guns. More specifically, appellant argues that his constitutional rights were violated by the officers "wrongfully detaining him, by placing him in custody with no just or probable cause, by exceeding the scope of their authority to search, by refusing to leave his residence when consent to search was withdrawn, and by willfully violating his right to privacy." He argues primarily that the search violated Ark. R. Crim. P. 3.1.[1] He also argues that the search

[1] Arkansas Rule of Criminal Procedure 3.1 (2001) provides:

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. An officer acting under this rule may require the person to remain in or near such place in the officer's presence

violated Ark. R. Crim. P. 11.3 and 11.5, which govern the scope of consent and withdrawal of consent.

The State responds that consent to enter the residence is irrelevant because, pursuant to Ark. R. Crim. P. 2.2 (2001), a law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The State argues alternatively that if appellant was seized, this seizure was permissible because of appellant's suspicious behavior, which gave rise to reasonable suspicion that appellant was committing a felony pursuant to Ark. R. Crim. P. 3.1. The State notes that the demeanor of a suspect and the suspect's apparent effort to conceal an article are factors to be considered in determining whether an officer has a reasonable suspicion. Ark. Code Ann. § 16-81-203 (1987).

We agree with appellant that there were insufficient facts upon which to form a reasonable suspicion that appellant had committed or was about to commit a crime in order to validate the interaction under Ark. R. Crim. P. 3.1. Instead, the resolution of the present appeal requires that we address the extent of permissible interruption that a citizen must bear to accommodate a law officer who is investigating a crime under Ark. R. Crim. P. 2.2. In *Baxter v. State*, 274 Ark. 539, 543, 626 S.W.2d 935, 937 (1982), our supreme court stated:

> The practical necessities of law enforcement and the obvious fact that any person in society may approach any other person for purposes of requesting information make it clear the police have authority to approach civilians.
>
> There is nothing in the Constitution which prevents the police from addressing questions to any individual. However, the approach of a citizen pursuant to policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and per-

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for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

> sonal freedom. To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. (Citations omitted.)

See also Blakemore v. State, 25 Ark. App. 335, 758 S.W.2d 425 (1988); *McDaniel v. State*, 20 Ark. App. 201, 726 S.W.2d 688 (1987). An encounter under Ark. R. Crim. P. 2.2 is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997); *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997); *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990); *Baxter v. State, supra*; *Meadows v. State*, 296 Ark. 380, 602 S.W.2d 636 (1980) .[2] The officer undeniably thought that Robinson was hiding in appellant's trailer, and it was for this reason that the officers approached appellant in the first place. Not all personal intercourse between police officers and citizens involves "seizures" of persons under the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1 (1968). A "seizure" occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *Id.*

It has been held that in the context of consensual public encounters, even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions, ask to examine identification, and request consent to search, provided they do not convey a message that compliance with their requests is required. *See Florida v. Bostick*, 501 U.S. 429 (1991). In the present appeal, Hydron made it clear that appellant did not have to answer any further queries when he orally rendered

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[2] For example, in *Hammons v. State, supra*, the supreme court held that it was permissible under Rule 2.2 for an officer to approach the driver of a parked car in the course of investigating a tip from a confidential informant that the driver of a black Corvette was selling drugs behind the Old Town Tavern. Likewise, in *Baxter v. State, supra*, the supreme court held that an officer had not violated Rule 2.2 when he asked a driver about a theft from a nearby jewelry store that occurred only ten minutes earlier. In both of these cases, the initial encounter, which was not a seizure under the Fourth Amendment, was permissible under Ark. R. Crim. P. 2.2 because the officer was seeking assistance in the investigation of a particular crime.

Miranda warnings to appellant. Thereafter, appellant answered one question about Robinson and voluntarily responded to a question about possession of drugs. Appellant's freely given statement in which he admitted to having "a little meth" created probable cause to seize the contraband and arrest appellant.

After reviewing the totality of the circumstances presented by these unique facts, we cannot say that the trial court's denial of appellant's motion to suppress was clearly erroneous.

Affirmed.

CRABTREE, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in affirming this case, but write separately to emphasize that the giving of *Miranda* warnings, without probable cause or even reasonable suspicion to believe that an offense has occurred, will not cure the taint of an illegal arrest. *See Rose v. State*, 294 Ark. 279, 742 S.W.2d 901 (1988)(citing *Wong Sun v. United States,* 371 U.S. 471 (1963)); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986)(citing *Brown v. Illinois*, 422 U.S. 590 (1975)). This is because *Miranda* warnings alone do not sufficiently deter Fourth Amendment violations. *Brown v. Illinois*, *supra.* I agree with the majority that there were insufficient facts in this instance from which Investigator Phillip Hydron could form a reasonable suspicion that appellant Jeffrey King had committed or was about to commit a crime. The issue thus to be resolved is whether, despite the officers' consensual entry into King's home for the alleged purpose of searching for Joe Robinson, a man with an outstanding warrant for a hit-and-run accident, King was "seized" by Investigator Hydron at the time he made the incriminating statement that he had methamphetamine in his pocket.

The evidence in this regard is somewhat sketchy. Seven or eight officers entered King's residence to conduct the search for Robinson. While most of the officers commenced the search,

King retreated to his bedroom, followed by Hydron. Hydron had been advised in advance of the entry by another officer that an informant had reported that King was selling methamphetamine out of his trailer. According to Hydron's testimony, he "went to the back and stayed with Mr. King" in order to find out more about Robinson's location. King also testified that Hydron immediately followed him to his bedroom and remained with him the entire time the search was being conducted, questioning him for about fifteen minutes or so before giving him his *Miranda* rights. Although King's testimony about Hydron's interrogation differed markedly from Hydron's, King did not state that he felt that he was under arrest or detained by Hydron until at the point Hydron read his rights to him. The majority finds that this sequence of events is a permissible encounter pursuant to Ark. R. Crim. P. 2.2, as a request to furnish information in the "investigation of crime."

Clearly, the focus of Hydron's attention soon shifted from inquiry about Robinson's whereabouts to King himself. However, I can find no authority that supports the finding that the giving of Miranda rights in the unique circumstances of this case constitutes an illegal detention, even though *Miranda* is intended for use when custodial interrogations occur. *See Godbold v. State*, 336 Ark. 251, 983 S.W.2d 939 (1999)(holding that *Miranda* warnings are necessary when statement is made during a custodial interrogation). King makes a reasoned and persuasive argument on appeal that he was "detained in his own residence," and it is surely credible and understandable that a person suddenly read his *Miranda* rights may believe that he is not at that point free to leave, even in his own home. Unfortunately, King provides us with no authority to support such a holding, and in the absence of it, we are compelled to affirm.

Audrey WRIGHTSELL *v.* Lott JOHNSON

CA 01-473 72 S.W.3d 114

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered April 3, 2002

Richard J. Orintas, for appellant.

Cross, Kearney & McKissic, by: *Othello C. Cross*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellant Audrey Wrightsell challenges a Lonoke County chancellor's order that granted appellant a constructive trust in a one-tenth interest in property that Wrightsell deeded to her brother, appellee Lott Johnson. As her sole point on appeal, appellant contends that the chancellor erred by not imposing a constructive trust on two-thirds of seventy-nine acres acquired by appellee pursuant to an agreement between the parties. We hold that the chancellor's ruling is inconsistent with his findings. Thus, we reverse and remand.

Factual and Procedural History

The parties, along with their eight sisters, acquired 159 acres of land located in Lonoke County, Arkansas, from their parents.[1] Afterward, six of the siblings deeded their interests to Larry Atkinson and Steve Smith, while the remaining four, including appellant, retained their interests.

In 1998, a petition to partition the 159-acre parcel was filed by Atkinson and Smith, owners of the six-tenths interest, against the owners of the four-tenths interest. Subsequently, appellant and her sister, Freddie Perkins, deeded their fractional interests to appellee, who arranged a settlement of the partition petition and received seventy-nine acres of land solely in his name. Appellee procured settlement funds with a mortgage on the seventy-nine acres, and paid another sister, Pearl Johnson, $15,000 out of the funds.

The present parties then became embroiled in a dispute regarding ownership of the seventy-nine acres. Appellant alleged that she and Freddie Perkins only deeded their interest to appellee to allow him to obtain a loan and use the loan money to settle the 1998 partition petition. She claimed that appellee agreed to subsequently re-deed the seventy-nine acres in order for appellant, Perkins, and appellee to share the property jointly and equally.

Appellant filed a cause of action in Lonoke County Chancery Court, alleging that appellee falsely and fraudulently represented and promised appellant that if she signed a deed of her property to him, he would use the deed to purchase other property and then reissue a deed, naming appellant and appellee as co-tenants. She requested that the court order appellee to cancel the deed or order appellee to add her name to the deed. Appellant's sister, Freddie Perkins, did not join her cause of action. Appellee responded that the conveyance represented a gift. On October 31, 2000, and November 28, 2000, the chancellor heard testimony on the matter.

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[1] The property is described as follows:
South half of the Southwest Quarter of Section 13, Township Two South, Range Seven West (S ½ SW 1/4, T-2-S, R-7-W) Lonoke County, Arkansas.

Garland Johnson Shy testified that after her parents left their ten children 159 acres of property in Lonoke County, six of the children, including Ms. Shy, wanted to sell the land and four[2] did not wish to sell. The property was originally separated into two tracts, with one eighty-acre tract consisting of wooded area and another seventy-nine-acre tract that could be leased for farmland or flooded to attract waterfowl and hunting. Ms. Shy found two hunters, Larry Atkinson and Steve Smith, who agreed to purchase a six-tenths interest in the 159 acres. Ms. Shy testified that she handled the sale in 1997 and that each of the six children who favored selling received $14,500 for each of their interests. Atkinson and Smith later filed a partition suit and wanted Shy to persuade her other four siblings to selling their four-tenths interest. Shy testified that the four remained adamant about not selling, and that appellant did not want to sell or gift her interest, but wanted the property to remain in the family. Shy also testified that appellant trusted appellee.

Appellee testified that he acquired a deed from his two sisters on June 20, 1998. He corroborated Ms. Shy's testimony that appellant wanted to keep the property in the family, and testified that appellant gave him the quitclaim deed of her interest in the property to keep it in the family. He testified that he contacted appellant about repairing a pump on the irrigation well on the property, and that appellant gave him a check after she had already deeded and given him the property. Appellee testified that after he acquired the interest of Pearl Johnson, Freddie Perkins and appellant, he obtained a loan secured by a mortgage on the property. He then settled the partition suit by paying $14,500 jointly to Atkinson and Smith, the owners of the sixth-tenths interest, and by relinquishing an undivided four-tenths interest in the eighty-acre tract. In return, Atkinson and Smith conveyed their undivided six-tenths interest in the seventy-nine-acre-open tract to appellee. Appellee also paid $15,000 to his sister Pearl Johnson, and gave appellant and Freddie Perkins $1,030 each.

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[2] The four children who did not wish to sell were appellee, appellant, Pearl Johnson, and Freddie Perkins.

Upon redirect examination, Garland Shy testified that when appellant was approached about selling the entire 159-acre parcel, she would not sell, and that her other sisters were not willing to deed their property to appellee in order for him to secure a loan to purchase the property. She testified that Freddie Perkins chose not to sell the land because she wanted it to stay in the family. Shy stated that Ms. Perkins did not give her interest to appellee because Perkins was on disability and was unable to give anything away due to her medical and financial condition. Shy again relayed that Ms. Perkins and appellant deeded their interest to appellee so that appellee could get a loan to purchase other property from the owners of the sixth-tenths interest.

Appellant testified that she lived in Chicago and that she and her sister (Perkins) quitclaimed their interests to appellee because he had to have a certain amount in order to secure the loan. She stated that appellee told her and Perkins that if the three of them went in together, everything would be split four ways to include their sister Pearl. She testified that the quit claim deed was not a gift. Appellant stated that appellee wanted the deed in order to have collateral and to sue Atkinson and Smith because the land was wrongfully sold. She stated that her father's will provided that the property had to be offered to each brother and sister before it could be sold to an outside person. Appellant testified that after appellee secured a loan, appellee bought Steve Smith's and Larry Atkinson's interests. Appellee then borrowed $4,000 more and gave appellant and Freddie Perkins $1,030. She testified that the only way that she and her brother could buy the seventy-nine-acre tract was to put their interests together and borrow the money in order to have enough collateral to buy the property back. Appellant testified that she never talked with appellee about giving him a gift and that she and her sister never received anything for the property. She testified that the sole purpose of the transaction was to get the property and to keep it in the family. Appellant stated that she and her sister paid appellee money to retain an attorney. In addition, appellant testified that she gave appellee $200 in 1999 for work on a pump after the quitclaim transaction (between herself and appellee) because she was under the impression that she still owned an interest in the property. She also gave appellee

$100 for a levee. Appellant testified that she and her brother had a verbal agreement, and that he kept her informed of the transactions relating to the partition suit and the settlement negotiations with Atkinson and Smith. However, appellant testified that after she gave notice to her brother to add her name to the deed, he refused to do so.

Following the hearing, the chancellor found 1) that appellant did not meet her burden of proving that appellee fraudulently and deceitfully acquired appellant's interest in the property, 2) that appellant did not intend to convey a gift to appellee, 3) that appellant and appellee had a confidential and trusting relationship, 4) that appellant relied heavily on appellee's knowledge and expertise, and 5) that appellee was unjustly enriched in his dealings with appellant. The chancellor then imposed a constructive trust in favor of appellant of a 1/10 interest in the property she conveyed to appellee. The chancellor determined the value of the property at the time of the conveyance at $15,000. He then imposed a constructive trust on appellee's property in the amount of $15,000 and ordered that the trust be secured by an equitable lien.

Analysis

As her sole point on appeal, appellant contends that the chancellor erred and made a mistake by not imposing a constructive trust on two-thirds of the seventy-nine acres acquired by appellee, when the evidence clearly demonstrated that the parties had an agreement that the seventy-nine acres would be shared equally among appellant, appellee, and their sister Freddie Perkins. Although we agree with the chancellor's decision to impose a constructive trust, we hold that the chancellor clearly erred in decreeing that appellant was entitled to only a one-tenth interest in the seventy-nine-acre tract that appellee acquired after she quitclaimed her one-tenth interest in the 159-acre parcel to him so he could settle the petition suit with Atkinson and Smith.

■ ■ Constructive trusts are implied trusts that arise by operation of law when equity so dictates. *See Hall v. Superior Fed. Bank*, 303 Ark. 125, 794 S.W.2d 611 (1990). These trusts are imposed against a person who secures a legal title by violating a

confidential relationship or fiduciary duty, or who intentionally makes a false oral promise to hold legal title for a specific purpose and after having acquired the title, claims the property for himself. *See Andres v. Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). Constructive trusts are remedial and are imposed to prevent situations of unjust enrichment when the circumstances demonstrate that an individual has an equitable duty to convey title of the disputed property to another because of a determination that the beneficial interest should not accompany the legal title and that the person would be unduly enriched if he were allowed to retain the property. *See Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996).

In *Nichols v. Wray*, 325 Ark. 326, 952 S.W.2d 785 (1996), our supreme court set out the following guidelines for appellate review of a chancellor's decision regarding a constructive trust:

> To impose a constructive trust, there must be full, clear and convincing evidence leaving no doubt with respect to the necessary facts, and the burden is especially great when a title to real estate is sought to be overturned by parol evidence. The test on review is not whether the court is convinced that there is clear and convincing evidence to support the chancellor's finding but whether it can say the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, and we defer to the superior position of the chancellor to evaluate the evidence. 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.

Id. at 333, 925 S.W.2d at 789 (citations omitted).

In the present case, appellant's complaint sought a one-half interest in the property she alleged that appellee acquired as a result of his false representations. At the conclusion of the hearing, the chancellor found that appellant did not meet her burden of demonstrating that appellee acquired appellant's interest by fraud or deceit. The chancellor also found that appellant did not intend her one-tenth interest (in the 159-acre tract that she originally conveyed) to be a gift to appellee.

However, the pleadings, the argument presented at trial, and the proof do not support the decree of a constructive trust equal to a one-tenth interest in the property appellant conveyed to appellee. That decree cannot stand because appellant's one-tenth interest in the 159-acre parcel was sold by appellee in the transaction with Atkinson and Smith. The transaction resulted in appellee receiving the seventy-nine-acre tract that he plainly was able to acquire only with help from appellant and their other sister (Pearl Johnson). While we agree with the chancellor that appellant did not prove her allegation that appellee obtained the quitclaim deed to her one-tenth interest in the 159-acre tract by fraud, it is equally clear that the chancellor did not err by finding that the quitclaim deed from appellant to appellee was not a gift. As such, the decision to impose a constructive trust was not clearly erroneous.

On appellate review, however, we are unable to determine the basis for the chancellor's decision that appellant is entitled to a one-tenth interest in the seventy-nine-acre tract that appellee obtained with her help. Whatever else may be disputed, it appears clear on our *de novo* review that appellant's contribution of her one-tenth interest in the 159-acre family parcel was equal to what appellee contributed. However, appellee also obtained financing to acquire the seventy-nine-acre tract in the settlement with Atkinson and Smith by borrowing funds in his own name. Even after appellant had relinquished her one-tenth interest in the larger parcel, appellee obtained funds from her for expenses related to the property he ultimately secured. In view of these facts, it is not clear why the chancellor did not grant her prayer to be added to the deed to the seventy-nine-acre tract, subject to appellant joining appellee on the mortgage. Thus, further proceedings are needed to allow the chancellor to fashion relief consistent with the constructive trust determination, yet more representative of appellant's contribution to the seventy-nine-acre tract now held by appellee in his own name. Because the chancellor's findings are inconsistent with the relief granted, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

HART, ROBBINS, and NEAL, JJ., agree.

STROUD, C.J., and ROAF, J., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would affirm both the trial court's decision to grant equitable relief in this case and the relief that he fashioned. In fact, the appellant's attorney moved at the end of the trial testimony to conform the pleadings to the proof and asked the trial court to impose a constructive trust on the property; the chancellor did just that. The chancellor found that the appellant had failed to prove fraud, misrepresentation, or an agreement with Johnson, but that appellant's deed to Johnson had not been a gift, and that Johnson had been unjustly enriched in his dealings with appellant. The chancellor awarded appellant $15,000, the value of her original one-tenth interest in the 179 acres, and imposed a constructive trust on the property in the form of an equitable lien.

Although not in the appellant's abstract, the chancellor carefully stated the reasons for his decision at the conclusion of the trial. The chancellor also stated that he could fashion any equitable remedy he deemed appropriate. I cannot say that the court clearly erred in any of his findings, including that appellant failed to prove fraud, that she also failed to prove that appellee specifically agreed to deed to his sisters two-thirds or any amount of the property after the partition suit was resolved, and that appellant had risked nothing but her original one-tenth interest in transferring title to Johnson so that he could attempt to stave off the partition and sale of the property. Significantly, the other sister involved in this alleged agreement neither participated in the suit, nor testified at trial to corroborate appellant's version of events. Moreover, appellant did not claim a half-interest in the property as asserted in the majority opinion, she claimed two-thirds. And, it is clear from reviewing the transcript that appellant made a number of questionable and contradictory statements during her testimony and was evasive in answering some of the questions posed to her. Of course, the trial court ultimately must judge the credibility of the witnesses. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001). I find the relief granted by the trial court appropriate and fair when the entire record is considered.

Moreover, while appellant initially held only a one-tenth undivided interest in the 179 acres before the partition action was filed, it is unclear from the majority opinion just what her interest in the 79 acres now held by appellee should be on remand, one-third, one-half, 17.9 acres, or some other amount. Apparently, this decision is to be left to the trial court, conditioned upon appellant "joining" appellee on his mortgage, a feat that may be easier said than done. We ought to leave well enough alone, and affirm this case.

STROUD, C.J., joins.

Harlan FLEECE and Nancy Fleece *v.*
Bill KANKEY and Charlotte Kankey

CA 01-1020 72 S.W.3d 879

Court of Appeals of Arkansas
Division III
Opinion delivered April 3, 2002

Osman & Ethredge, P.A., by: *David Ethredge* and *Kincade Law Firm*, by: *Kerry D. Chism*, for appellant.

Larry Dean Kissee, for appellee.

OLLY NEAL, Judge. The parties are adjoining landowners. They agreed that an old fence was the boundary line between them, and agreed to share in the cost of replacing the fence. The appellees bulldozed the old fence that separated the properties. They also bulldozed all the trees alongside the fence. Appellants accused appellees of erecting the new fence in the wrong location and of removing their trees without permission.

The trial court found that, with the exception of two posts that needed to be moved south two feet, the new fence was located in the same position as the old fence. The court also found that appellants suffered no loss with regard to the removed trees because the trees had no market value.

On appeal, appellants argue that the trial court committed error by ruling that they could not be awarded damages for the replacement value of the trees removed because they had no market value and because the removal of the trees and installation of the new fence actually improved the area. We reverse and remand.

[redacted] Although chancery cases are reviewed *de novo* on the record, the appellate court does not reverse unless it determines that the chancery court's findings of fact were clearly erroneous. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). 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 conviction that a mistake was committed. *Hedger Bros. Cement & Material v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). In reviewing a chancery court's findings of fact, the appellate court gives due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Jennings v. Burford, supra.*

[redacted] Arkansas Code Annotated section 18-60-102(a) (1987) provides, in part, that "if any person shall cut down, injure, destroy, or carry away any tree placed or growing for use or shade . . . on the land of another person, . . . the person so trespassing shall pay the party injured treble the value of the thing so damaged, broken, destroyed, or carried away, with costs." The treble-damages remedy under this code section requires a showing of intentional wrongdoing, even though the intent may be inferred

from the carelessness, recklessness, or negligence of the offending party. *Hackleton v. Larkan*, 326 Ark. 649, 933 S.W.2d 380 (1996). Less than intentional conduct may support double damages under Ark. Code Ann. § 20-22-304, which concerns causing fire and damage to another's property. *Id.* This double-damages remedy, however, must be pleaded in order to give a defendant adequate notice of the remedy he would be confronting. *Id.*

Appellants argue that there is no requirement in section 5-60-102 section that a tree must have a market value in order for a landowner to be entitled to replacement value damages. Larry Morris, a registered forester, gave expert testimony as to the value of the trees. Morris estimated that thirty-five trees had been bulldozed on the east/west side and twenty-five trees on the north/south side, and testified that the trees removed from the fence row included Post Oak, Black Oak, and Black Jack Oak. He calculated that the replacement value of the trees was $17,531 and opined that the Black Jack Oak had no merchantable value and was worth nothing, except for firewood.

The trial court, in its judgment and decree, found that Morris's testimony was not helpful because all of his testimony concerned replacement value and he stated that he was unable to give an opinion concerning market value. The court stated that, "in view of the rural nature of this area, and the location of the lane over which the [appellants] travel, it seems absurd to award damages on a replacement estimate, because the removal of the old fence and the installation of the new fence has actually improved the area." The ruling was clearly erroneous and suggests that the court failed to consider evidence as to the number of trees cut down and their replacement value.

We have adopted the rule that when ornamental or shade trees are injured, the use made of the land should be considered, and the owner compensated by the damages representing the cost of replacement of the trees. *Revels v. Knighton*, 305 Ark. 109, 805 S.W.2d 649 (1991). Damages awarded for loss of a shade tree cannot include both replacement costs and consequential damages. *Id.*

Because the trial court appears to have relied entirely on the question of market value, we are unable to determine whether the court considered other factors besides the market value in assessing appellants' damages, including replacement value and the number of trees lost. Therefore, we reverse and remand.

We note that it appears uncontroverted that many of the trees were located in the boundary line. Other jurisdictions have held that owners of boundary line trees are considered tenants in common, and neither tenant possesses the right to destroy the commonly held property without consent of the other. *Holmberg v. Bergin*, 172 N.W.2d 739 (Minn. 1969); *see e.g.*, *Ridge v. Blaha*, 166 Ill. App.3d 662, 520 N.E.2d 980 (1988).

Reversed and remanded.

PITTMAN and CRABTREE, JJ., agree.

Peggy BRANSON v. DIRECTOR,
Arkansas Employment Security Department

E02-28 73 S.W.3d 616

DISSENTING OPINION ON DENIAL
OF MOTION TO FILE BELATED APPEAL

WENDELL L. GRIFFEN, Judge, dissenting. Arkansas Code Annotated section 11-10-529(a) (1987) provides that any party entitled to a decision of the Board of Review shall have twenty days from the date the decision is mailed to her last known address in which to request a judicial review thereof by filing in the Court of Appeals a petition for review of the decision. The Board of Review decision from which appellant seeks to

appeal was mailed on January 4, 2002. According to the statute, appellant's petition for review should have been filed in our court no later than January 24, 2002. The petition for review did not reach our court until January 25, 2002, twenty-one days after the Board of Review decision was mailed. It is well settled that the court of appeals has no authority to extend the deadline for filing a petition for review. *Wooten v. Daniels*, 271 Ark. 131, 607 S.W.2d 96 (1980).

Nevertheless, I cannot deny this motion for belated appeal in good conscience after considering the facts surrounding the untimely appeal. This appellant lives in North Little Rock, Arkansas. Our court is located in Little Rock, merely across the Arkansas River. According to appellant's motion, she mailed the petition for review at the postal distribution center on McCain Boulevard in North Little Rock at approximately 8:30 a.m. on January 22, 2002. The postmark supports appellant's assertion. It is marked 22 January 2002. However, appellant's mailing was not processed at the distribution center until January 24, 2002, two days later. *This petition for review arrived at our court on January 25, 2002, because the United States Postal Service did not do its job, not because appellant was dilatory.*

I do not know why the Postal Service cannot deliver a letter mailed from its North Little Rock distribution center to a Little Rock address in less than three days. I do not know why the Postal Service allowed appellant's mailing to languish for two days at the Distribution Center before delivering it to our court. I do not know who in the Postal Service is responsible for the two-day stay that appellant's mailing experienced at the Distribution Center. Neither does appellant. What is very plain to me, however, is that to slavishly follow our statute in the face of these facts produces a harsh result for this appellant when it is clear that her conduct was both timely and reasonable.

In *Springdale Farms v. Daniels*, 1 Ark. App. 89, 613 S.W.2d 117 (1981), our court held that an employer's appeal was timely despite the fact that it was filed after the permitted time for filing. In that case, the employer never received written notice of the determination from which its appeal was taken. In reversing the

decision by the Board of Review that denied the appeal as untimely, we reasoned that the fact that the notice was not received was a circumstance beyond the appellant employer's control. Granted, that case involved a different statute with a fifteen-day period prescribed for filing (Arkansas Statutes Annotated section 81-1107(d)(2) (Repl. 1976)). The statute involved in that case explicitly provided that an appeal could be considered as having been timely filed where the failure to file resulted from circumstances beyond the appellant's control. For some unknown reason, the statute that applies to the present case omits such language. The instant case involves an appeal by an employee. Yet, as in *Springdale Farms*, the fact that the petition for review was not received at our court within the prescribed filing period was a circumstance clearly beyond the employee's control.

Finally, I hope that the members of the Arkansas General Assembly will change Ark. Code Ann. § 11-10-529(a) so that its filing-time schedule is consistent with that prescribed by Ark. Code Ann. § 11-10-524(a). That statute has the same twenty-day period for filing appeals from determinations by the Employment Security Division to the appeal tribunal and from decisions by the appeal tribunal to the Board of Review. However, it also contains the following wording:

> *If mailed, an appeal shall be considered to have been filed as of the date of the postmark on the envelope. However, if it is determined by an appeals tribunal or the Board of Review that the appeal is not perfected within the twenty-day period as a result of circumstances beyond the appellant's control, the appeal may be considered as having been filed timely.*

(Emphasis added.) Appealing parties, the General Assembly, and our court cannot control whether the Postal Service will do its job. However, appellants should not lose their rights to judicial review because of postal inefficiency.

I respectfully dissent.

Bonnie K. WILLIAMS *v.* Sue WALKER

CA 01-1092 72 S.W.3d 131

Court of Appeals of Arkansas
Division IV
Opinion delivered April 10, 2002

Wilson & Valley, by: *E. Dion Wilson*, for appellant.

Walter A. Kendel, Jr., for appellee.

JOSEPHINE LINKER HART, Judge. A jury awarded appellee, Sue Walker, $2,700 in damages for medical expenses incurred after Walker, a passenger in a pick-up truck, was injured when the truck was struck in the rear by a car driven by appellant, Bonnie K. Williams. On appeal, appellant contends that the trial court erred in allowing appellee to present evidence of $2,934.60 in medical expenses because appellee did not lay an adequate foundation for the admission of her medical bills by presenting testimony from a physician or other medical expert establishing both the reasonableness and necessity of the medical expenses. We affirm.

Appellee testified that the rear impact caused injury to her back and also caused her ear to hit the side window. She was taken by ambulance to Helena Regional Medical Center where she was examined by a physician. X-rays were taken of her head and back, and she was given a shot for pain. After leaving the hospital, she continued to have pain in her neck and back. The next day, she went to see her family physician, who examined her head, back, and neck. The doctor took more x-rays, prescribed medication, and referred her to a third doctor, whom she saw the same day for physical therapy. Based on the doctor's advice, she continued to see him for physical therapy two to three times a week for two or three months afterwards. That doctor referred her to a doctor in Little Rock because she was having trouble with her head and ear. She was treated at an orthopedic clinic and University Hospital and again received x-rays and was given drops for her ear. She was also referred to a physician in Memphis, who read her x-rays. At trial, she introduced into evidence hospital, physician, and pharmacy bills totaling $2,943.60 that she testified were related to the accident.

Appellant argues that the trial court erred by allowing appellee to introduce into evidence the medical bills because

appellee did not lay an adequate foundation for the admission of her medical bills by presenting testimony from a physician or other medical expert establishing that the medical expenses were for treatment of injuries sustained in the accident and that the treatment and the expenses were both reasonable and necessary. This issue has been addressed by the appellate courts in this state on several occasions. In one recent opinion, the Arkansas Supreme Court stated that a person seeking recovery of medical expenses has the burden of proving the reasonableness and necessity of the expenses. *Avery v. Ward*, 326 Ark. 829, 833, 934 S.W.2d 516, 519 (1996). In *Avery*, the court, quoting with approval an earlier supreme court decision, stated that while the testimony of an injured party can provide a sufficient foundation for the introduction of medical expenses incurred, expert testimony would normally be required in certain circumstances. Those circumstances included instances where expenses were incurred for medical procedures performed months after the accident, where there is no indication that the patient was referred by an initial attending physician, and where the expenses do not appear to be related to the accident.

Though not cited by the parties and not discussed in *Avery*, we conclude that this issue is controlled by statute. Specifically, the statute provides as follow:

> (a) Upon the trial of any civil case involving injury, disease, or disability, the patient, a member of his family, or any other person responsible for the care of the patient shall be a competent witness to identify doctor bills, hospital bills, ambulance service bills, drug bills, and similar bills for expenses incurred in the treatment of the patient upon a showing by the witness that such bills were received from a licensed practicing physician, hospital, ambulance service, pharmacy, drug store, or supplier of therapeutic or orthopedic devices, and that such expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial.
>
> (b) Such items of evidence need not be identified by the person who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary.

Ark. Code Ann. § 16-46-107 (Repl. 1999). The statute provides that if a patient shows that she received medical bills from a provider of medical services and that such expenses were incurred in connection with the treatment of the injury that is the subject of the litigation, then she is considered a competent witness to identify the medical bills. Further, testimony from an expert witness regarding the reasonableness and necessity of medical expenses is not required.

In applying this statute to the facts presented here, we note that appellee, who was the patient, testified that she received the bills from providers of medical services and that the expenses were incurred as a result of the accident. Because appellee's testimony mirrored the statutory requirements, she was competent to testify regarding the medical expenses. Further, expert testimony was not required to establish that the charges were reasonable and necessary. The Arkansas Supreme Court has stated that it is within the trial judge's discretion to decide whether an injured party has laid a sufficient foundation to testify about the amount of certain medical expenditures. *Blissett v. Frisby*, 249 Ark. 235, 247-48, 458 SW.2d 735, 742 (1970). Given the evidence presented here, we cannot conclude that the trial court abused its discretion in permitting appellee to testify regarding the medical bills or in admitting them into evidence, as appellee's testimony met the requirements of the statute.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Debbie DANIELS *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 01-911 72 S.W.3d 128

Court of Appeals of Arkansas
Division III
Opinion delivered April 10, 2002

Kenneth A. Olsen, for appellant.

Thomas J. Pendowski, Public Employee Claims Division, for appellees.

JOHN E. JENNINGS, Judge. The appellant, Debbie Daniels, appeals from the Commission's order denying her claim for benefits based on a finding that the car accident in which she was injured occurred at a time when she was not performing employment services. Her argument on appeal is that the Commission's decision is not supported by substantial evidence. We affirm.

The appellant was employed by appellee in the Division of Children and Family Services as a Social Services Aide II. Her duties consisted of transporting foster-care clients and completing paperwork related to the travel, as well as putting narrative reports into a computer. An estimated eighty percent of her job involved travel. When transporting clients, she used her own vehicle and

was paid twenty-eight cents per mile. Appellant had access to a cellular phone provided by appellee when she traveled outside of Pulaski County. Although it was not required by appellee, appellant had also purchased her own pager so that she could be reached while she was out of the office. Appellant testified that she was expected to be available to receive calls to transport clients at any time of the day. She also said that there were days that she did not get a regular lunch break. Appellant testified that, if paged during lunch, she would answer the page to find out what she was needed to do. She said that mileage was not claimed for travel on lunch breaks, unless a call was received during lunch for her to transport a client. Then, mileage was charged from the place of the lunch break to the destination.

Appellant worked in the office on the morning of September 10, 1999. She signed out for lunch at about noon. Before going home, she stopped to visit a client, but the client was not at home. Appellant then proceeded to her house where she ate a quick lunch. On her way back to the office, she was injured in a car accident. Appellant testified that she had not received a page or a call during lunch and that she was just returning to the office after her lunch hour. She claimed no mileage for this excursion.

The Commission determined that appellant's claim was not compensable because she was not performing employment services at the time of the accident. Appellant contends that there is no substantial evidence to support the Commission's decision.

■ ■ In reviewing decisions from the Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). Substantial evidence exists if reasonable minds could reach the same conclusion. *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43, 47 S.W.3d 263 (2001). When a claim is denied because the claimant has failed to show an entitlement to compensation 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. *Clardy v. Medi-Homes LTC Serv. LLC*, 75 Ark. App. 156, 55 S.W.3d 791 (2001).

Arkansas Code Annotated section 11-9-102(4)(A) (Supp. 2001) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment." Section 11-9-102(4)(B)(iii) provides that the term "compensable injury" does not include an injury that was inflicted upon the employee at a time when employment services were not being performed. The statute does not define the phrase "in the course of employment" or the term "employment services." The supreme court has held, however, that we are to use the same test to determine whether an employee was performing "employment services" as is used when determining whether an employee was acting within "the course of employment." *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest, directly or indirectly. *Id. See also Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002).

An employee is generally said not to be acting within the course of employment when he or she is traveling to and from the workplace. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, the "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from work. *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

There are exceptions to this rule. For instance, in *Olsten Kimberly Quality Care v. Pettey, supra*, the court applied the "traveling men" exception where the employee's journey is considered part of the service or where travel is an integral part of the job. There, the court affirmed an award of benefits to a traveling nurse who was injured in a car accident en route to a client's home.

Conversely, in *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985), we reversed the Commission's finding of compensability. In that case, the claimant was a nurse who

worked in a mobile unit that traveled to various locations to collect blood donations. She was involved in a car accident one day on her way to meet the mobile unit at a designated location. We held that the going and coming rule precluded an award of benefits. *See also, e.g., Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000).

In the case at bar, the appellant was not engaged in the service of transporting clients when the accident occurred, nor had she received a call from appellee directing her to perform that service. She was thus not engaged in work-related travel. Instead, she was simply returning to the office after lunch when the accident took place. Because appellant was going to the workplace, we cannot conclude that she was carrying out the employer's purpose or advancing the employer's interest, either directly or indirectly, when the accident occurred. The Commission's decision displays a substantial basis for the denial of relief, and we affirm.

STROUD, C.J., and GRIFFEN, J., agree.

Ernest W. HENDRICKSON *v.* STATE of Arkansas, OFFICE of CHILD SUPPORT ENFORCEMENT *ex rel.* Tina D. Henderson (now Feast)

CA 01-714 72 S.W.3d 124

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered April 10, 2002

Law Offices of Charles M. Kester, PLC, by: *Charles M. Kester*, for appellant.

G. Keith Griffith, for appellee.

SAM BIRD, Judge. Ernest Hendrickson appeals from a judgment of the Benton County Chancery Court. He contends that the court erred in its determination of the amount of back child support that he owed by rejecting his defense of

equitable estoppel. Hendrickson further contends that the evidence supports the defense of equitable estoppel because it established (1) that Hendrickson timely paid support for four years until an agreement was made in June 1992 for appellee Tina Feast to forego child support in exchange for joint custody and the ability to claim their daughter as a dependent for income tax purposes; (2) that Hendrickson relied upon this agreement by providing food, clothes, housing, and other things directly to the children, by ceasing to claim their daughter as a dependent on his income taxes, by allowing Feast to live rent-free in a house he owned, and by foregoing modification of the child support award by court order; and (3) that Feast received the benefits of the agreement for nine years without objection. We reverse and remand for the trial court to consider the applicability of the doctrine of equitable estoppel.

Hendrickson and Feast were divorced by a decree filed on November 3, 1988, which incorporated a Child Custody, Separation, and Property Settlement agreement. Feast was awarded permanent primary custody of the two minor children, subject to Hendrickson's right of reasonable visitation. Child support payments were fixed at $500 per month. By agreement between the parties, Hendrickson actually had physical custody of the children for approximately fifty percent of the time, although the visitation provision of the decree was never modified. The amount of child support, however, was modified twice. In 1989, the parties filed a joint petition requesting a reduction of child support to $300 per month, which the court granted. In 1991, the court granted the parties' second joint petition to increase the child-support payment to $400 per month.

Testimony from Hendrickson, Rick Robertson, Feast's husband during the time at issue, and Jared, the parties' oldest child, reveals that around June 1992, Feast decided that since Hendrickson had begun keeping the children fifty percent of the time, Hendrickson should no longer pay child support. In consideration of this new arrangement, Hendrickson agreed to allow Feast to claim their daughter, Miranda, as a dependent for income-tax purposes. Thereafter, Hendrickson supported the children by buying clothing and other items for them, taking them on vaca-

tions, and providing housing and food for them fifty percent of the time, instead of paying support in cash through the court clerk. Although this arrangement continued for nine years, until July 2000, the agreement between Hendrickson and Feast was never the subject of a court order.

On October 9, 2000, the Office of Child Support Enforcement filed a Motion for Contempt and Ex Parte Motion for Show Cause Order, seeking $41,200 in delinquent child support from Hendrickson. In his defense, Hendrickson contended that he relied upon the parties' agreement that he was not to pay child support because the children were with him half the time and he supported them by providing housing, food, clothing, etc. In support of his position, Hendrickson pointed to the fact that Feast claimed their daughter as a dependent for tax purposes and made no demand that he pay any child support for nine years. Feast acknowledged that she had agreed in 1991 or 1992 that Hendrickson did not have to pay a $900 judgment for delinquent child support that had been entered against him, but she denied that she had agreed to waive payment of future support. However, she admitted claiming Miranda as a dependent for tax purposes.

At the conclusion of the hearing, the chancellor concluded that in the absence of the entry of a court order modifying the divorce decree in conformity with the agreement of the parties, the agreement was not enforceable, and that appellant was liable for the entire amount of the arrearage in child support according to the amount set forth in the decree. Therefore, the court held that, as of February 21, 2001, Hendrickson owed $42,000 in child-support arrearages. We think that the chancellor's refusal to consider the applicability of the doctrine of equitable estoppel was erroneous as a matter of law, and we reverse and remand for consideration of the applicability of that doctrine to this case.

In *Roark v. Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991), this court addressed the issue of vesting of child-support payments, stating:

> Once a child support payment falls due, it becomes vested and a debt due the payee. Arkansas has enacted statutes in order to comply with federal regulations and to insure that the State will

> be eligible for federal funding. These statutes provide that any decree, judgment, or order which contains a provision for payment of child support shall be a final judgment as to any installment or payment of money which has accrued. Furthermore the court may not set aside, alter, or modify any decree, judgment or order which has accrued unpaid support prior to the filing of the motion. While it appears that there is no exception to the prohibition against the remittance of unpaid child support, the commentary to the federal regulations which mandated our resulting State statutes, makes it clear that there are circumstances under which a court might decline to permit the enforcement of the child-support judgment.

Id. at 252, 809 S.W.2d at 824 (citations omitted). The commentary to the federal regulations, which mandated our Ark. Code Ann. §§ 9-12-314 and 9-14-234 states:

> [e]nforcement of child support judgments should be treated the same as enforcement of other judgments in the State, and a child support judgment would also be subject to the equitable defenses that apply to all other judgments. Thus, if the obligor presents to the court or administrative authority a basis for laches or an equitable estoppel defense, there may be circumstances under which the court or administrative authority will decline to permit enforcement of the child support judgment.

54 Fed. Reg. 15, 761 (April 19, 1989).

■■ The elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) she must intend that her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other's conduct to his detriment. *Barnes v. Morrow*, 73 Ark. App. 312, 43 S.W.3d 183 (2001); *Arkansas Dep't of Human Servs. v. Cameron*, 36 Ark. App. 105, 818 S.W.2d 591 (1991). This court has affirmed the use of equitable defenses to prevent the enforcement of child-support orders, including arrearages. *See Barnes v. Morrow, supra*; *Ramsey v. Ramsey*, 43 Ark. App. 91, 861 S.W.2d 313 (1993); *Arkansas Dep't of Human Servs. v. Cameron, supra; Roark v. Roark, supra.*

We applied the doctrine of equitable estoppel in *Ramsey v. Ramsey, supra.* There, Mrs. Ramsey dropped her son off at her daughter's house and did not provide any support for him when he was out of her home. Mr. Ramsey relied on this conduct to his detriment by not making child-support payments to Mrs. Ramsey. Mr. Ramsey instead provided support directly to his daughter and to his son when his son moved in with him. As in the case at bar, Mrs. Ramsey waited several years before trying to collect past-due child support.

In the case at bar, the chancellor simply refused to consider the applicability of the doctrine of equitable estoppel, relying, instead, on his mistaken understanding that unless the agreement of the parties was incorporated in a modification to the divorce decree, the agreement was not enforceable. We hold that, under the evidence presented, it was error for the chancellor to refuse to consider the applicability of the doctrine, and we remand this case to the trial court for that purpose.

We should emphasize that, by this decision, we do not hold that the doctrine of equitable estoppel should be applied in this case. That is a decision for the trial court. We hold only that, under the facts of this case, the trial court erred in refusing to consider the applicability of the doctrine.

Reversed and remanded for further proceedings consistent with this opinion.

NEAL, BAKER, and ROAF, JJ., agree.

PITTMAN and ROBBINS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. This is a child-support case. Appellant is the father and was ordered to pay child support. He did for some time but stopped and failed to pay for nine years. Child Support Enforcement sued him for arrears. Appellant testified that his failure to pay was pursuant to and in reliance on an agreement with his ex-wife, whereby the ex-wife agreed that he should no longer pay child support, and he agreed that she could have the tax deduction for one of the children and would care for and support the children one-half of the time. Appellant's ex-wife disputed this, stating that they had an

agreement but that it only extended to back child support, not future child support.

Appellant cites numerous unpublished cases in his brief and, while acknowledging that this is expressly forbidden by Ark. Sup. Ct. R. 5-2(d), argues that the rule is unconstitutional. This calls for a determination of the constitutional validity of the supreme court's rule, and I believe that we should have certified this case to the supreme court for them to decide the issue.

We have once before certified a case for resolution of this issue. Although it was accepted by the Arkansas Supreme Court, that court decided the case on other grounds, and the question remains unresolved. *See Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001).

The question in the present case is of the utmost public interest. Appellant's argument is based on reasons stated in Judge Richard Arnold's opinion in *Anastasoff v. United States,* 223 F.3d 898, *vacated* 235 F.3d 1054 (8th Cir. 2000), in which the court initially held that its rule denying precedential value to unpublished opinions violated the constitution, was contrary to practice that has existed throughout the development of the common law and extends back to Roman times, and corrupted the very essence of the judicial decision-making process by substituting the arbitrary discretion of judges for legal precedent.

I believe that the issue raised by appellant calls into question the integrity of the judicial process as practiced by our court, and should thus have been certified to the Arkansas Supreme Court pursuant to Ark. R. Sup. Ct. 1-2(d)(2). *See* Ark. R. Sup. Ct. 1-2(b)(1), (3), (4), (5), and (6).

My view regarding the need for certification precludes consideration of the merits. Nevertheless, I do not agree that the chancellor clearly erred in failing to find equitable estoppel to be applicable in this case. Here, despite appellant's assertions to the contrary, the evidence of the terms of the agreement and the extent of the consideration were in sharp dispute. I think that the judge could simply have found appellant, as the party most inter-

ested in the outcome, to be lacking in credibility, and that the evidence was sufficient to support the conclusion reached.

I respectfully dissent.

ROBBINS, J., joins in this dissent.

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Eddie REED *v.* SMITH STEEL, INC.

CA 01-987 78 S.W.3d 118

Court of Appeals of Arkansas
Division I
Opinion delivered April 10, 2002

[redacted]

Russell D. Berry, for appellant.

Gill Law Firm, PLC, by: *Brooks A. Gill*, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from the Desha County Circuit Court's judgment in the amount of $9,419.12 for appellee Smith Steel, Inc., against Claudia Clark and appellant Eddie Reed. Ms. Clark has not appealed from the judgment entered against her. Mr. Reed argues that the circuit judge, sitting as the finder of fact, erred in entering judgment against him and in awarding appellee its attorney's fees. We disagree.

Appellee manufactures and erects metal buildings and their components. Ms. Clark was employed by appellee as a bookkeeper and office administrator from 1992 to early 1997. During most of that time, she lived with appellant. While Ms. Clark was employed by appellee, appellant entered into three contracts with appellee for the erection of steel buildings. Contract 96-40, dated March 27, 1996, provided that appellee would build a farm shop for appellant. Ms. Clark signed this contract as the buyer, in her capacity as secretary for appellant's farm. On November 18, 1996, the parties entered into Contract 96-112, which provided that appellee would build appellant a metal garage. The parties entered into Contract 96-111 on November 19, 1996, for appellee's construction of a residence. Ms. Clark was heavily involved in all three projects. According to appellee, Ms. Clark acted as appellant's agent in the building process. Appellant, however, denies that she acted in any capacity other than as appellee's agent. After the parties entered into the contracts, Ms. Clark and appellant separated. However, Ms. Clark continued to work on the construction projects. Appellee became concerned about Ms. Clark's job performance, and in early 1997, Ms. Clark left its employ. Appellee learned that approximately $15,000 in cash was missing from the business, and as a result, Ms. Clark later pled guilty to felony

theft of property. Appellee also audited its accounts with appellant and concluded that appellant had received a substantial number of items for which he had not been billed during the construction of the three buildings.

Appellee then instituted this action against appellant and Ms. Clark, asserting claims based in contract, civil conspiracy, and quantum meruit. At trial, appellant was granted a directed verdict on the civil conspiracy claim. The circuit judge made the following findings of fact:

> There is no doubt in the Court's mind on the proof that was presented in this case that Claudia Clark was Eddie Reed's agent for the purpose of building these structures and contracting regarding the construction projects including the farm shop, house, and garage. It so happened, that she was also an agent of Smith Steel at the same time. Based on Restatement of Agency, Section 424, the Court finds that under the circumstances proven in this case, that Smith Steel is entitled to recover the value of items sold and furnished to Eddie Reed by Smith Steel and Claudia Clark at too low a price, from Eddie Reed. Although it has not been proven that Eddie Reed knew what Claudia Clark was doing under the facts and circumstances in this case, a person of reasonable diligence and inquiry should have known what she was doing and Mr. Reed had accepted the benefits of what she did. He is responsible for paying for them.

The circuit judge found that appellant owed appellee $3,787 for the residence under Contract 96-111. From the contract's base price of $13,286, he subtracted the unused labor cost of $2,400, added $600 for the use of appellee's equipment, added $1,075 for extra panels ordered by Ms. Clark that were not billed to appellant, added $1,316 for material that was installed at a heavier gauge than originally contemplated, and added $96 for a better grade of insulation. From the total of $12,973, the circuit judge subtracted appellant's payment of $9,186, leaving a balance of $3,787.

For the garage, Contract 96-112, the circuit judge found that appellant owed appellee $1,320. From the contract's base price of $4,089, he subtracted $492 for an industrial overhead door that was not installed, added $564 for a residential door that was

installed, and added $1,008 for additional roof and ridge material. From the total of $5,169, he subtracted appellant's payment of $3,849, leaving a balance of $1,320.

The circuit judge denied appellee's claim of $598 for doors and skylights in the farm shop, Contract 96-40, because appellee did not prove that they were installed. Under the heading "Miscellaneous Items," he awarded appellee $2,511.76 for additional farm shop items, stating:

> The purchase orders and tickets on these items are sufficiently related in time, color, and identity and method of operation to the farm shop project that Mr. Reed had going about this time that the Court finds they should be added to the judgment. In all likelihood they are in the farm shop and the Court finds that judgment should be granted for these items.

Under the "Miscellaneous Items" heading, the circuit judge awarded appellee $1,800.36 for additional insulation covered by a purchase order, signed by Ms. Clark, that was assigned to the house and garage contracts. The circuit judge found that these items were never included in a change order but that they were "evidently supplied" to the jobs. The circuit judge denied appellee's claim for trim screws and certain reject panels.

The circuit judge entered judgment for appellee in the amount of $9,419.12 against appellant and Ms. Clark, jointly and severally. He also awarded appellee costs of $125 and attorney's fees of $6,000.

Claudia Clark's Agency for Appellant

Appellant first argues that the circuit judge's finding that Ms. Clark acted as his agent is clearly against the preponderance of the evidence. The burden was on appellee to prove the existence of the agency relationship between Ms. Clark and appellant. *E.P. Dobson, Inc. v. Richard*, 17 Ark. App. 155, 705 S.W.2d 893 (1986). The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents to so act. *Undem v. First Nat'l Bank*, 46 Ark. App. 158, 879

S.W.2d 451 (1994). The two essential elements of an agency relationship are (1) that an agent have the authority to act for the principal, and (2) that the agent act on the principal's behalf and be subject to the principal's control. *Pledger v. Troll Book Clubs, Inc.*, 316 Ark. 195, 871 S.W.2d 389 (1994).

If the facts are in dispute, agency is a question of fact to be determined by the finder of fact. *E.P. Dobson, Inc. v. Richard, supra.* Agency can be proved by circumstantial evidence, if the facts and circumstances introduced into evidence are sufficient to induce in the mind of the finder of fact the belief that the relation did exist and that the agent was acting for the principal in the transaction involved. *Id.* The law makes no distinction between direct evidence of a fact and circumstances from which a fact can be inferred. *Muskogee Bridge Co. v. Stansell*, 311 Ark. 113, 842 S.W.2d 15 (1992). Mere relationship or family ties, unaccompanied by any other facts or circumstances, will not justify an inference of agency, but such relationship is entitled to great weight, when considered with other circumstances, as tending to establish the fact of agency. *Schuster's, Inc. v. Whitehead*, 291 Ark. 180, 722 S.W.2d 862 (1987); *Braley v. Arkhola Sand & Gravel Co.*, 203 Ark. 894, 159 S.W.2d 449 (1942).

Appellant testified at trial that Ms. Clark was not acting on his behalf. However, the circuit judge did not believe him, nor was he required to do so. *See Leinen v. Arkansas Dep't of Human Servs.*, 47 Ark. App. 156, 886 S.W.2d 895 (1994). On appellate review of a trial judge's decision regarding agency, we must give due regard to his opportunity to judge the credibility of the witnesses, and we will not set aside his findings unless they are clearly against the preponderance of the evidence. *E.P. Dobson, Inc. v. Richard, supra.*

We hold that appellee did establish that Ms. Clark acted as appellant's agent in constructing these buildings. Ernest Smith, appellee's president, testified that appellant had admitted to him that he had assigned Ms. Clark to manage the project. Additionally, appellee introduced testimony and exhibits demonstrating that Ms. Clark had, in managing the project, incurred debts on appellant's behalf for items that he accepted; that Ms. Clark had

hired appellee's erection crew to work for appellant on a non-work day; that Ms. Clark had frequently supervised the projects at the construction sites; and that Ms. Clark had dealt with many contractors and suppliers regarding all aspects of the construction on appellant's behalf. Further, during much of this time, appellant and Ms. Clark lived together. The circuit judge's finding that Ms. Clark was appellant's agent is not clearly against the preponderance of the evidence.

Appellant's Responsibility for Claudia Clark's Actions

In his second point, appellant contends that the circuit judge erred in basing his decision on the *Restatement (Second) of Agency* § 424 (1957). That section provides:

> Unless otherwise agreed, an agent employed to buy or to sell is subject to a duty to the principal, within the limits set by the principal's directions, to be loyal to the principal's interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal.

Comment g. to that section states:

> *Sale or purchase at improper price.* The violation of duty by the agent may be selling to a third person at too low a price something which he is otherwise authorized to sell. In this case, the principal is entitled to recover the thing in specie or its value from the purchaser, if the agent had no power to bind the principal. . . .
>
> . . . . If the principal recovers back the property from the transferee, or obtains compensation from him, the damages against the agent are diminished pro tanto.

Appellant argues that this section addresses only the duty of the agent to the seller/principal, and not the liability of one principal to another. We agree. Although the comment recognizes a purchaser's duty to pay for goods obtained at too low a price, we do not believe that section 424, in and of itself, provides the basis for appellant's liability to appellee. As discussed below, however, the circuit judge reached the correct result. We will

affirm the trial court's ruling if it is correct for any reason. *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989).

Appellant also argues that he cannot be held liable for Ms. Clark's actions in the absence of his knowledge of them. We disagree. It is a well established rule that a principal cannot ratify a portion of an unauthorized transaction, and not ratify the whole of it. *Kelley v. Sparks*, 193 Ark. 811, 102 S.W.2d 838 (1937). When a person acts for another, who accepts the fruits of her efforts, the latter must be deemed to have adopted the methods employed; he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the measures by which they were acquired. *Id.*

Taking a different approach, appellant asserts that, as a matter of law, Ms. Clark could not have been the agent of two principals and cites *Fennell v. Ross*, 289 Ark. 374, 711 S.W.2d 793 (1986), which involved the sale of real estate. In that case, the supreme court stated:

> The law of agency contemplates that an agent may serve only one principal with respect to any one transaction. *See* Rest. Agency (Second) §§ 387, 391, 394 (1957). We agree with the authorities and authors cited above who have reached the conclusion that in an MLS [multiple listing service] transaction like this one the selling agent is a subagent of the sellers.

289 Ark. at 379, 711 S.W.2d at 796. However, in *Whitten v. Harold Austin Construction, Inc.*, 55 Ark. App. 409, 935 S.W.2d 579 (1996), we held that the holding in *Fennell v. Ross* was limited to MLS cases and noted that selling agents in such cases are constrained by their legal duty to the seller and may only serve one principal per transaction.

Further, the supreme court recognized the dual-agency doctrine in *United States Fire Insurance Co. v. Montgomery*, 256 Ark. 1047, 511 S.W.2d 659 (1974), and in *City National Bank v. McCann*, 193 Ark. 967, 106 S.W.2d 195 (1937). That doctrine provides that an agent may represent both parties to a transaction with their knowledge and consent; however, without such knowledge and consent, an agent's contracts relating to the transaction

between his principals are voidable at the instance of either who may feel aggrieved, even though the principals are not in fact injured or the agent intends no wrong, or the other party acts in good faith. *Id.* In *Georgia Home Insurance Co. v. Bennett*, 134 Ark. 52, 60, 203 S.W. 279, 282 (1918), the supreme court explained:

> The principle that one can not serve two masters whose interests are antagonistic applies unless the authority so to do is given expressly or by necessary implication; otherwise, where the interests are conflicting, the agent acts only for the principal whose interests he promotes or in whose behalf he acts . . . .

See also 3 AM. JUR. 2D *Agency* §§ 241-42 (1986).

Therefore, appellant is wrong in asserting that an agent cannot, as a matter of law, represent two principals. The evidence soundly demonstrates that Ms. Clark was promoting appellant's, and not appellee's, interests in obtaining and failing to charge appellant for the additional items that he received during the construction of the buildings. Even though he may not have known of her wrongful acts, he accepted the benefits of those acts and was properly held to be responsible for them.

Delivery of the Materials

Appellant argues in his third point that appellee failed to establish that the materials were actually delivered to his property. The circuit judge's determination of this fact question will not be reversed unless it is clearly against the preponderance of the evidence. *E.P. Dobson, Inc. v. Richard, supra.* Appellee concedes that, for the most part, its evidence that such materials were delivered to appellant was circumstantial but argues that its evidence adequately supports the trial judge's findings. We agree. Circumstantial evidence does not directly prove the existence of a fact, but gives rise to a logical inference that it exists. *Ford Motor Co. v. Fish*, 233 Ark. 634, 346 S.W.2d 469 (1961). A fact is established by circumstantial evidence when its existence can be fairly and reasonably inferred from other facts proved in the case. *Id.* A well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence and frequently outweighs opposing direct testimony; any issue of fact in controversy can be estab-

lished by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions. *Pekin Wood Prods. Co. v. Mason*, 185 Ark. 166, 46 S.W.2d 798 (1932).

Ernest Smith testified that, when a customer changes his mind after signing a contract, a change order is prepared to add or delete the materials. He said that, after the customer approves the change order, the contract is considered to be modified. Mr. Smith stated that it was Ms. Clark's responsibility to see that all items that were delivered to the customer were billed to him.

Karen Butcher, Ms. Clark's replacement as appellee's bookkeeper, testified that, when she audited appellant's account, she found many items that appellee had clearly purchased for appellant's projects for which no change order was made and for which appellant was not billed. In her testimony, she thoroughly discussed each additional item claimed by appellee, and exhibits that supported her testimony were introduced into evidence. Ms. Butcher also testified that she saw Ms. Clark borrow one of appellee's trailers, have it loaded with merchandise, and leave with it while stating that she was going to the house site.

Additionally, the circuit judge's finding that certain items were "[i]n all likelihood . . . in the farm shop" is adequately supported by the circumstantial evidence. He stated: "The purchase orders and tickets on these items are sufficiently related in time, color, and identity and method of operation to the farm shop project that Mr. Reed had going about this time. . . ." Appellee presented evidence that, in purchase order number 67843, Ms. Clark ordered some reject panels, in the same color as that used by appellant, for $2,511.76. Ms. Butcher testified that, although these panels were not billed to anyone by appellee, they were missing from appellee's shop. She said that the panels had apparently left appellee's premises without being paid for during the time that appellant's project was under way.

We hold that the circuit judge's finding that appellant received these materials is not clearly against the preponderance of the evidence.

Attorney's Fees

Appellant argues in his fourth point on appeal that the circuit judge erred in awarding attorney's fees to appellee on the basis of Ark. Code Ann. § 16-22-308 (Repl. 1999). That statute provides for a reasonable attorney's fee in certain civil actions. It states:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs.

This statute does not provide for the recovery of attorney's fees in tort actions. *Mercedes-Benz Credit Corp. v. Morgan*, 312 Ark. 225, 850 S.W.2d 297 (1993). Where both contract and tort claims are advanced, an award of attorney's fees to the prevailing party is proper only when the action is based primarily in contract. *Meyer v. Riverdale Harbor Mun. Prop. Owners Improvement Dist. No. 1*, 58 Ark. App. 91, 947 S.W.2d 20 (1997). Appellant argues that the circuit judge based his award in tort because of Ms. Clark's tortious behavior. We disagree. The trial judge directed a verdict against appellee on its civil conspiracy claim, leaving appellee's contract and *quantum meruit* claims.

Appellee and appellant had three contracts for the construction of metal buildings, and the circuit judge found that the additional items for which he held appellant responsible were provided as additions to those contracts. Appellee presented testimony that the normal procedure for making an addition to a contract included the completion of a change order, which would be added to the total price of the contract; thus, the contract would be modified. It is logical to conclude that, as appellant's agent, Ms. Clark made modifications to the contracts for items that should have been billed to appellant. Appellee proved that appellant received these materials; therefore, appellant owes appellee for

them on the basis of the modified contracts. Accordingly, the circuit judge properly awarded attorney's fees to appellee.

Affirmed.

BIRD and ROAF, JJ., agree.

Larry WALKER *v.* STATE of Arkansas

CA CR 01-941 72 S.W.3d 517

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered April 10, 2002

Steven M. Harper, for appellant.

Mark Pryor, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant was convicted in a bench trial of possession of a controlled substance and possession of drug paraphernalia. He was sentenced to sixty months' imprisonment, with thirty-six months suspended. Appellant's sole contention on appeal is that the evidence of his constructive possession of the contraband was insufficient to sustain the convictions, and accordingly the trial court should have dismissed the charges against him. We agree.

On June 19, 2000, a vehicle driven by appellant entered into an area under surveillance by Faulkner County law enforcement. The area included a Quonset hut filled with a substantial amount of stolen property. The officers were instructed to stop any vehicle approaching or exiting the area and to identify any persons "that might have cause to be on the property." Appellant arrived about 1:30 a.m. driving a vehicle belonging to his passenger, Darlene Ables. Deputy Brocker testified that he stopped the vehicle and checked appellant's license. He noted that appellant had various charges (not warrants) including a weapons charge, and asked him and the passenger to exit the vehicle. A search of Ables's person revealed a clear plastic bag which later tested positive for methamphetamine residue. However, the search of appellant produced no evidence of contraband.

Subsequent to the searches of both individuals, a canine search of the vehicle was performed and the dog alerted under the driver's seat. A search under the seat revealed a pair of work gloves and inside one of the gloves was a ball of tinfoil containing methamphetamine. After the arrests, while being transported in the police car, Ables accused the officer of planting the drugs and the appellant joined her accusation. The appellant was tried before the court and was convicted of possession of a controlled substance and possession of drug paraphernalia (for the tinfoil).

■ ■ Walker challenges the trial court's denial of his motion to dismiss. A motion to dismiss, identical to a motion for a directed verdict in a jury trial, is a challenge to the sufficiency of the evidence. *Dye v. State,* 70 Ark. App. 329, 17 S.W.3d 505 (2000). On appeal of a denial of a motion for dismissal, the sufficiency of the evidence is tested to determine whether the verdict

is supported by substantial evidence, direct or circumstantial. *Peeler v. State,* 326 Ark. 423, 932 S.W.2d 432 (1999). Circumstantial evidence is substantial if it is of sufficient force to compel a conclusion beyond mere suspicion or conjecture. *Jones v. State,* 336 Ark. 191, 984 S.W.2d 432 (1999). Only the evidence supporting the guilty verdict need be considered, and that evidence is viewed in the light most favorable to the State. *Williams v. State,* 338 Ark. 97, 991 S.W.2d 565 (1999).

The cases are legion concerning constructive possession and joint possession of controlled substances. It is well settled that it is not necessary for the State to prove literal physical possession of drugs in order to prove possession. *Dodson v. State,* 341 Ark. 41, 14 S.W.3d 489 (2000) (citing *Mings v. State,* 318 Ark. 201, 884 S.W.2d 596 (1994)). Constructive possession requires the State to prove beyond a reasonable doubt that 1) the defendant exercised care, control, and management over the contraband, and 2) the accused knew the matter possessed was contraband. *Boston v. State,* 69 Ark. App. 155, 12 S.W.3d 245 (2000). Although constructive possession can be implied when the drugs are in the joint control of the accused and another, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. *Dodson, supra.* There must be some other factors linking the accused to the drugs:

> Other factors to be considered in cases involving automobiles occupied by more than one person are: 1) whether the contraband is in plain view; 2) whether the contraband is found with the accused's personal effects; 3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; 4) whether the accused is the owner of the automobile, or exercises dominion or control over it; and, 5) whether the accused acted suspiciously before or during the arrest.

Mings, supra at 207, 884 S.W.2d at 600.

Although factors three and four were present in this case, neither of these factors established that appellant had knowledge of the presence of the contraband without resorting to speculation or conjecture. Each of the remaining *Mings* factors (plain view, whether the contraband is found in the accused's personal effects,

and suspicious acts of accused) indicate that the accused had direct knowledge of the presence of the contraband.

While the *Mings* factors offer guidance for our court in analyzing constructive possession cases, the mere presence of some of these enumerated factors does not relieve our obligation to determine whether a nexus between the accused and the contraband has been established. The link between the accused and the drugs must be sufficient to raise a reasonable inference of knowledge of the contraband. In *Boston, supra,* we reversed a conviction where the contraband was found in a suitcase in the trunk of appellant's car where it could not be shown that he had knowledge of the contents of the suitcase. Similarly, in *Miller v. State,* 68 Ark. App. 332, 6 S.W.3d 812 (1999), we affirmed a conviction where (although none of the five *Mings* factors were apparent) the strong odor of burning marijuana was sufficient to establish that the appellant had knowledge of the drug, and concluded that it is the knowledge of the existence of the contraband that provides substantial evidence of constructive possession. *Id.*

Knowledge of the presence of the contraband is a well-established element of constructive possession which has been developed better in premises cases than automobile cases. In *Franklin v. State,* 60 Ark. App. 198, 962 S.W.2d 370 (1998), we reversed a conviction based on constructive possession where joint occupancy of a house was at issue. After analyzing the evidence the State offered, which allegedly linked appellant to the drugs, we found it to "fall short of demonstrating the degree of connection to the contraband or *knowledge of its presence.*" *Id.* at 203, 962 S.W.2d at 375 (emphasis added).

In the case at bar, appellant was in Darlene Ables's car, and methamphetamine was found on her person and not on appellant. Additionally, the officer testified that appellant was cooperative and did not act suspiciously. The State offered only two links between appellant and the contraband: 1) that the glove was found on appellant's side of the vehicle; and 2) that appellant was the driver of the automobile. Neither of these raise a reasonable inference that appellant had knowledge of the presence of the contraband. Therefore, there was no substantial evidence to sup-

port a finding of constructive possession, and we reverse appellant's convictions and dismiss the charges against him.

Reversed and dismissed.

HART, BIRD, GRIFFEN, NEAL, and BAKER, JJ., agree.

STROUD, C.J., PITTMAN, and JENNINGS, JJ., dissent.

JOHN F. STROUD, JR., Chief Judge, dissenting. I would affirm appellant's convictions because I believe that, viewing the evidence in the light most favorable to the State, as we must, there is substantial evidence to support the convictions.

In *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000), our supreme court, citing *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994) stated:

> It is not necessary for the State to prove literal physical possession of drugs in order to prove possession. Possession of drugs can be proved by constructive possession. Although constructive possession can be implied when the drugs are in the joint control of the accused and another, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. There must be *some other factor* linking the accused to the drugs:
>
>> Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion or control over it; and (5) whether the accused acted suspiciously before or during the arrest.

341 Ark. at 47, 14 S.W.3d at 493 (citations omitted) (emphasis added). I agree with the majority that in the present case, only factors three and four are present. However, there is no set number of factors that are required to be present in order to link a defendant to the contraband. Furthermore, this list of factors to be considered is not an exhaustive one. In addition to the five factors listed above, our supreme court has also considered the improbability that anyone other than the occupants of the vehicle

placed the contraband in the vehicle, and the improbable nature of the accused's explanation for his journey. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995).

In this case, appellant and Ables drove up to a Quonset hut that was filled with stolen merchandise at 1:30 in the morning. Appellant's stated reason for being in Mount Vernon was that he was going to Ables's mother's house to spend the night and to help start a garden and clean the yard. He said that when he missed the driveway, Ables told him to go on up to the Quonset hut because she knew some girl that was there and she wanted to see if she was home. Appellant said that he could not understand why Ables would tell the police that they were at the Quonset hut to see Dan because they had heard someone had been arrested. Appellant, who admitted that he had previous felony drug convictions, testified that he told Ables that she needed to clean her car out because he knew that she had been "convicted of crystal meth." He denied knowing that the gloves were in the car and said that when he got in the car, it appeared to have been picked up. However, decisions regarding the credibility of witnesses are for the trier of fact, and the trier of fact is not required to believe any witness's testimony, especially the testimony of the accused since he is the person most interested in the outcome of the trial. *Hickson v. State*, 50 Ark. App. 185, 901 S.W.2d 868 (1995).

In my opinion, there is substantial evidence to support appellant's convictions. Appellant was driving the car, the drugs were found under his seat, and when asked, he gave an improbable explanation as to why he was at a secured crime scene at 1:30 in the morning.

I dissent, and I am authorized to state that Judges PITTMAN and JENNINGS join in this dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I join in Chief Judge STROUD's dissent. I write only to point out one additional problem with the majority opinion.

The majority appears to rely heavily upon the idea that the car belonged to appellant's passenger; the majority opinion states the proposition as fact more than once. In concluding that the

evidence was insufficient to support a finding that appellant constructively possessed the methamphetamine found under the seat of a car that appellant was driving, the majority emphasizes that "appellant was in Darlene Ables's car, and [other] methamphetamine was found on her person and not on appellant." However, the only evidence that the car belonged to Ms. Ables is found in appellant's own testimony.

This case is unquestionably governed by the substantial evidence standard of review. That standard includes as an integral part the rule that we view the evidence in the light most favorable to the appellee, in this case the State. Among other things, viewing the evidence in the light most favorable to the State means that we consider only that evidence that tends to support the verdict and that we do not weigh it against evidence favorable to the appellant. *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001); *Smith v. State*, 337 Ark. 239, 988 S.W.2d 492 (1999); *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). Nor do we pass on the credibility of the witnesses; that duty is left to the trier of fact. *Ford v. State*, 75 Ark. App. 126, 55 S.W.3d 315 (2001); *Hickson v. State*, 50 Ark. App. 185, 901 S.W.2d 868 (1995). The trier of fact is not required to believe any witness's testimony, especially that of the accused since he is the person most interested in the outcome of the trial. *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *Hickson v. State, supra.* By accepting appellant's testimony regarding ownership of the car as true, the majority has failed to view the evidence in the light most favorable to the State and has misapplied this court's standard of review.[1]

[1] For the reasons stated in Judge Stroud's dissent, my opinion that appellant's conviction is supported by substantial evidence would not change even were I to assume that the car belonged to Ms. Ables. However, to the extent that the majority relies upon such ownership for its decision to reverse, that reliance is misplaced.

Rosetta Marie E. DAVIS *v.* STATE of Arkansas

CA CR 01-509 72 S.W.3d 121

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered April 10, 2002

[redacted]

Alvin Schay, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. Appellant Rosetta Davis was convicted of aggravated robbery by a jury in Independence County Circuit Court. She was sentenced to twenty-three

years in the Arkansas Department of Correction to be served consecutively with a sentence she was already serving. On appeal, appellant argues that the trial court committed reversible error by failing to grant her motions for directed verdict. We affirm.

The facts giving rise to appellant's conviction are as follows. On the evening of September 8, 1999, Tammy Sue Mansfield was working as a cashier at Dugger's Grocery Store. That night, she worked alone from 6:00 until closing at 9:00. Between 9:15 and 9:30, Ms. Mansfield set the alarm, locked the door, and walked to her vehicle. Ms. Mansfield testified that at that point, a man wearing a mask and camouflage clothing and carrying a gun appeared in front of the car. She testified that the gun was approximately a foot long. The man carrying the gun was later determined to be Doug Looney. He pointed the gun at her and forced her out of the vehicle. The two struggled, and Ms. Mansfield pulled off his mask, only seeing the back of his head. The man grabbed her purse and ran. Ms. Mansfield testified that the man hit her in the head three times during the scuffle.

Testimony showed that earlier in the evening, appellant and Looney visited Anita and Tim Ferrier. Anita testified that while Looney was visiting her home, he was wearing jeans and a t-shirt not camouflage clothing. She also stated that there was no evidence of a gun on Looney's person that night. Anita further testified that although she did not know exactly what time appellant and Looney left her house, she estimated that it was around 9:30. Tim testified that Looney was wearing jeans and a t-shirt that night, and that the house was about six miles from Dugger's Grocery. Testimony from Sergeant Jonathon Deeter also showed that when he arrived on the scene at Dugger's store, Lieutenant Ferguson asked him to check the highway for anyone that might be walking along the road. As he was doing so, he saw a parked car on a dirt road off the highway without its lights or engine on; the dirt road where the car was parked was approximately 100 or 200 yards from the store. When he approached the car, appellant was sitting alone inside the car. When the officers asked her what she was doing, she told them that she was turning around. She also stated that she had just left a friend's house. Officer Huss testified that appellant was given her *Miranda* warnings, and she agreed to

talk to the officer. She told Officer Huss that she was out driving that evening and she was just taking a break. When initially asked if she had been with anyone that evening, she told them no. She admitted to going to the Ferrier's home earlier that evening to get some money that someone owed her, and she told the officer that she had not seen Looney since last summer. However, she later stated that Looney had accompanied her to the Ferrier's home that evening. She also agreed to let the officers search the car. The officers found men's clothing and a bank statement with Looney's name on it. She stated that she had dropped off Looney along a highway earlier that evening.

Deputy Price testified that his police dog traced a scent from the store to along the driver's side door where appellant was found. However, the dog went from near the driver's side door, back into a dry creek bed, and then off into a wooded area. Deputy Price stated that other officers were near the car and the trail could have been contaminated.

At the close of the State's case, appellant moved for a directed verdict arguing that the State had failed to provide any evidence that there was an agreement showing assistance or that she had aided or abetted in the commission of the crime. Appellant also moved for a directed verdict arguing that there was a lack of evidence connecting her with the gun or that there was any agreement by her for the gun to be used. Appellant's counsel also made a motion for a directed verdict because she was denied the right to cross examine the co-defendant. The motions for directed verdict were denied. At the close of all the evidence, appellant's counsel renewed the motions for directed verdict, all were again denied. This appeal followed.

■ ■ Directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Hutcherson v. State*, 74 Ark. App. 72, 47 S.W.3d 267 (2001) (citing *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000)). When the sufficiency of the evidence is challenged, the appellate court considers only evidence that supports the guilty verdict, and the test is whether there is substantial evidence to support the verdict. *Id.* Evidence, whether direct or circumstantial, is substantial if it is of sufficient

force that it would compel a conclusion one way or the other without recourse to speculation and conjecture. *Rose v. State*, 72 Ark. App. 175, 35 S.W.3d 365 (2000). This court will affirm if there is any substantial evidence to support the verdict. *Id.*

Appellant argues that the trial court committed reversible error by failing to grant her motions for directed verdict. Specifically, appellant argues that the State produced no evidence proving that she was an accomplice to the co-defendant, Doug Looney, who was convicted of aggravated robbery. Arkansas law states that an accomplice is one who, with the purpose of promoting or facilitating the commission of an offense, either solicits, advises, encourages, or coerces another person to commit the offense, 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 prevent the commission of the offense. Ark. Code Ann. § 5-2-403 (Repl. 1997). One's status as an accomplice ordinarily is a mixed question of law and fact. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). Further, the presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime in a manner suggestive of joint participation are relevant factors in determining the connection of an accomplice with the crime. *Harrell v. State*, 331 Ark. 232, 962 S.W.2d 325 (1998).

In this case, the evidence showed that when police approached the car and found appellant, she was unable to explain why she was sitting in the parked car, on a dark dirt road, within walking distance of Dugger's Store, without the car lights on or the engine running. Moreover, there was evidence that appellant failed to tell the truth about having not seen Looney since last summer when she was questioned by police officers, as there was testimony placing the two together at the Ferrier's home earlier that evening. Upon appellant's consent to search the car, the officers found men's clothing, from which the jury could infer that Looney changed from his jeans and t-shirt into the camouflage clothing in the car before the robbery, and a bank statement with Looney's name on it. The police dog traced a scent from

Dugger's Store to near the driver's side door of the car where appellant was found. Furthermore, the victim testified that during the robbery Looney was carrying a gun that was approximately a foot long. There was no evidence of a gun when Looney was seen earlier in the evening; thus, the inference was created that when he left the car to commit the robbery he took the gun from inside the car. Moreover, the jury could have infered that appellant was aware that Looney took the gun with him to commit the robbery. Our supreme court has stated that the jury is not required to lay aside its common sense in evaluating the ordinary affairs of life, and it may infer a defendant's guilt from improbable explanations of incriminating conduct. *See Branscum v. State*, 345 Ark. 21, 43 S.W.3d 148 (2001). Likewise, circumstantial evidence can provide the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001). Here the evidence supports the inference that appellant was Looney's accomplice to the aggravated robbery. Clearly, the jury could conclude from the facts in evidence that Looney was in possession of a firearm when he left the vehicle to conduct the robbery and that appellant knew his purpose and was awaiting his return when she was approached by police officers. Thus, we hold that there was sufficient evidence to convict appellant of aggravated robbery.

ROBBINS, BIRD, GRIFFEN, CRABTREE, and ROAF, JJ., agree.

Robert BOXLEY *v.* Kathy S. BOXLEY

CA 01-1141 73 S.W.3d 19

Court of Appeals of Arkansas
Division III
Opinion delivered April 17, 2002

[redacted]

Mike Everett, for appellant.

No response.

JOHN F. STROUD, JR., Chief Judge. Robert Boxley has appealed from a divorce decree entered by the Poinsett County Circuit Court in July 2001. He challenges the judge's allocation of the marital debts and his refusal to confirm a commissioner's sale of a portion of the marital personal property. We affirm the judge's decision.

Robert married appellee, Kathy Boxley, in November 1986. Their daughter, Jennifer Paige, was born in December 1989. During most of the marriage, Kathy did not work outside of the home, and Robert supported the family by working as a farm and

gin assistant manager. Robert has a college degree. Kathy does not have a high school diploma or a GED. At the time of trial, Robert's bi-weekly salary was $1,615.38, with a net take-home pay of $1,141.79. At the trial, Kathy testified that she cleaned one house per week, earning $35, and that she was looking for full-time employment.

The parties' only marital debts were owed to Robert's mother, Ruby Jean Boxley. Between 1991 and 1994, Ruby loaned them $17,000 to remodel their house. In return, Kathy and Robert signed a handwritten, notarized document that stated: "We Robert and Lisa Kathleen Boxley owe Ruby Jean Boxley $17,000 on the property at 204 Woody. This is a promissory note to be paid at the time this house is sold. . . ." Ruby later paid their mortgagee $23,603 to release their mortgage. She also loaned them $24,486 for additional remodeling on their house and an additional $16,000 for a truck. Robert and Kathy did not sign any documents evidencing these debts. Robert and his mother both testified that these payments were loans that both parties had agreed to repay, not gifts. According to Ruby, the parties owed her $64,789 at the time of trial. Kathy admitted at trial that she had agreed to pay the $17,000 but denied having agreed to repay the other amounts.

The judge issued a letter opinion on June 6, 2001, which he supplemented on June 14, 2001. He found that Robert was entitled to a divorce on the grounds of general indignities and gave the parties joint custody of their daughter with Kathy to have primary physical custody of her. He ordered Robert to pay $100 per week child support and to provide health insurance for the child.

The judge ordered most of the parties' marital personal property to be sold at public auction and the proceeds to be split equally. He awarded Kathy a one-half interest in that portion of Robert's retirement account that had accrued during the marriage. The judge also permitted Robert to keep his non-marital property, which primarily consisted of a large amount of furniture. The judge directed that the parties' real property be converted to a tenancy in common and awarded Kathy possession of the house so long as she has primary physical custody of the child.

He directed that her right to possession will terminate upon the child's reaching majority or graduating from high school, whichever is later; Kathy's remarriage; Kathy's permitting a non-relative to live there; or Kathy's abandonment of the house. He directed Kathy to be responsible for ordinary maintenance and that the parties equally bear the cost of substantial repairs. He ordered Robert to pay for insurance and taxes on the house and to receive credit for one-half of such payments and for one-half of the monthly rental value of the house when it is sold.

In his June 6, 2001, letter opinion, the judge stated:

> 8. Marital debts: At issue are alleged marital debts which [appellant] contends are owed by both parties to Ruby Jean Boxley for monies advanced by Ruby Jean Boxley towards the pay-off of the marital home, for improvements to the marital home, and for the purchase/pay-off of the aforesaid marital vehicle. In this connection, the Court finds/concludes that on August 1, 1994, both parties executed an evidence of indebtedness to Ruby Jean Boxley for the sum of $17,000.00, which the Court determines to be a lien (as between the parties) on the aforesaid marital residence in the sum of $17,000.00, which lien is to be satisfied/paid at such time as the marital residence is sold prior to dividing the net proceeds of such marital residence sale between the parties. As relates to remaining monies advanced by Ruby Jean Boxley to the parties, the Court concludes that the parties are indebted to Ruby Jean Boxley as an unsecured creditor in the sum of $22,989.50 each. ($82,089.00 total advances less $17,000.00 secured to be paid when house is sold equals $65,089.00 less $19,110.00 payments made equals $45,979.00 divided by two equals $22,989.50 each).

In his June 14, 2001, letter opinion, the judge added:

> 6. REQUEST ON BEHALF OF RUBY JEAN BOXLEY FOR JUDGMENT: The Court declines to render an advisory Opinion as relates to the claim of Ruby Jean Boxley against either of the parties of this case. Ruby Jean Boxley is not a party to this case, has not intervened and this Court will not at this time, in this case, permit an intervention or render judgment in favor of Ruby Jean Boxley except as relates to the establishment of a lien on $17,000.00 of the proceeds of the ultimate sale of the marital home which has been previously addressed.

A commissioner's sale of thirteen items of marital personal property, including the parties' truck, was held on September 10, 2001. At that sale, Ruby bid a total of $8,450 for twelve of the items, including the truck. Her bid read as follows: "As payment of the bid price, she releases Robert Boxley and Kathy Boxley from paying her the sum bid, that to be deducted from the sums Robert Boxley and Kathy S. Boxley owe her, as adjudicated on the Court's decree of May 1, 2001." On September 20, 2001, the judge refused to confirm the sale, stating: "The Court does not consider the bid of Ruby Jean Boxley to conform to Arkansas law concerning purchasing property at public sale. The Court would not confirm the sale without the consent and approval of [appellee]."

Marital Debts

Appellant does not challenge any of the judge's findings of fact, including his finding that, in addition to the $17,000 represented by the promissory note, the parties owe Ruby $45,979. In appellant's first point on appeal, he argues that the judge erred in dividing this debt equally between the parties because, as the only party with an income, he will surely be required to pay the entire debt, which appellant asserts is inequitable.

Although the division of marital debt is not addressed in Arkansas Code Annotated § 9-12-315 (Repl. 2002), the judge has authority to consider the allocation of debt in a divorce case. *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993); *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). In fact, this court has stated that an allocation of the parties' debt is an essential item to be resolved in a divorce dispute. *Ellis v. Ellis*, 75 Ark. App. 173, 57 S.W.3d 220 (2001); *Warren v. Warren*, 33 Ark. App. 63, 800 S.W.2d 730 (1990). A judge's decision to allocate debt in a particular manner is a question of fact and will not be reversed on appeal unless clearly erroneous. *Anderson v. Anderson, supra.*

Further, the allocation of marital debt must be considered in the context of the distribution of all of the parties' property. *See Hackett v. Hackett*, 278 Ark. 82, 643 S.W.2d 560 (1982). Arkansas Code Annotated section 9-12-315 does not compel

mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). The statute vests the judge with a measure of flexibility and broad powers in apportioning property, nonmarital as well as marital, in order to achieve an equitable distribution; the critical inquiry is how the total assets are divided. *Id.* The overriding purpose of the property division statute is to enable the court to make a division that is fair and equitable under the circumstances. *Canady v. Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986); *Smith v. Smith*, 32 Ark. App. 175, 798 S.W.2d 443 (1990). The judge's findings as to the circumstances warranting the property division will not be reversed unless they are clearly erroneous. *Dunavant v. Dunavant*, 66 Ark. App. 1, 986 S.W.2d 880 (1999). We will not substitute our judgment on appeal as to what exact interest each party should have; we will decide only whether the order is clearly wrong. *Pinkston v. Pinkston*, 278 Ark. 233, 644 S.W.2d 930 (1983).

A judge's determination that debts should be allocated between the parties in a divorce case on the basis of their relative ability to pay is not a decision that is clearly erroneous. *Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510 (1983); *Ellis v. Ellis, supra; Anderson v. Anderson, supra.* Given the disparity between Kathy's and Robert's earning powers, the allocation of debt in this case was not clearly erroneous. We affirm the judge's decision to hold the parties equally responsible for the debt to Ruby.

Appellant also contends that the judge erred in finding each party separately liable for only one-half of the debt to Ruby because he had no authority to determine the validity of a debt to a third party who is not a party to the lawsuit. Appellant is correct that a judge has no authority to decide the validity of an obligation to a third party who is not a party to the divorce. *Arnold v. Spears*, 343 Ark. 517, 36 S.W.3d 346 (2001); *Grace v. Grace*, 326 Ark. 312, 930 S.W.2d 362 (1996); *see also Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989). Third parties may be brought into, or intervene in, divorce actions for the purpose of clearing or determining the rights of the spouses in specific properties. *Copeland v. Copeland*, 2 Ark. App. 55, 616

S.W.2d 773 (1981). As the judge noted, Ruby did not intervene in this action. Therefore, the judge had authority only to determine Robert's and Kathy's obligations, as to each other, in regard to this debt. We stress, however, that the judge did have the authority to allocate responsibility for this debt as between the parties.

Appellant also argues that this court should modify the decree to make all of the debt to Ruby, instead of only the $17,000, payable out of the proceeds of the sale of the house. We disagree. Although she could have required that she be granted a lien on the house simultaneously with making the loans or she could have intervened in this action to protect her interests, Ruby did neither. Additionally, Robert would have a claim against Kathy for any amount over his one-half share of that debt that he might be required to pay to Ruby and could seek the judge's assistance in making Kathy meet her obligations under the decree.

The Commissioner's Sale

In his second point, appellant argues that the judge erred in refusing to confirm the commissioner's sale at which Ruby sought to purchase twelve items by granting the parties a partial release of her debt "which the court adjudicated that the parties owed the creditor." Appellant also contends that it would be a waste of money and judicial effort to require Ruby to adjudicate this debt in a separate lawsuit. Arkansas Code Annotated section 16-66-413(a) (1987) provides that bids at commissioners' sales may be made on three months' credit, upon the purchaser's giving of "bond and good security." In subsection (b), that statute provides for the making of such bids in cash. It is clear, therefore, that Ruby, as a creditor seeking to bid with a credit against her unadjudicated claim, did not meet either provision of this statute. We affirm the judge's refusal to confirm the commissioner's sale.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Rene Charles TAYLOR *v.* STATE of Arkansas

CA CR 01-748 72 S.W.3d 882

Court of Appeals of Arkansas
Division II
Opinion delivered April 17, 2002

[redacted]

Ed Webb & Associates, by: *Lynn D. Lisk*, for appellant.

Mark Pryor, Att'y Gen., by: *Valerie L. Kelly*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Rene Charles Taylor, was convicted by a Pope County jury of battery in the first degree. He was sentenced to serve two years in the Arkansas Department of Correction, with an additional three years suspended based upon the conditions that he live a law-abid-

ing life and obtain counseling, and he was fined $15,000. On appeal, he argues that the evidence is insufficient to sustain the verdict; that the trial court erred in refusing to instruct the jury on lesser-included offenses; and that the trial court erred by not declaring a mistrial or admonishing the jury based on comments made during the State's closing arguments. We affirm.

Although Taylor's state of mind was contested at trial in his motions for directed verdict, the other facts pertaining to the case were not seriously disputed except in Taylor's testimony during the sentencing phase of the trial, which is not pertinent to the issues being appealed. The testimony at trial revealed that in January 2000, Dr. Carroll Don Johnson and his wife had rented a trailer from Taylor and his wife while remodeling their newly purchased home. Johnson borrowed Taylor's backhoe to remove some stumps from his property, and he agreed that in return, he would purchase a swing set for Taylor's daughter. Johnson also agreed to allow Taylor to use his condominium in Florida at some time. While Johnson had the backhoe, the windshield was broken when the exhaust pipe fell off the backhoe and struck the glass, and Johnson offered to repair the windshield.

In April 2000, Johnson and his wife moved out of Taylor's property. On April 30, 2000, Johnson went to see Taylor about the repair of the backhoe windshield and the refund of his $250 rental deposit. When Johnson arrived at Taylor's house, Taylor presented him with a document detailing all of their past "agreements" and asked Johnson to sign it. Johnson refused to sign the formal document, stating that he thought the two of them had a gentleman's agreement. A disagreement ensued, and Taylor told Johnson to get out of his house. When Johnson got up to leave, Taylor rushed toward him and began pushing him; Johnson pushed Taylor back and hit him in the face with his fist, bloodying Taylor's nose. When Johnson turned to leave again, Taylor jumped on his back and pinned him to the table; Johnson "nose-dived" Taylor off his back and onto the floor, hitting Taylor so hard in the back of the head that he broke his hand. Johnson pinned Taylor to the ground; Taylor said, "I give"; and Johnson, after inquiring if Taylor was okay, got up yet again to leave. Johnson saw Taylor go to a cabinet, reach up, and come down with a

pistol. Johnson ran past Taylor, pushing him in the back as he passed, and ran out the door. Johnson ran around the corner of the garage yelling for help, and he started running across a field toward Taylor's in-laws' house. When Johnson turned around, he saw Taylor at the end of the garage with a .22 rifle, and he saw three rounds "dance around his feet" as he ran. Johnson said there was a pause, and then there were four "bams." He said that he saw one shot go in and come out of his leg, and another shot hit him in the buttocks. He continued to run until he was hit in his right side and was knocked down. Johnson said that he heard Taylor yell that he was going to kill him, and that he feared for his life. The wife of one man who heard Johnson's calls for help called 911, and another man came to Johnson's aid, helping him to move behind a house for cover and calling for an ambulance. Johnson was taken to the hospital, where he underwent exploratory surgery to rule out any internal injuries.

Although Taylor raises the issue of the sufficiency of the evidence as his last point on appeal, double jeopardy considerations require that we consider sufficiency of the evidence before the other points raised. *Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000). A directed-verdict motion is a challenge to the sufficiency of the evidence. *Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998). When the sufficiency of the evidence is challenged, we consider only the evidence that supports the verdict, viewing the evidence in the light most favorable to the State. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000). The test is whether there is substantial evidence to support the verdict, which is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.*

Arkansas Code Annotated section 5-13-201(a)(7) (Repl. 1997) provides that a person commits battery in the first degree if, "with the purpose of causing physical injury to another person he causes physical injury to any person by means of a firearm." Taylor argues on appeal that the evidence presented by the State did not show that he was trying to cause physical injury to Johnson when he shot at him with the .22 rifle. He contends that "merely firing the rifle in [Johnson's] direction is insufficient" to prove that he purposefully shot Johnson, and he points to the fact that he

did not use his larger .380 handgun as evidence that he did not have the purpose to injure Johnson.

This argument is unavailing. A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (Repl. 1997). Intent can seldom be proven by direct evidence and must usually be inferred from the circumstances surrounding the crime; because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his acts. *Brown v. State*, 54 Ark. App. 44, 924 S.W.2d 251 (1996). The jury is allowed to draw upon its own common knowledge and experience to infer intent from the circumstances. *Id.* Here, the evidence showed that Taylor fired multiple shots at Johnson, there was a pause during the time that the shots were fired, and Johnson was then hit by three bullets. When Taylor began firing a gun at Johnson, it was presumed that he intended the natural and probable consequence of his actions, which was that he shot Johnson. There is sufficient evidence to support Taylor's first-degree battery conviction.

Taylor's next argument is that the trial court erred by refusing to give the jury his proffered instructions for second- and third-degree battery, contending that those offenses were lesser-included offenses of battery in the first degree. Arkansas Code Annotated section 5-1-110(b)(1)-(3) (Repl. 1997) states that an offense must meet one of the following criteria to be considered a lesser-included offense: (1) it is established by proof of the same or less than all the elements of the greater offense; or (2) it consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or (3) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.[1]

[1] Until recently our caselaw required that an offense must meet three criteria to be considered a lesser-included offense: (1) it must be established by proof of the same or less than all the elements of the greater offense; (2) it must be of the same generic class as the greater offense; and (3) it must differ from the greater offense based upon the degree of risk

A trial court's decision to exclude an instruction on a lesser-included offense will be affirmed only if there is no rational basis for giving the instruction. *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001).

At trial, the judge instructed the jury that to convict Taylor of first-degree battery, the State must have proved beyond a reasonable doubt that Taylor, with the purpose of causing physical injury to Johnson, caused physical injury to Johnson by means of a firearm. Taylor's proffered instruction on battery in the second degree stated:

> If you have a reasonable doubt of the guilt of Rene Taylor on the charge of Battery in the First Degree you will then consider the charge of Battery in the Second Degree. To sustain this charge the State must prove beyond a reasonable doubt that:
>
> Rene Taylor, with the purpose of causing physical injury to Carroll Johnson, caused serious physical injury to Carroll Johnson.
> OR
> Rene Taylor recklessly caused serious physical injury to Carroll Johnson by means of a deadly weapon.
>
> Definitions
>
> "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.
>
> "Physical injury" means the impairment of physical condition or the infliction of substantial pain.

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to persons or property or upon grades of intent or culpability. *See Goodwin v. State*, 342 Ark. 161, 27 S.W.3d 397 (2000); *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999). The State noted in its brief that in *Goodwin, supra,* our supreme court recognized that there was a possible inconsistency between the case law and the provisions of Ark. Code Ann. § 5-1-110 (Repl. 1997) because the statute speaks in the disjunctive while the case law interprets the statute to read in the conjunctive. However, in *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002), an opinion handed down on March 14, 2002, our supreme court addressed that inconsistency, holding that "the determination of when an offense is included in another offense depends on whether it meets one of the three tests set out in section 5-1-110(b)(3)." 347 Ark. at 921, 69 S.W.3d at 435.

> "Deadly weapon" means a firearm or anything manifestly designed, made, adapted for the purpose of inflicting death or serious physical injury or anything that in the manner of its use or intended use is capable of causing death or serious physical injury.
>
> "Purpose" — A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.
>
> "Recklessly" — A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results 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 defendant's situation.

The proposed instruction for second-degree battery does not describe a lesser-included offense under Ark. Code Ann. § 5-1-110(b)(1) because both alternatives given in the proffered instruction require an additional element, *serious* physical injury, that is not required in the first-degree battery instruction that was given, which only requires physical injury when the injury is caused by a firearm. Likewise, the proposed instruction is neither a lesser-included offense under subsection (b)(2) because the offense is not an attempt offense, nor is it a lesser-included offense under subsection (b)(3) because it does not differ from the offense charged with respect to less serious injury to the victim to establish its commission.

Taylor's proffered instruction on battery in the third degree stated:

> If you have a reasonable doubt of the guilt of Rene Taylor on the charge of Battery in the First Degree and Battery in the Second Degree you will then consider the charge of Battery in the Third Degree. To sustain this charge the State must prove beyond a reasonable doubt:
>
> That Rene Taylor, with the purpose of causing physical injury to Carroll Johnson, caused physical injury to Carroll Johnson.
> OR

That Rene Taylor recklessly caused physical injury to Carroll Johnson.
OR
That Rene Taylor negligently caused physical injury to Carroll Johnson by means of a deadly weapon.

Definitions

"Physical injury" means the impairment of physical condition or the infliction of substantial pain.

"Deadly weapon" means a firearm or anything manifestly designed, made, adapted for the purpose of inflicting death or serious physical injury or anything that in the manner of its use or intended use is capable of causing death or serious physical injury.

"Purpose" — A person acts with purpose with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

"Recklessly" — A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results 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 defendant's situation.

"Negligently" — The term "negligently" as used in this criminal case means more than it does in civil cases. To prove negligence in a criminal case the State must show that defendant should have been aware of a substantial and unjustifiable risk that the injury would occur. The risk must have been of such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.

It is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by the slightest evidence; however, a trial court may refuse to offer a jury instruction on an included offense when there is no rational basis for a verdict acquitting the defendant of the charged offense and convicting him of the included offense. *Atkinson v. State*, 347

Ark. 336, 64 S.W.3d 259 (2002). Where there is no evidence tending to disprove one of the elements of the larger offense, the trial court is not required to give an instruction on a lesser one; if after viewing the facts in the light most favorable to appellant, no rational basis for a verdict acquitting him of the greater offense and convicting him of the lesser one can be found, it is not error for the trial court to refuse to give an instruction on the lesser-included offense. *Stultz v. State*, 20 Ark. App. 90, 724 S.W.2d 189 (1987).

In the present case, there is no rational basis to give an instruction on the basis that Taylor recklessly or negligently caused physical injury to Johnson. Even viewing it in the light most favorable to Taylor, the evidence shows that he fired multiple shots at Johnson, pausing between some of the shots, and that Johnson was hit by three bullets. When Taylor began firing a gun at Johnson, it was presumed that he intended the natural and probable consequence of his actions, which was that he shoot Johnson.

The remaining alternative in the proffered instruction for third-degree battery is the same as the instruction that was given to the jury for battery in the first degree, with the exception that the first-degree battery required the use of a firearm. Although this alternative would be considered a lesser-included offense under Ark. Code Ann. § 5-1-110(b)(1), we hold that the trial judge did not err in refusing this portion of the proffered third-degree battery instruction based upon our supreme court's holding in *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000). In that case, the supreme court held that while it is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence, it is not error for the court to refuse or fail to instruct on the lesser offense where the evidence clearly shows that the defendant is either guilty of the greater offense charged or innocent. *Id.*

In the present case, the only difference in the instruction for first-degree battery and that portion of the proffered instruction for third-degree battery that states "that Rene Taylor, with the purpose of causing physical injury to Carroll Johnson, caused physical injury to Carroll Johnson," is the fact that for bat-

tery in the first degree, the injury must be caused by a firearm. There was no dispute that Johnson's injuries were caused by a firearm shot by Taylor; therefore, Taylor was either guilty of battery in the first degree or he was innocent. For these reasons, there was no error in refusing to give the proffered instruction for third-degree battery.

Taylor's last argument is that the trial judge erred in not granting a mistrial or admonishing the jury when the prosecutor, during the State's closing argument, stated, "He [Taylor] never said it was an accident." Taylor requested a mistrial, arguing that the State had commented on his right not to testify. The State contended that he was referring to the statements made by Taylor in his call to the 911 operator. The motion for mistrial was denied, and the trial judge also declined to admonish the jury, stating that he did not believe that the statement deserved an admonishment. On appeal, Taylor argues that the prosecutor's statement was an impermissible comment on his Fifth Amendment right not to testify.

The declaration of a mistrial is an extreme remedy and should only be granted when justice cannot be served by continuing the trial; mistrial is proper only where the error is beyond repair and cannot be corrected by any curative relief. *Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001). The circuit court has wide discretion in granting or denying a motion for a mistrial, and we will not disturb the trial court's decision absent an abuse of discretion or manifest prejudice to the movant. *Id.*

In support of his argument, Taylor cites *Doyle v. Ohio*, 426 U.S. 610 (1976), for the proposition that the prosecution in a criminal case is prohibited from commenting on a defendant's post-arrest, post-Miranda warning silence. However, a review of the State's closing argument indicates that the incident to which the prosecutor referred, Taylor's call to and subsequent conversation with the 911 operator, occurred prior to his arrest and before he was Mirandized. Therefore, *Doyle* is not applicable in the instant case. *See Cagle v. State*, 68 Ark. App. 248, 6 S.W.3d 801 (1999). Furthermore, we find that the comment by the prosecutor during closing argument was not a comment on appellant's

right not to testify and that appellant's interpretation ignores the context in which the comment was made. The trial judge did not err in denying Taylor's motion for a mistrial and for an admonition to the jury.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Anthony Arnez NELSON *v.* STATE of Arkansas

CA CR 01-840 72 S.W.3d 526

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered April 17, 2002

William R. Simpson, Jr., Deputy Public Defender; *Don Thompson*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Anthony Arnez Nelson, was sentenced to a total of fifty years' imprisonment after a Pulaski County jury found him guilty of aggravated robbery, theft of property, and kidnapping. On appeal, he contends that he was not timely brought to trial, and therefore, his convictions should be reversed and dismissed. We agree with his argument and reverse and dismiss.

On November 13, 1999, appellant was arrested in Conway, Faulkner County, for fleeing, robbery, terroristic threatening, and theft by receiving. The arrest for theft by receiving, however, was based on allegations that a car, a 1995 Chrysler LeBaron owned by Fiona Mitchell, had been stolen in Little Rock. In fact, Conway police stopped and arrested appellant for theft by receiving after determining that the vehicle appellant was driving was reported stolen by Little Rock police. On November 15, 1999, Conway police notified Little Rock authorities that they had arrested appellant on various charges, including the theft-by-receiving charge, and he was held for Pulaski County.

Appellant was convicted of the Faulkner County charges on May 12, 2000, and sentenced to a total of fifty years' imprisonment. He was arrested that same day by Pulaski County authorities for the crimes of aggravated robbery, kidnapping, and theft of property, all crimes that allegedly occurred on November 13, 1999, in Pulaski County; an arrest warrant had been issued for appellant on November 22, 1999. On June 13, 2000, an information was filed in Pulaski County charging appellant by information with the three crimes. The information stated that the victim of the aggravated robbery and the kidnapping was Teresa Witt. The property alleged to have been stolen was the vehicle owned by Fiona Mitchell.

On January 17, 2001, appellant filed a motion to dismiss the charges filed in Pulaski County. He contended that the State was required to bring him to trial on these charges within one year from the date of his arrest, and further, his arrest in Faulkner County on the charge of theft by receiving on November 13, 1999, began the running of the time for speedy trial. Thus, he concluded that the time for bringing him to trial had passed. The

trial court denied the motion, and appellant was ultimately convicted of all three counts. However, in sentencing appellant, the court calculated appellant's jail-time credit from the November 13, 1999, arrest. Appellant raises this same argument on appeal.

In determining whether appellant was timely brought to trial on the Pulaski County charge, we observe that

> [a]ny defendant charged . . . in circuit court and held to bail . . . 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.

Ark. R. Crim. P. 28.1(c). Further, we note that the time for trial begins to run

> from the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody . . . to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date of arrest. . . .

Ark. R. Crim. P. 28.2(a). The periods excluded in computing the time for trial, however, include the period of delay "resulting from other proceedings concerning the defendant, including . . . trials of other charges against the defendant." Ark. R. Crim. P. 28.3(a).

Appellant remained in the custody of Faulkner County after his arrest on November 13, 1999, until his conviction and then remained in the custody of Pulaski County, so we must determine whether from November 13, 1999, appellant was "continuously held in custody. . . to answer for the *same offense* or an offense based on the *same conduct* or arising from the *same criminal episode*." (emphasis added). If so, then the time for trial on the Pulaski County charges commenced running from his November 13, 1999, arrest in Faulkner County on the charge of theft by receiving, and the time for trial on the Pulaski County charges would have run by the time appellant filed his speedy-trial motion on January 17, 2001.

The evidence presented at the Pulaski County trial revealed that on November 13, 1999, Witt was sitting in the passenger seat of Mitchell's car at an E-Z Mart in Little Rock. The driver, Mitchell, went into the store, leaving the engine running and the driver's side door unlocked. Appellant then entered the car and told Witt that he would shoot her if she yelled or moved. As he started backing the car out onto the street, Witt jumped out of the car, and appellant continued backing into the street and drove away.

These acts formed the basis for the Pulaski County convictions for aggravated robbery, kidnapping, and theft of property and the basis of the arrest on the theft-by-receiving charge in Faulkner County. In our view, the basis of both the theft-by-receiving arrest in Faulkner County and the theft-of-property conviction in Pulaski County was appellant's "control" of Mitchell's car. *See* Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2001) (requiring proof of "unauthorized control" of the property to establish the crime of theft of property); Ark. Code Ann. § 5-36-106(b) (Repl. 1997)(defining "receiving" in part as "control"). Thus, we conclude that appellant's conduct that led to the theft-by-receiving arrest in Faulkner County was the "same offense" or "same conduct" that was the basis of his conviction for theft of property in Pulaski County.

We further note that our statutes provide that "[a] criminal charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the indictment or information," lending further support for the conclusion that both the arrest and the conviction involved the "same offense" or "same conduct." *See* Ark. Code Ann. § 5-36-102(a)(2) (Repl. 1997). We also note that "[w]hen the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense." Ark. Code Ann. § 5-1-110(a) (Repl. 1997). Appellant's acts in Pulaski County would have supported either a theft-of-property or a theft-by-receiving charge. Because the arrest and the conviction involved the "same offense" or "same conduct," we conclude that the time for trial on the Pulaski County charge

of theft of property began to run from the date he was arrested for theft by receiving in Faulkner County, November, 13, 1999, and that he was untimely brought to trial on the theft-of-property charge. Consequently, we must reverse and dismiss his conviction for theft of property.

We also conclude that the aggravated-robbery conviction and the kidnapping conviction arose from the "same criminal episode" as the theft-by-receiving arrest, and thus, the time for trial on these charges also ran from November 13, 1999, the date of appellant's arrest in Faulkner County on the theft-by-receiving charge. In support of this conclusion, we observe that in *Johnson v. State*, 337 Ark. 477, 485-86, 989 S.W.2d 525, 529 (1999), the Arkansas Supreme Court concluded that for the purposes of Rule 28.2, a capital murder conviction and a conspiracy to commit aggravated robbery were the "same criminal episode" when the victim was murdered during the aggravated robbery. Further, the Arkansas Supreme Court has defined the same or a single criminal episode broadly when interpreting that phrase in the area of joinder and severance of offenses. For instance, in *Ruiz v. State*, 273 Ark. 94, 97-99, 617 S.W.2d 6, 8-9 (1981), the court concluded that two murders in separate areas at different times were part of the same criminal episode. *See also McMillan v. Donovan*, 301 Ark. 393, 784 S.W.2d 752 (1990)(involving first-degree murder and conspiracy to commit theft of property); *Parker v. State*, 292 Ark. 421, 433, 731 S.W.2d 756, 762 (1987)(involving two counts of capital felony murder, two counts of attempted first-degree murder, two counts of burglary, one count of kidnapping, and one count of attempted capital murder); *Johnson v. State*, 290 Ark. 166, 168-69, 717 S.W.2d 805, 806-07 (1986)(involving the raping of two persons); *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986)(involving a rape and kidnapping in separate counties); *Jones v. State*, 282 Ark. 56, 59, 665 S.W.2d 876, 878-79 (1984)(involving the first-degree battery of one person and the aggravated robbery of another). Given that the aggravated robbery and kidnapping occurred at the same time as the theft of property, we conclude that they were all part of the same criminal episode.

Finally, the State notes that the periods excluded in computing the time for trial include the period of delay "resulting from

other proceedings concerning the defendant, including . . . trials of other charges against the defendant." Ark. R. Crim. P. 28.3(a). The State argues that even if the time for trial began to run on November 13, 1999, then pursuant to Rule 28.3(a), the time required for appellant's trial on the Faulkner County charges should be excluded in calculating the time for trial on his Pulaski County charges. In support of its argument, the State cites two cases from the Arkansas Supreme Court that excluded for speedy-trial purposes a period of delay resulting from trial on other charges where the defendant was held in a foreign jurisdiction. The court stated that the period of delay in such cases "commences when the accused is taken to the foreign jurisdiction and ends when the trial in that jurisdiction is complete and the accused becomes available for extradition." *Patterson v. State*, 318 Ark. 358, 361-62, 885 S.W.2d 667, 668-69 (1994)(citing *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988)).

■ ■ We note, however, that "[o]nce the defendant has made a *prima facie* showing of a violation of Rule 28.1, the State bears the burden of showing that there has been no violation, in that some of the time comprising the one-year period provided in the rule is to be excluded. . . ." *Burmingham v. State*, 346 Ark. 78, 83-84, 57 S.W.3d 118, 122 (2001). While it is apparent that appellant was being held in Faulkner County for trial on the Faulkner County charges, the State failed to present any evidence that the period of delay in bringing him to trial on the Pulaski County charges *resulted* from his trial on the Faulkner County charges. Nothing in the record suggests that appellant's Pulaski County trial could not have taken place even though he was awaiting trial on the Faulkner County charges. It is the State's burden to establish excludable periods, and without the presentation of any evidence on this issue, we cannot conclude that this period of time was excludable. *See Reed v. State*, 35 Ark. App. 161, 167, 814 S.W.2d 560, 563 (1991)(holding that a failure to have speedy trial on certain charges did not *result* from a trial on other charges in the same county and court).

Consequently, we reverse and dismiss appellant's convictions.

Reversed and dismissed.

GRIFFEN, NEAL, and BAKER, JJ., agree.

JENNINGS and BIRD, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. In this case, the majority holds that appellant's arrest in Faulkner County triggered the speedy-trial limitations period for the charges brought in Pulaski County. I disagree with that conclusion because appellant's Faulkner County arrest was not based on the same offense or conduct and was not part of the same criminal episode as the events which took place in Pulaski County. Even if the majority were correct that the limitations period began with appellant's arrest in Faulkner County, the time during which appellant remained in jail awaiting trial on the charges in Faulkner County is excludable from the speedy-trial limitations period pertaining to the Pulaski County charges.

On November 13, 1999, Fiona Mitchell and Teresa Witt were traveling in Mitchell's Chrysler LeBaron when they stopped at an E-Z Mart in Little Rock. Mitchell went into the store, leaving Witt in the car with the motor running and the doors unlocked. Appellant got into the driver's seat of Mitchell's car and told Witt that he would shoot her if she yelled or moved. As appellant was backing the car out the parking space, Witt escaped by jumping out of the car. The appellant continued to drive away, and the women then called the police. This incident formed the basis for the charges of aggravated robbery, kidnapping, and theft of property in Pulaski County from which this appeal arises.

Near midnight on that same evening, Patrolman Bobby Harvill of the Conway Police Department received a report about a robbery at a local Blockbuster store and was told that the suspect was driving a white Chrysler LeBaron. Harvill was also advised that the vehicle and its tags matched the description of one that had been reported stolen out of Little Rock. Harvill spotted the described vehicle and stopped it after a brief chase. He arrested appellant for robbery and terroristic threatening, based on the events that took place at Blockbuster, and fleeing. Because appellant committed these offenses while driving a stolen vehicle, theft by receiving was included as an additional reason for the arrest. Harvill testified, however, that he did not know when the vehicle

had been stolen and that he did not know anything about the circumstances surrounding its theft.

David Murphy, another police officer in Conway, presented the case to the local prosecuting attorney. As a result, appellant was charged the next day in Faulkner County with robbery, terroristic threatening, and fleeing. A charge of theft by receiving was not pursued by the authorities in Faulkner County, and Officer Murphy testified that appellant was held in the Faulkner County jail pending trial only on the charged offenses.

Appellant was arrested on May 12, 2000, on the Pulaski County charges of aggravated robbery, kidnapping, and theft of property, immediately after his conviction on the charges in Faulkner County. The information was filed on June 13, 2000.

Rule 28.2(a) of the Rules of Criminal Procedure provides that the time for trial commences to run:

> (a) from the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody . . . *to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode*, then the time for trial shall commence running from the date of arrest.

The issue in this case involves determining when the appellant was arrested for the purpose of calculating the speedy-trial period for the Pulaski County offenses. The majority concludes that the appellant's arrest on November 13, 1999, for theft by receiving in Faulkner County marked the beginning of the limitations period. I submit that appellant's arrest on May 12, 2000, was the date the speedy-trial period began to run.

The majority holds that the Faulkner County arrest began the limitations period because theft by receiving and theft of property are the same offense or involve the same conduct. The two offenses, however, are separate and distinct, and proscribe different criminal behavior. Theft of property is committed by a person who knowingly takes or exercises unauthorized control over the property of another with the purpose of depriving the owner of the property. Ark. Code Ann. § 5-36-103 (Supp. 2001). Theft by receiving is committed by a person who receives, retains or

disposes of stolen property, knowing that it was stolen or having good reason to believe it was stolen. Ark. Code Ann. § 5-36-106 (Repl. 1997).

Arkansas Code Annotated section 5-36-102(a)(2) (Repl. 1997) does provide that a "charge of theft may be supported by evidence that it was committed in any manner that would be theft," but that does not mean that the offenses are considered to be the same. In *Coleman v. State*, 327 Ark. 381, 938 S.W.2d 845 (1997), the appellant argued that, based on the theft consolidation statute, an amendment to the theft statute also amended the theft-by-receiving statute. In rejecting that argument, the supreme court noted that the purpose of the theft consolidation statute was to prevent a defendant from escaping conviction of one offense by proving he was actually guilty of another. The court recognized that the crimes of theft and theft by receiving remained different offenses.

The Pulaski County theft offense was based on the actual taking of the car. The theft-by-receiving arrest was based on the possession of a stolen car. I am unwilling to say that the appellant's arrest for theft by receiving constitutes an arrest for the offense of theft of property. They are not the same offense, and they do not involve the same conduct.

Nor can I agree with the majority's opinion that the arrest in Faulkner County arose out of the same criminal episode that occurred in Pulaski County. The incident in Pulaski County involved the aggravated robbery and kidnapping of Ms. Witt, and the theft of Ms. Mitchell's vehicle. Appellant was arrested in Faulkner County based on the unrelated events that transpired at a Blockbuster store and the act of fleeing to evade arrest. Theft by receiving was included as a basis for the arrest only because appellant was driving a stolen vehicle at the time he committed the other offenses. The events for which appellant was arrested in Faulkner County simply did not arise out of the same criminal episode as the acts committed in Pulaski County.

Cases dealing with the issues of joinder and severance do not, in my view, have much relevance to speedy-trial questions. Under Rule 21.1, two or more offenses may be joined in a single

information when the offenses are of the same or similar character or are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. As noted in the Commentary, the rule is "uncommonly broad." The language of the joinder rule is far different and much broader than that found in Rule 28.2, and the application of the joinder rule is based on considerations that are not present in determining, as we are here, the precise date on which an accused is deemed to have been arrested.

It is true, as the majority states, that the authorities in Pulaski County placed a "hold" on the appellant while he was jailed in Faulkner County. But this does not start the running of the speedy-trial period for charges brought against an accused who is incarcerated for an unrelated offense. *See Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998); *Washington v. State*, 31 Ark. App. 62, 787 S.W.2d 254 (1990).

Even if I could agree that the speedy-trial period began to run on November 13, 1999, I believe that the time between that date and May 12, 2000, the date the trial in Faulkner County was completed and appellant became available for transfer to Pulaski County, should be excluded. Rule 28.3(a) provides an exclusion for the period of delay resulting from other proceedings concerning the defendant, including "trials of other charges against the defendant." The supreme court has applied this exclusion when a defendant has been tried on charges in a foreign jurisdiction before being tried on charges in Arkansas. *See Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994); *Allen v. State*, 294 Ark. 209, 742 S.W.2d 886 (1988). However, the rule contains no language limiting its application to trials in "foreign" jurisdictions. In this case, the trials were situated in different counties, and thus involved different jurisdictions. I can see no basis for rejecting the exclusion here. *Reed v. State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991), is distinguishable; there we declined to apply the exclusion because the defendant was charged with two sets of crimes in the same county and same court. Here, the appellant was charged with two sets of crimes in two different counties.

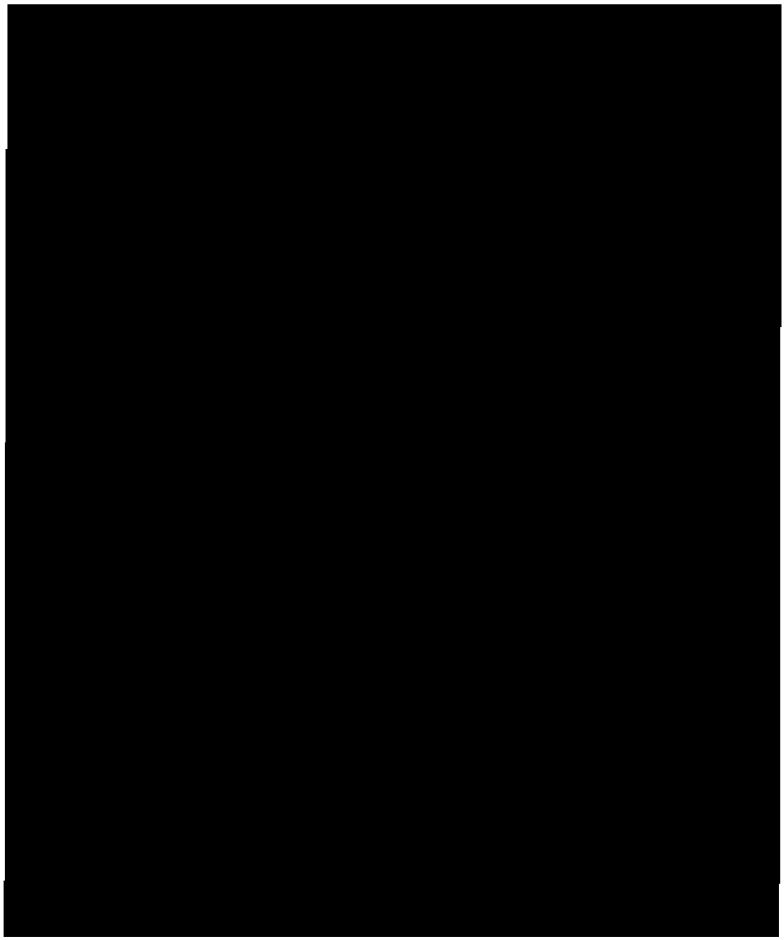
I respectfully dissent.

BIRD, J., joins.

WAL-MART STORES, INC., and Claims Management, Inc.
v. Jerrell WESTBROOK

CA 01-1282 72 S.W.3d 889

Court of Appeals of Arkansas
Division IV
Opinion delivered April 17, 2002



Roberts, Roberts & Russell, P.A., by: *Michael Lee Roberts* and *J.R. Wildman*, for appellants.

Philip M. Wilson, for appellee.

JOSEPHINE LINKER HART, Judge. Appellants appeal from an order of the Arkansas Workers' Compensation Commission granting appellee temporary total disability benefits and permanent partial disability benefits. Appellants argue that there was not substantial evidence to establish that appellee (i) suffered a right shoulder injury arising out of and in the course of his employment; (ii) was entitled to temporary total disability benefits; and (iii) was entitled to permanent partial disability benefits associated with a 3% permanent impairment rating. We affirm.

On September 3, 1999, appellee, as an employee of appellant Wal-Mart, was restacking pallets of bicycles when a pallet fell, hitting appellee's right shoulder and pinning him against another pallet. Appellee testified that he suffered extreme pain, but after being pulled out from underneath the bicycles, he worked for most of the day. The next day, his shoulder was sore, but he continued to work. He testified that following the accident he notified his supervisor.

Appellee further testified that he continued to work from September 1999, until he was excused from work, according to medical records, on February 7, 2000. Appellee stated that, following the accident, his pain worsened, and he suffered numbness in the mornings and could not lift his arm, and in January 2000, he went to see a company physician about his shoulder. The doctor referred him to another physician, Jay M. Lipke. Dr. Lipke performed surgery on appellee, according to medical records, on

February 14, 2000, and released him to return to work for limited or light duty on April 24, 2000. Appellee acknowledged that, after the September accident, he continued to work and receive a salary from his other job as a minister, even though from February to April the associate pastors performed the "major parts" of his job. He also testified that the only previous injury to his right shoulder was a fall on ice that occurred seventeen or eighteen years earlier, and he had never had any pain or soreness in his right shoulder prior to September 3, 1999.

According to a letter dated January 25, 2000, Dr. Lipke noted that appellee had "a large cyst over the right AC joint and pain with forward elevation and abduction to 90 degrees," with x-rays showing "some degenerative changes of the right AC joint and no other abnormalities." The doctor aspirated the cyst and opined that "his symptoms are related to AC osteoarthritis" and possibly could have "underlying rotator cuff pathology." An MRI was performed on February 3, 2000, which revealed (i) a "[l]arge chronic full thickness tear of the rotator cuff. . . with atrophy of all muscles involving the rotator cuff"; (ii) a "[s]uperior subluxation of the humeral head such that it abuts the undersurface of the acromion"; and (iii) a "[h]ypertropic changes of the AC joint with a[n] associated ganglion cyst superior to the AC joint."

Dr. Lipke, in his notes of February 7, 2000, stated that appellee's "MRI reveals evidence of a large chronic rotator cuff tear with proximal migration of the humeral head," as well as a cyst "that emanates from the AC joint." The doctor opined that appellee "would benefit from surgical intervention" as an attempt to "restore rotator cuff function if at all possible." He also indicated that during the surgery he would "excise the cyst" and "resect the distal clavicle." Surgery was performed on February 14, 2000, and in the postoperative report, Dr. Lipke noted that appellee had a "chronic irreparable rotator cuff tear" and "acromioclavicular osteoarthritis with synovial cyst."

Dr. Lipke subsequently determined that, within a reasonable degree of medical certainty, appellee had "60% [permanent partial impairment] to the upper extremity" with "30% [to the] body as a whole," that the impairment was based on objective data, but

that the work injury was not the "major cause" of appellee's impairment. In a letter to appellee dated April 20, 2000, Dr. Lipke stated, "I don't feel the work-related injury is the major cause of your impairment." He concluded that "[b]ased on the size and chronicity (long standing nature) of the tear, I think this is something that happened prior to the work[-]related injury."

On May 12, 2000, in response to a letter from appellants' attorney, Dr. Lipke stated that "[t]he 30% rating to the body as a whole is based on a 50% impairment to the right upper extremity as a whole."[1] He further concluded that "[t]he 50% impairment to the extremity as a whole is based on loss of strength and motion due to the chronic rotator cuff tear." On June 6, 2000, in response to a letter from appellee's attorney, Dr. Lipke stated that appellee's problems began with the work-related injury and that this injury "aggravated a pre-existing problem with the right shoulder (chronic rotator cuff tear)." Dr. Lipke further stated that, prior to the surgery, he felt that the work-related injury was the entire cause of appellee's shoulder problems. He noted, however, that at the time of the surgery, appellee had a chronic rotator cuff tear that predated the work-related injury. He further stated:

> I feel the work[-]related injury was an aggravating factor, or the straw that broke the camel's back and this has added to his underlying shoulder problem. With this in mind, I would say the work[-]related injury added 5% impairment to his shoulder. In other words, 45% of his impairment would be related to the pre-existing injury and 5% could be assigned to the work[-]related injury.

On August 21, 2000, in response to a letter from appellants' attorney, Dr. Lipke stated that of the 50% impairment, 10% was caused by the work-related injury and 90% by the pre-existing condition.

On appeal to the Commission from the administrative law judge's award of benefits to appellee, the Commission concluded that appellee established by a preponderance of the evidence that

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[1] We recognize that the 50% impairment figure differs from the 60% impairment figure mentioned above. The discrepancy, however, was not a basis for appeal.

his "right shoulder difficulties were aggravated by, and thus causally related to, his employment." The Commission further concluded that because Dr. Lipke opined that the compensable injury accounted for 10% of appellee's total impairment, "the compensable injury is the major cause of 3% of claimant's total permanent impairment to the body as a whole," and consequently, the Commission awarded permanent partial disability benefits on that basis. The concurring opinion noted that a 5% impairment to the right upper extremity is equivalent to a 3% impairment to the body as a whole. The Commission also awarded temporary total disability benefits from February 7, 2000, when Dr. Lipke excused appellee from work, to April 24, 2000, when the doctor released appellee to return to work. The Commission concluded that appellee's employment as a minister during that time period did not preclude the award of temporary total disability benefits.

On appeal, appellants first argue that the Commission erred in concluding that appellee suffered a right shoulder injury arising out of and in the course of his employment. Primarily, they argue that appellee failed to establish a causal relationship between his employment and his injury.

A "compensable injury" is one "arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002). As the claimant, appellee had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i) (Repl. 2002). "Thus, in order to prove a compensable injury [the claimant] must prove, among other things, a causal relationship between his employment and the injury." *McMillan v. U.S. Motors*, 59 Ark. App. 85, 90, 953 S.W.2d 907, 909 (1997).

Appellee testified that he had no previous problems with his shoulder, that he was in pain following the accident, and that the pain worsened over time. Dr. Lipke attributed part of his impairment to the accident, concluding that the accident was the "straw that broke the camel's back," aggravating his underlying shoulder problems. While appellants point out reasons why the Commission could have discredited appellee's testimony, the Commission found appellee to be credible and concluded that

appellee proved by a preponderance of the evidence that he sustained an injury arising out of and during the course of his employment and that there was a causal relationship between his injury and his employment. "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." *McMillan*, 59 Ark. App. at 87, 53 S.W.2d at 908. Further, "it is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony." *Id.* Because the evidence establishes a substantial basis for the Commission's decision, we affirm.

■ ■ Appellants argue that because appellee worked as a minister and received full pay, he was not totally incapacitated from earning wages, and thus, appellee failed to establish that he was entitled to temporary total disability benefits from February 7, 2000, to April 24, 2000. We note that "[t]emporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages." *Arkansas State Hwy. & Transp. Dep't. v. Breshears*, 272 Ark. 244, 247, 613 S.W.2d 392, 393 (1981). "'Disability' means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. . . ." Ark. Code Ann. § 11-9-102(8) (Repl. 2002). However, while appellee was able to earn wages as a minister during that period, as we explained in *Stevens v. Mountain Home Sch. Dist.*, 41 Ark. App. 201, 203-04, 850 S.W.2d 335, 336 (1993), for the purpose of defining disability, "'any other employment' means any other employment in lieu of the one in which the employee was injured." Because appellee was working both jobs when he was injured, his job as a minister was not "any other employment" undertaken in place of his employment at Wal-Mart. Accordingly, we affirm the Commission's award of temporary total disability benefits.

Appellants further contend that the Commission erred in awarding appellant permanent partial disability benefits because Dr. Lipke opined that the compensable injury was not the major

cause of appellee's permanent disability or need for treatment. The relevant statute provides as follows:

> (ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
>
> (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

Ark. Code Ann. § 11-9-102(4)(F) (Repl. 2002). "'Major cause' means more than fifty percent (50%) of the cause." Ark. Code Ann. § 11-9-102(14)(A) (Repl. 2002). "A finding of major cause shall be established according to the preponderance of the evidence. . . ." Ark. Code Ann. § 11-9-102(14)(B) (Repl. 2002).

We note, however, that the Commission did not award permanent partial disability benefits based on Dr. Lipke's conclusion that appellee had a 30% impairment to the body as a whole. Rather, consistently with Dr. Lipke's findings, the Commission concluded that the compensable injury was the major cause of 3% of appellee's permanent impairment to the body as a whole, and consequently, the Commission awarded permanent partial disability benefits on that basis. Dr. Lipke's exacting testimony provided the Commission with a preponderance of evidence from which to determine that the compensable injury was the major cause of appellee's 3% impairment. *See Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998)(holding that the "major cause" requirement was satisfied by evidence that an injury necessitated performance of surgery and that this surgery, at the site of a previous one, was the reason for the additional 2% impairment rating). We affirm the Commission's award of permanent partial disability benefits.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Nedra G. BRATTON *v.* STATE of Arkansas

CA CR 01-765 72 S.W.3d 522

Court of Appeals of Arkansas
Division III
Opinion delivered April 17, 2002

[redacted]

[redacted]

Hurst Law Office, by: *Q. Byrum Hurst, Jr.*, for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Nedra Bratton entered a conditional plea of guilty to a charge of possession of methamphetamine for which she was sentenced to a term of two years in prison. Bratton reserved her right to appeal the denial of her motion to suppress as permitted under Ark. R. Crim. P. 24.3(b). The only issue on appeal is whether the trial court erred in refusing to suppress evidence of contraband seized from her vehicle. Because the trial court's finding that the contraband was discovered in the course of a valid inventory is not clearly erroneous, we affirm.

State Trooper Jeff Crow was dispatched to investigate a one-car accident on Highway 7 south of Arkadelphia. A Clark County Deputy, Raymond Funderburk, was at the scene when Crow arrived. Appellant, the driver of the vehicle, had already been taken to the hospital by ambulance. There were no other occupants of the vehicle. Trooper Crow saw that the vehicle had left the roadway and had overturned, and he called a wrecker service to have the vehicle towed. When the wrecker arrived, the vehicle was righted and moved a short distance down the highway onto a county road. There, Crow conducted what he said was an inventory of the vehicle with the assistance of Officer Funderburk. Marijuana was found in a day-planner that was inside a backpack. A cosmetic case contained .267 grams of methamphetamine.

Trooper Crow testified that it was the policy of the state police to impound a vehicle involved in an accident and left unattended on the roadway. He said that the purpose of the inventory was to protect the owner's property found inside the vehicle and to protect officers from allegations of theft and the mishandling of

the vehicle's contents. A copy of the written policy was introduced into evidence.

Deputy Funderburk testified that the sheriff's department also had a policy to inventory impounded vehicles and that the policy required all containers to be opened. A copy of the Clark County Sheriff's Department policy was also introduced into evidence.

Based on the evidence, the trial court denied the motion to suppress, ruling that it was not unreasonable for the officers, coming upon this type of accident, to remove the vehicle to a safe location to conduct the inventory and that the inventory was accomplished in accordance with the written procedures.

On appeal, appellant contends that the inventory was invalid because the officers were searching the vehicle for the purpose of investigating the accident. Appellant bases this argument on a statement contained in Trooper Crow's accident report in which he said that he "conducted an inventory of the contents of the vehicle *and attempted to locate documents needed to complete the accident report.*" On this subject, Trooper Crow testified that it was not uncommon, in the course of conducting an inventory following an accident, for the driver's license, insurance papers, and other documents of ownership to be recovered as needed to complete an accident report. Appellant contends that the evidence reveals an investigatory motive for the search.

We begin with the basic premise that all warrantless searches are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *See Hoey v. State*, 73 Ark. App. 118, 42 S.W.3d 564 (2001). The so-called "inventory search" of an automobile is recognized as such an exception. *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Izell v. State*, 75 Ark. App. 377, 58 S.W.3d 400 (2001). Pursuant to this exception, police officers may conduct a warrantless inventory search of a vehicle that is being impounded in order to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger. *Benson v. State*, 342 Ark. 684, 30 S.W.3d 731 (2000). An inventory search, however,

may not be used as a guise for "general rummaging to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990). Hence, the police may impound a vehicle and inventory its contents only if the actions are taken in good faith and in accordance with standard police procedures or policies. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998) (citing *Colorado v. Bertine*, 479 U.S. 367 (1987)). Finally, Rule 12.6 of the Rules of Criminal Procedure provides:

> A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.

■ ■ In reviewing a trial court's denial of a motion to suppress, we make an independent determination based on the totality of the circumstances and reverse only if the ruling was clearly against the preponderance of the evidence. *Hadl v. State*, 74 Ark. App. 113, 47 S.W.3d 897 (2001). We defer to the superior position of the trial court to determine the credibility of the witnesses. *See Shaver v. State,* 332 Ark. 13, 963 S.W.2d 598 (1998).

In *Kirk v. State*, 38 Ark. App. 159, 832 S.W.2d 271 (1992), an officer discovered contraband in a black box located in a wrecked vehicle while looking for registration papers. The State conceded that the officer's actions amounted to a search, and we said that we knew of no exception to the warrant requirement permitting a general search of a disabled vehicle for evidence of ownership, at least when the identity of the driver is known. We rejected the State's argument that the search could be justified under the inventory exception because there was no evidence in the record of any standard policy regulating the opening of closed containers. Without evidence of any standardized criteria, we reversed the trial court's denial of the motion to suppress.

■ In the case at bar, however, there was evidence of department policies regulating inventory practice and procedure, and the case more closely resembles *Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997). There, the appellant's vehicle was impounded following his arrest. The appellant argued that the

inventory was a mere pretext for a search because one of the officers admitted that he was also looking for guns in the vehicle. The supreme court observed that an officer's awareness that he might come upon pertinent evidence in the course of an inventory is not fatal. The court held that, in order to suppress an inventory search, a defendant must show that the police officers were conducting the inventory search in bad faith for the *sole* purpose of collecting evidence. The court upheld the search because there was evidence that the officers were following standard procedure and there was no proof that the investigatory purpose was the sole motivation for the search. *Accord Folly v. State,* 28 Ark. App. 98, 771 S.W.2d 306 (1989) (holding that where an inventory is otherwise permissible, its validity is not affected by a suspicion that contraband may be found).

The decision in *Welch* is consistent with the view of a number of courts that the presence of an investigatory motive, even if proven, does not invalidate an otherwise lawful inventory search. *United States v. Agofsky*, 20 F.3d 866 (8th Cir. 1994); *United States v. Lomeli*, 76 F.3d 146 (7th Cir. 1996); *United States v. Rodriguez-Morales*, 929 F.2d 780 (1st Cir. 1991); *United States v. Frank*, 864 F.2d 992 (3rd Cir. 1989); *United States v. Johnson*, 815 F.2d 309 (5th Cir. 1987); *State v. Ture*, 632 N.W.2d 621 (Minn. 2001); *State v. Huisman*, 544 N.W.2d 433 (Iowa 1996); *People v. Hauseman*, 900 P.2d 74 (Colo. 1995); *People v. Gee*, 33 P.3d 1252 (Colo. Ct. App. 2001). In gauging whether an officer's conduct is calculated to hide an improper motive, the officer's actions are judged under a standard of objective reasonableness. Under this approach:

> An officer's hope of finding incriminating evidence during an otherwise valid search does not, without more, indicate a pretextual motive for his or her conduct. Instead, 'the pretext arises out of the fact that the evidence is found in a search which would not have occurred at all but for the manipulation of circumstances and events by the police because of their desire to conduct a search which could not otherwise be lawfully made.' Thus, the inquiry must focus on the objective reasonableness of the officer's conduct, and the trial court must determine whether a reasonable officer in the particular circumstances of the case would have engaged in the challenged conduct absent an illegitimate motive.

People v. Hauseman, 900 P.2d 74, 79 (Colo. 1995) (citations omitted).

Here, the appellant's vehicle was disabled, and the appellant had been transported to the hospital. Under these circumstances, the policies that the officers were working under mandated the impoundment of the vehicle and an inventory of its contents. It is permissible for an officer to impound and inventory a vehicle when the driver is physically unable to drive the car, and where leaving it on the side of the road would create a safety hazard. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998). From an objective standpoint, the officer had a legitimate reason to impound the vehicle and inventory its contents. Furthermore, the inventory was conducted in accordance with established procedures. For these reasons we hold that the officer's interest in investigating the accident did not render his inventory an "unreasonable search" under the Fourth Amendment.

Affirmed.

STROUD, C.J., and GRIFFEN, J., agree.

Ricco GREER *v.* STATE of Arkansas

CA CR 01-1033 72 S.W.3d 893

Court of Appeals of Arkansas
Division III
Opinion delivered April 17, 2002

William R. Simpson, Jr., Public Defender; *Sandra S. Cordi*, Deputy Public Defender; by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. On September 6, 2000, Ricco Greer took his mother's car from their home in North Little Rock without her permission. She called the police the next morning. They responded promptly and shortly found Greer and the car. Greer was charged with felony theft and, after a bench trial, was found guilty. He was sentenced as an habitual offender to a term of seven years' imprisonment.

On appeal, Greer's sole contention is that the court's decision is not supported by substantial evidence. He asks us to reduce his conviction to unauthorized use of a motor vehicle, a class A misdemeanor under Ark. Code Ann. § 5-36-108 (Repl. 1997). We agree that the decision of the circuit court should be affirmed as modified.

At trial three witnesses testified for the State; the defense called no witnesses. Appellant's mother, Delores Adkins, testified that she was at home on September 6, 2000, with another son, who was disabled. She went into the bathroom, having left the keys to her Oldsmobile on a table. When she came out, the keys to the car and the car itself were gone. She testified that she knew Greer had taken it because "he is the only one [who was] messing with the car." The next day she phoned the police to report her car had been stolen.

Mrs. Adkins testified that her son, Ricco Greer, lived with her at her house; that she let him drive her car "every now and then"; that he did not have permission to drive her car that day; that he knew he could not use that particular car because her daughter used it to go to work; and that she has a "habit" of calling the police if he does not return her car "on time." She said, "He just likes to go joy-ride."

North Little Rock police officer John Gravett testified that Mrs. Adkins told him her son had stolen her car. He immediately went to the Eastgate housing area and found the car. Mrs. Adkins then arrived and told Gravett she had seen Greer running toward their North Little Rock home. He was quickly apprehended.

Bill Elizandro, another officer, testified that he read Greer his *Miranda* rights. Officer Gravett then testified that Greer admitted to having taken the car and driven it.

Arkansas Code Annotated section 5-36-103(a)(1) provides:

> (a) A person commits theft of property if he:
>
> (1) Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof;

The word "deprive" is defined at Ark. Code Ann. § 5-36-101(4)(A) as "to withhold property or to cause it to be withheld either permanently or under circumstances such that a major part of its economic value, use, or benefit is appropriated to the actor or lost to the owner."

Arkansas Code Annotated § 5-36-108 provides that "a person commits unauthorized use of a vehicle if he knowingly takes, operates, or exercises control over another person's vehicle without consent of the owner." Unauthorized use is a class A misdemeanor. Historically, the "unauthorized use" statutes were passed to deal with the problem of "joy-riding," a phenomenon that apparently arose in the 1940's. *See In re Lakeysha P.*, 106 Md. App. 401, 665 A.2d 264 (1995). *See also Sullivant v. Pennsylvania Fire Ins. Co.*, 223 Ark. 721, 268 S.W.2d 372 (1954).

When the sufficiency of the evidence is challenged in a criminal case, we affirm if the verdict of the court or jury is supported by substantial evidence. The test is whether the evidence is "of sufficient force and character to compel reasonable minds to reach a conclusion beyond suspicion and conjecture." *Smith v. State*, 337 Ark. 239, 988 S.W.2d 492 (1999).

We defer to the trier of fact, here the circuit court, on questions of fact and, more specifically, on issues of the credibility of the witnesses. Even if the evidence is undisputed, as it is here, we defer to the trial court if different inferences might reasonably be drawn from the testimony of the witnesses. *Williams v. State*, 54 Ark. App. 271, 927 S.W.2d 812 (1996); *Lewis v. State*, 7 Ark.

App. 38, 644 S.W.2d 303 (1982); *Core v. State*, 265 Ark. 409, 578 S.W.2d 581 (1979).

Appellant's argument is that the evidence adduced at trial was insufficient to show that he intended to "deprive" his mother of her car within the meaning of the statute. Arkansas Code Annotated section 5-36-101(4)(A) states that "deprive" means "to withhold . . . permanently." Her testimony alone rebuts the State's contention that the defendant committed felony theft.

We acknowledge the decisions in *Moore v. State*, 299 Ark. 532, 773 S.W.2d 834 (1989) and *Hickson v. State*, 50 Ark. App. 185, 901 S.W.2d 868 (1995), both saying that the theft statute "makes no exceptions for temporary deprivation." We can only assume that in neither case did the defendant argue the definition of "deprive" as set forth in Ark. Code Ann. § 5-36-101(4)(A). We hold that on these facts the trial court's judgment was not supported by substantial evidence.

The only remaining question is the proper disposition of the appeal:

> [W]here the evidence presented is insufficient to sustain a conviction for a certain crime, but where there is sufficient evidence to sustain a conviction for a lesser included offense of that crime, this court may "reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it . . . at some intermediate point, remand the case to the trial court of the assessment of the penalty, or grant a new trial either absolutely or conditionally.

Tigue v. State, 319 Ark. 147, 889 S.W.2d 760 (1994).

We agree with appellant that his conviction should be reduced to unauthorized use of a motor vehicle, a class A misdemeanor, and set his punishment at one year in the Pulaski County Jail.

Affirmed as modified.

HART and NEAL, JJ., agree.

Pauline HARTWICK *v.* Bradley R. HILL
and Connie Lee Hill

CA 01-891 73 S.W.3d 15

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 2002

[Petition for rehearing denied July 3, 2002]

Morgan & Tester, P.A., by: *M. Edward Morgan*, for appellant.

Phil Stratton, for appellees.

SAM BIRD, Judge. Appellant, Pauline Hartwick, appeals from an order of the circuit court that granted a roadway

across Hartwick's land to the appellees, Bradley and Connie Hill, who own land adjacent to Hartwick's. The Hills had petitioned the county court for the establishment of a roadway across Hartwick's land pursuant to Ark. Code Ann. § 27-66-401 (Repl. 1994). The county court denied this petition, finding that the Hills had failed to prove the necessity for a roadway across Hartwick's land because, according to the evidence, the Hills had access to their land by virtue of their permissive use of a roadway that crossed the land of another adjacent owner. The circuit court, finding that absolute necessity is not required under section 27-66-401, reversed and ordered the delivery of a clerk's deed conveying to the Hills fee simple title to a thirty-foot strip of Hartwick's land on which the proposed roadway would lie.

Hartwick raises several points on appeal; however, we are unable to reach the merits of her arguments due to her failure to timely appeal the circuit court's order that she challenges. We agree with the Hills' argument that Hartwick did not timely appeal from the February 2, 2001, order of the court that granted the roadway to the Hills. Instead, Hartwick has appealed only from the court's May 10, 2001, order that served no purpose other than to authorize the clerk to deliver a $2,640 check to appellant for the amount of damages assessed against the appellees for the taking of the roadway. Appellees argue, and we agree, that the February 2, 2001, order was a final order for purposes of appeal. Because appellant's notice of appeal was not filed until May 18, 2001, it was not timely to appeal the court's February 2, 2001, order.

Whether an order is final and appealable is a matter going to the jurisdiction of the appellate court. *Scherz v. Mundaca Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994) (dismissing the appeal as untimely when a foreclosure order was final and appealable but the party did not file the notice of appeal from this order within the thirty days from the filing of the decree). A final order is one that dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. *Harold Ives Trucking Co. v. Pro Transp., Inc.*, 341 Ark. 735, 19 S.W.3d 600 (2000). A final order is one that is of such a nature as to not only decide the rights of the parties, but also to

put the court's directive into execution, ending the litigation or a separable part of it. *See id.* A final judgment or decision is one that finally adjudicates the rights of the parties, putting it beyond the power of the court that made it to place the parties in their original positions; it must be such a final determination of the issues as may be enforced by execution or in some other appropriate manner. *Budget Tire & Supply Co. v. First Nat'l Bank of Fort Smith*, 51 Ark. App. 188, 912 S.W.2d 938 (1995). The finality of an order is not defeated because it contemplates further action that is ministerial and in furtherance of the enforcement of the court's decision. *See Smith v. Smith*, 51 Ark. App. 20, 907 S.W.2d 755 (1995).

By the order filed February 2, 2001, the trial judge accepted and adopted the report of viewers who had been earlier appointed to examine the land and lay out the location of a roadway, described the location of the road way to be granted, ordered the Hills to have a survey conducted to determine the precise acreage within the roadway, established that Hartwick would incur damages in the amount of $6,000 per acre due to the loss of the land for the roadway, and ordered that a deed containing a description of the land resulting from the survey be delivered to the Hills upon payment of the damages. Any further action contemplated by this order was collateral, ministerial, and in furtherance of the enforcement of the court's decision. *See Smith, supra.*

Collateral action is action that does not make any direct step toward final disposition of the merits of a case, will not be merged in the final judgment, is not an ingredient of the cause of action, and does not require consideration with the main cause of action. Such collateral and ministerial orders need not be final for purposes of Arkansas Rule of Civil Procedure 54 or Arkansas Rule of Appellate Procedure 2. *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), *overruled on other grounds by State v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996). The entry of orders pertaining to collateral and ministerial matters does not convert a final order into an order that is not final. *See id.*

The future action contemplated by the February 2, 2001, order included the obtaining of a survey reflecting the precise

acreage in the roadway; the application of the $6,000 per acre formula that was ordered by the court as damages in the February 2, 2001, order; and the preparation and delivery of a deed upon payment of the damages. These actions are collateral to the main issues before the court, which was whether the Hills were entitled to a roadway across Hartwick's land pursuant to Ark. Code Ann. § 27-66-401 and the amount of damages to be paid therefor. To appeal the merits of this case, Hartwick had thirty days from February 2, 2001, in which to file an appeal. *See* Ark. R. App. P.—Civ. 4.

Hartwick's appeal was filed on May 18, 2001, and designated as the order from which the appeal was taken only the May 10, 2001, order by which the court authorized the clerk to release to Hartwick the funds that had been paid by the Hills into the court registry as damages. Hartwick does not contend on appeal that the trial court erred in its act of releasing the funds, which was the only purpose and effect of the May 10, 2001, order. Hartwick's arguments on appeal relate to the alleged error of the trial court in granting the roadway, in allowing the Hills to place utilities on the roadway, and ordering the transfer to the Hills of fee simple title to it. Therefore, we conclude that the appeal from the May 10, 2001, order was ineffective to bring up for appellate review the actions of the trial court that were memorialized in its February 2, 2001, order.

In reaching this conclusion, we are not unmindful that the trial court entered another order on July 9, 2001, in which it found: (1) that its February 2, 2001, order "was not a final order because it did not provide for the payment of funds to [Hartwick]"; (2) that the "final order" from which Hartwick could appeal was the May 10, 2001, order that provided for the payment of funds to Hartwick; (3) that Hartwick's appeal from the May 10, 2001, order was timely. To the extent that the trial court's July 9 order was an attempt to extend the time for appealing from the February 2 order and to determine the jurisdiction of the appellate court to entertain this appeal, it is ineffective. Whether an order of the trial court is final and appealable is a matter within the jurisdiction of the appellate court. *See Capitol Life & Accident Ins. Co. v. Phelps*, 72 Ark. App. 464, 37 S.W.3d 692 (2001). It is the duty

of the appellate court to determine whether it has jurisdiction to entertain the appeal. *Tucker v. Lakeview Sch. Dist. No. 25 of Phillips Co.*, 323 Ark. 693, 917 S.W.2d 530 (1996).

■ ■ We are also aware that, prior to the submission of this appeal for its consideration on the merits by this division, this court, sitting *en banc*, denied, without written opinion, a motion by the Hills to dismiss Hartwick's appeal, raising the same arguments that they now raise in their brief. *Law or Chancery Mandate*, CA01-891, entered Dec. 5, 2001; *Motion to Dismiss Appeal*, CA01-891, filed Nov. 1, 2001. Hartwick asserts that the Hills' argument is now barred by the law-of-the-case doctrine. We disagree. The doctrine of the law of the case "prevents an issue raised in a prior appeal from being raised in a subsequent appeal unless the evidence materially varies between the two appeals." *Richardson v. Rogers*, 334 Ark. 606, 611, 976 S.W.2d 941, 944 (1998) (quoting *Vandiver v. Banks*, 331 Ark. 386, 391-92, 962 S.W.2d 349, 352 (1998)). The simple answer to Hartwick's argument is that the Hills' earlier motion was not made in a "prior appeal," but was made in the same appeal as that now under consideration. Although it is unusual, it is neither unheard of nor prohibited for this court to deny a presubmission motion, but to grant the motion following submission of the appeal. *See Simmons v. State*, 341 Ark. 251, 15 S.W.3d 344 (2000); *Simmons v. State*, 72 Ark. App. 238, 34 S.W.3d 768 (2000). This is because a thorough examination of the complete record on appeal and, where appropriate, the transcript of the record, provides more information for our consideration than is ordinarily made available to the court by the presubmission motions and briefs of the parties. Therefore, although the Hills' motion to dismiss this appeal was heretofore denied, following our thorough examination of the briefs and record, we are now persuaded that the February 2, 2001, order constituted the final order from which the appeal should have been taken.

Appeal dismissed.

VAUGHT and ROAF, JJ., agree.

Pauline HARTWICK, *et al.* *v.* Bradley R. HILL
and Connie Lee Hill

CA 01-891 80 S.W.3d 757

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered July 3, 2002
[Dissenting opinion only
on denial of Petition for Rehearing]

JOHN MAUZY PITTMAN, Judge, dissenting. I disagree with the majority's conclusion that the February 2001 order was final for purposes of appeal.

The appeal arises from an order granting appellees a roadway across appellant's land pursuant to Ark. Code Ann. § 27-66-401 (Repl. 1994). That statute allows an owner of land, situated so as to make an access road over the land of another necessary, to compel an adjacent landowner to permit the establishment of an access road. The landowner from whom the right-of-way is taken is entitled to recover money damages for the land actually taken and for any damage done to the balance of his land. *Arkansas Game & Fish Commission v. Lindsey*, 299 Ark. 249, 771 S.W.2d 769 (1989).

Here, the trial judge entered an order in February 2001 establishing appellees' right to a roadway across appellant's land. The majority has declared that this was a final order from which the appeal should have been taken. I disagree. Express exceptions aside, an appealable order is one that dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997).

The February order patently fails to resolve all the outstanding issues presented to the trial court. As previously noted, the landowner from whom a right-of-way is taken is entitled to recover money damages for the taking, but the February order did not finally resolve the issue of money damages. Instead, the February order specifically orders that a survey be made by a qualified

and licensed surveyor so as to "provide a legal description of the property to be conveyed and an exact quantity of the land taken" so that money damages could be awarded on the basis of the quantity of land actually taken. Simply put, the February order reserved for later decision the question of monetary damages; ergo, that order does not conclude the parties' rights to the subject matter in controversy and is, by definition, not a final order.

The majority appears to argue that the February order is nevertheless final because it provides a formula for determining the monetary damages by announcing that the ultimate award will be computed on the basis of $6,000.00 per acre. I do not understand this argument. No monetary award can be computed on the basis of the February order because that order expressly leaves unresolved the other variable necessary to compute the monetary damages, *i.e.*, the exact quantity of the land taken. Even ignoring the glaring absence of a money judgment, the February order could be viewed as a final resolution of the parties' rights only were we to assume that the trial judge wholly abdicated his duty to pass on the credibility of the ordered survey and intended to accept the results of the surveyor without regard to whether the surveyor's measurement of the area taken amounted to a few square inches or the entire North American continent. But it would be error for the trial judge to abdicate his responsibility to make the necessary factual findings, and we may not presume that he made such an error in the absence of a showing to the contrary. To the contrary, in the absence of a showing otherwise, the presumption attendant upon every judgment of a court of competent jurisdiction is that it was entered in accordance with the law. *See, e.g., Davis v. Schimmel,* 252 Ark. 1201, 482 S.W.2d 785 (1972). In the present case, there is no indication that the trial judge considered that the February order concluded the rights of the parties to the subject matter in controversy. Any lingering doubts should be removed by the trial judge's own statement, in a subsequent order, that he did not consider the February order to be final because it did not conclude the rights of the parties by awarding money damages.

Chris Shanna WALTERS *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 01-1094 72 S.W.3d 533

Court of Appeals of Arkansas
Division II
Opinion delivered April 17, 2002
[Petition for rehearing denied June 26, 2002]

Blackmon-Solis & Moak, L.L.P., by: *DeeNita D. Moak*, for appellant.

Dana McClain, for appellee.

Gail Laster, attorney *ad litem*.

OLLY NEAL, Judge. This appeal is from the Pulaski County Circuit Court wherein the trial court terminated the parental rights of appellant as to S.B. and J.W., her two minor children. On appeal, appellant argues (1) the trial court lacked jurisdiction to terminate her parental rights; (2) the trial court erred by violating Arkansas law and her due process rights by failing to hold an adjudication hearing after the November 2000 probable cause hearing; and (3) the trial court erred in finding that there was sufficient evidence to terminate her parental rights. We affirm.

Appellant's first contention is that the trial court lacked jurisdiction to terminate her parental rights because the court failed to hold an adjudication hearing following the November 9, 2000 probable-cause or emergency hearing. We disagree and affirm on this point.

Arkansas Code Annotated section 9-27-306 (Repl. 2002) establishes the extent of a juvenile court's jurisdiction. *Inter alia,* it provides that the juvenile courts of this State shall have original, exclusive jurisdiction for proceedings in which a juvenile is alleged to be delinquent or dependent-neglected, those in which a family is alleged to be in need of services, and proceedings involving the termination of parental rights. Ark. Code Ann. § 9-27-306 (Repl. 2002).

Probable-cause hearings are limited to the purpose of determining whether probable cause existed to take a juvenile from the home and to determine whether probable cause still exists to protect the juvenile. Ark. Code Ann. § 9-27-315(a)(1)(B) (Repl. 2002). At the probable-cause hearing, the court is required to set the time and date for the adjudication hearing, which must be held within an absolute maximum of fifty days of the probable-cause hearing. Ark. Code Ann. § 9-27-315(e) (Repl. 2002). All other issues, with the exception of custody and services, shall be reserved for hearing by the court at the adjudication hearing conducted subsequent to the probable-cause hearing. Ark. Code Ann. § 9-27-315(a)(2)(A) (Repl. 2002).

An adjudication hearing is held to determine whether the allegations in a petition are substantiated by the proof. Ark. Code Ann. § 9-27-327(a) (Repl. 2002). "The adjudication hearing shall be held within thirty (30) days of the emergency hearing, but may be continued for no more than twenty (20) days following the first thirty (30) days on motion of any party for good cause." Ark. Code Ann. § 9-27-315 (Repl. 2002). Where the court has approved the return of a child to the mother, our supreme court has held that DHS retains legal custody of the child until the date on which the court enters an order permitting it to close its protective-services case and dismiss the action. *See Moore v. Arkansas Dep't of Human Servs.*, 333 Ark. 288, 969 S.W.2d 186 (1998).

In any case where there is probable cause to believe that immediate emergency custody is necessary to protect the health or physical well-being of a child from immediate danger, the court may issue an *ex parte* order for emergency custody. Ark.

Code Ann. § 9-27-315 (Repl. 2002). Following the issuance of an emergency order, the court must hold a hearing to determine if probable cause to issue the order continues to exist. Ark. Code Ann. § 9-27-315 (Repl. 2002). At the emergency hearing, the court shall schedule an adjudication hearing. Ark. Code Ann. § 9-27-315(d)(1) (Repl. 2002). The use of the word "shall" in a statute means that the legislature intended mandatory compliance with the statute unless such an interpretation would lead to an absurdity. *Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001).

Appellant went with her children into her probation officer's office on June 4, 1999. The affidavit in support of the Petition for Emergency Custody provided that appellant was very tearful and irrational. "She was crying, yelling, screaming, and reading the Bible. The mom's behavior was erratic. She started going down the hallways making lots of noise and disturbing court already in session." Appellant was asked whether or not she was on drugs, to which she replied that she was not and that they could test her. While being tested, appellant urinated in her panties and then did not put them back on. She tested positive for marijuana and possible PCP and was held in jail due to her behavior.

On June 15, 1999, a probable-cause hearing was held, at which time the trial court determined that probable cause existed to remove the children from the appellant's custody and ordered that the children remain in DHS custody. On August 3, 1999, the court held an adjudication hearing and determined that the children were dependent-neglected. The court ordered that the children remain in DHS custody and ordered family services, including a psychological evaluation and random drug/alcohol screening for appellant.

In February of 2000, the trial court issued an order that allowed appellant to have unsupervised, overnight visitation with her children, and in the May 23, 2000 permanency planning hearing, the trial court returned custody of the children to appellant. In making this decision, the court provided:

> I will order the return of the children. I have no problem doing that, but it would be premature for the Court to terminate its

> involvement. It would take a most unusual case for me to close it on the day that we return the children home because the proof of the pudding is what happens after the children get home. I can't imagine a case where I would close it the first day we return the children home because I want to follow up and make sure that everything works. . . . I would not remove the Court's authority at this point. I'm at least scheduling us for one more review to make sure that things have actually gone well with the reunification. . . . I am going to require DHS to maintain a protective-services file. I want at least one home visit every two weeks until we can come back to court and make sure that things are going well.

Further, the court, in the order, provided that jurisdiction was continued. The children remained in appellant's custody until October 11, 2000, when DHS filed a Motion for Ex Parte Emergency Change of Custody, following an incident where Ms. Walters walked in front of cars with her youngest son, J.W. The children remained in DHS custody until the termination proceedings.

The court noted on several occasions that it would retain jurisdiction over the case. The probable-cause/emergency retaking of custody hearing was simply a hearing held to protect appellant's rights with regard to whether or not the taking of the children into DHS custody was appropriate. Appellant was afforded that hearing on November 9, 2000, at which time the court determined that probable cause existed. During the hearing, the court stated "this is essentially a probable-cause hearing as to DHS' removal." It was unnecessary for the court to hold an adjudication hearing at this juncture because the children were already adjudicated dependent-neglected. Thus, we conclude that jurisdiction was proper.

In the alternative, appellant argues that the trial court erred by violating Arkansas law and her due process rights by failing to hold an adjudication hearing after the November 2000 probable-cause hearing. We do not reach the due process argument as it was not raised below. Failure to raise the challenge below is fatal to the appellate court's consideration on appeal. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). Even

constitutional issues will not be considered when raised for the first time on appeal. *Id.*

Appellant's final argument is that the trial court erred in finding that there was sufficient evidence to terminate her parental rights. When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Dinkins v. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). Arkansas Code Annotated section 9-27-341 (Supp. 1999) allows a court of competent jurisdiction to terminate the rights of a parent if

> 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 to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent.

Termination of parental rights is an extreme remedy and is in derogation of the natural rights of the parents; however, parental rights should not be allowed to continue to the detriment of the child's welfare and best interests. *Id.* Arkansas Code Annotated section 9-27-341(b)(3) (Supp. 1999) requires that "an order terminating parental rights . . . be based upon a finding by clear and convincing evidence." When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the court's findings that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *Dinkins, supra.* "Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegations sought to be established." *Id.*; *see Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999).

In making its determination, the court duly noted that DHS failed to show a compelling reason to continue reunification; nor did it ask to terminate its petition. The court found that there were no compelling reasons to continue attempting to reunify the family, as it would be contrary to the children's best interest, health and safety, and welfare to return them to the parental care and custody of their mother and the children had been out of the

home well in excess of one year. The court relied in part on the testimony of Dr. Greg Kazinski who testified that, in his opinion, Walters could not adequately parent her children. We give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Anderson v. Douglas, supra.*

Given our deferential standard of review, we are not left with a definite and firm conviction that a mistake has been made. The evidence reveals that the children have been out of the home over a year. Although Walters has made some progress, she is still not able to adequately care for her children. The trial court's decision to terminate appellant's parental rights was not clearly erroneous.

We affirm.

PITTMAN and CRABTREE, JJ., agree.

HOLT BONDING COMPANY, INC. *v.* STATE of Arkansas

CA 01-928 72 S.W.3d 537

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 2002

Price Law Firm, by: *Robert J. Price*, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from an order granting the State's complaint for bond forfeiture against appellant in the amount of $10,000. Appellant raises two points on appeal: (1) that the trial court erred in entering a bond-forfeiture judgment against the surety because it did not follow the requirements of Ark. Code Ann. § 16-84-201(a)(1)(A) (Supp. 2001) strictly and exactly, and (2) that the trial court erred in entering a bond-forfeiture judgment against the surety because there was no proof in the record that the defendant had been notified to be in court on the dates he failed to appear. We agree with appellant's first point and reverse.

On August 24, 1999, the State charged Jason McDonald with aggravated assault in Sebastian County Circuit Court. Appellant, Holt Bonding Company, posted an appearance bond for McDonald. McDonald was represented by a public defender. The trial court scheduled a hearing on the State's petition to revoke bond for July 25, 2000, and notice of the hearing was sent to Holt Bonding. McDonald failed to appear at the July 25 hearing; the trial court's docket entry noted the failure to appear and a bench warrant for McDonald's arrest was issued on July 28. The court also notified Holt Bonding of a hearing scheduled for August 23, 2000. Again, McDonald failed to appear and his failure to appear was noted in the court's docket. On August 25, 2000, the court sent a notice (filed August 28) to Holt Bonding to notify it of McDonald's August 23 failure to appear. The notice

provided that Holt Bonding had 120 days from August 28 to show cause as to why the bond should not be forfeited.

A bond-forfeiture summons was sent to Holt Bonding on January 3, 2001, regarding McDonald's failure to appear on August 23, 2000, and Holt Bonding was ordered to answer within 20 days. Holt Bonding responded that the requirements of Ark. Code Ann. § 16-84-201 were not strictly followed. A hearing was held on February 7, 2001, and posttrial briefs were submitted. The trial court's original order granting the forfeiture was entered on March 16, 2001, and an almost identical order was entered on March 23, 2001, ordering that the bond be forfeited and entering a judgment against appellant in the amount of $10,000. From that order, comes this appeal.

Appellant first contends that the trial court erred in entering a bond-forfeiture judgment against the surety because it did not follow the requirements of Ark. Code Ann. § 16-84-201(a)(1)(A) strictly and exactly. Arkansas Code Annotated section 16-84-201(a)(1)(A) provides:

> 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 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.

Statutory service requirements, being in derogation of common-law rights, must be strictly construed, and compliance with them must be exact. *Bob Cole Bail Bonds, Inc. v. State*, 65 Ark. App. 1, 984 S.W.2d 78 (1999).

Appellant argues that it was not "promptly" notified pursuant to Ark. Code Ann. § 16-84-201 after McDonald's first failure to appear in July 2000. The record below indicates that McDonald failed to appear on July 25, 2000, and that the court noted his failure to appear on its docket sheet. McDonald also failed to appear on August 23, 2000, a fact which the court also noted on

its docket. On August 28, 2000, the court sent a notice to Holt Bonding informing that McDonald failed to appear on August 23.

In *Bob Cole Bail Bonds, supra*, this court addressed the issue of whether notice was "promptly" given within the meaning of Ark. Code Ann. § 16-84-201. In that case, a bond was posted on June 14, 1995, to ensure a defendant's appearance. The defendant failed to appear on numerous occasions from August 23, 1995, to February 3, 1997. After the defendant's first failure to appear on August 23, 1995, the trial court made a docket entry that an arrest warrant would be issued for failure to appear and included the words "Notify Bondsman." However, an order requiring appellant to appear and show cause why the bond should not be forfeited was not entered until February 14, 1997, more than a year after the first failure to appear. Appellant received this notice by certified mail on February 18, 1997. Appellant argued that it was not "promptly" notified pursuant to Ark. Code Ann. § 16-84-201(a)(1)(A) because it should have been notified after the first failure to appear in August 1995. The trial court disagreed, and appellant appealed.

This court reversed, stating that once the trial court made the docket entry noting the defendant's failure to appear, it was mandatory pursuant to the statute for notice to be promptly given to the surety. We went on to state that "[w]ithout designating a bright-line rule of what "promptly" means in this context, we find that the time lapse in this case cannot pass muster[.]" *Id.* at 4, 984 S.W.2d at 80.

In the present case, the July 25 failure to appear was noted in the court's docket, but notice of the July 25 failure to appear was never given to Holt Bonding. Rather, Holt Bonding was only given notice of the August 23 failure to appear. According to Ark. Code Ann. § 16-84-201(a)(1)(A) and *Bob Cole Bail Bonds Inc., supra*, once the trial court made the docket entry noting McDonald's July 25 failure to appear, it was mandatory for notice to be promptly given of that failure to appear. The August 28 notice to Holt Bonding only notified it of the August 23 failure to appear, a fact which the State concedes. As stated previously, statutory service requirements must be strictly construed, and

compliance with them must be exact. *Bob Cole Bail Bonds, Inc., supra.* Because the State failed to specifically notify Holt Bonding of McDonald's July 25 failure to appear, we cannot say that the service requirements of Ark. Code Ann. § 16-84-201 were followed exactly, and we reverse on this basis. Further, we need not reach the other issues appellant raises in its first and second points of appeal because our decision on the first issue is determinative of the matter.

Reversed and dismissed.

BIRD and ROAF, JJ., agree.

Benjamin OLIVER *v.* STATE of Arkansas

CA CR 01-988 72 S.W.3d 547

Court of Appeals of Arkansas
Division IV
Opinion delivered April 24, 2002

Fernando Padilla, Public Defender Conflicts, for appellant.

Mark Pryor, Att'y Gen., by: *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Benjamin Oliver was charged with first-degree murder in connection with the shooting death of George Dove. Prior to trial, the circuit court conducted a *Denno* hearing after Oliver moved to suppress a statement he gave to the police. The court ruled that Oliver's statement was admissible and after a jury trial he was found guilty. Oliver was sentenced to sixty years in prison.

His sole argument on appeal is that the trial court erred in admitting his confession absent the testimony of a material witness. We agree and reverse and remand.

At the suppression hearing, Oliver testified that officers threatened to beat him with a "blackjack" or "billy club" during the course of the questioning. Detective Steve Knowles, who conducted the interview, testified at the suppression hearing. Detective Chuck Ray, who was also present, but took no significant part in the questioning, was not called as a witness.

In *Smith v. State*, 254 Ark. 538, 494 S.W.2d 489 (1973), the supreme court held that:

> [W]henever the accused offers testimony that his confession was induced by violence, threats, coercion, or offers of reward then the burden is upon the state to produce all material witnesses who were connected with the controverted confession or give adequate explanation for their absence.

The court in *Smith* relied in part on *People v. Armstrong*, 282 N.E. 2d 712 (Ill. 1972).

In *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995), the supreme court restated the rule:

> The State has the burden to produce all material witnesses *who were connected* with the controverted confession or give an adequate explanation of their absence. (Emphasis in original.)

The court in *Griffin* noted that since *Armstrong* the rule had been repudiated in Illinois. *See People v. R.D.*, 155 Ill.2d 122, 613 N.E.2d 706 (1993).

■ There is no requirement that the issue of the State's failure to call all material witnesses be raised in the trial court. *Brown v. State*, 347 Ark. 44, 60 S.W.3d 422 (2001); *Matthews v. State*, 261 Ark. 532, 549 S.W.2d 492 (1977).

■ The question, then, is whether Detective Ray was a material witness. In *Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996), the court said:

> In determining whether a witness is "material," this court has stated that there must be some connection between the witness and the alleged acts of coercion or an opportunity to observe the alleged coercion.

In *Smith v. State*, 256 Ark. 67, 505 S.W.2d 504 (1974), the court said:

> The State's evidence shows that Hale was present when Smith made the statement, and his name was signed as a witness at the end of the statement. It goes without saying that he was a material witness on the question.

The State relies on *Hayes v. State*, 269 Ark. 47, 598 S.W.2d 91 (1980). In *Hayes* the State called the two officers who were

primarily responsible for conducting the questioning as witnesses at the *Denno* hearing. The State did not call Lieutenant Moore who was also present. The supreme court held that the State was not required to call Moore.

It is true, as the State contends, that Moore's participation in the questioning was virtually the same as Detective Ray's participation in the case at bar. The difference is that in *Hayes* there was no allegation of coercion or mistreatment, while here Oliver contends that he was threatened with physical violence.

In *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995), the court said, "*There must be some connection between the alleged acts of coercion or an opportunity to observe the alleged coercion.*" *Id.* at 214 (quoting *Bushong v. State*, 267 Ark. 113, 589 S.W.2d 559 (1979), cert. denied, 446 U.S. 938 (1980) (emphasis in *Griffin*)). The court in *Griffin* found that the absent witnesses (jailers) were not material because "they were not in a position to observe the alleged coercion."

■ ■ In the case at bar Detective Ray, while taking no significant part in the questioning, was in a position to observe the alleged coercion, and therefore it was error not to require that he be called as a witness. We agree with the State, however, that only a "limited remand" is required. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997); *Harris v. State*, 271 Ark. 568, 609 S.W.2d 48 (1980); *Burnett v. State*, 71 Ark. App. 142, 27 S.W.3d 454 (2000); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989). We remand the case to the circuit court for the purpose of conducting a new *Denno* hearing. If the trial court determines, at the conclusion of the hearing, that the statement was not given voluntarily, the court should suppress the statement and order a new trial. If the court determines that the defendant's statement was voluntarily given, a new trial will not be required. *See e.g., Burnett v. State, supra.*

Reversed and remanded.

ROBBINS and CRABTREE, JJ., agree.

Thomas A. HART *v.* STATE of Arkansas

CA CR 01-838 72 S.W.3d 540

Court of Appeals of Arkansas
Division IV
Opinion delivered April 24, 2002

[redacted]

The Jesse Law Firm, P.L.C., by: *Mark Alan Jesse*, for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Thomas Hart appeals his convictions for first-degree false imprisonment and third-degree assault of a sheriff's deputy as found by the jury in Cleveland County Circuit Court. Though also charged with terroristic threatening of three women, he was acquitted on that count. He appeals, arguing as a single point for reversal that the trial court abused its discretion in permitting the State to question appellant's wife about his typical behavior when under the influence of alcohol, which appellant argued was irrelevant and highly prejudicial. We affirm.

The acts for which appellant was charged arose in the context of a domestic-disturbance call. Appellant and his wife were parties to a pending divorce action. On the afternoon of June 19, 2000, appellant appeared at the marital residence, where his wife Pat was living, to retrieve personal belongings from the garage. Appellant and Pat exchanged harsh words in the yard because appellant was unhappy with the condition of his belongings, and appellant threatened her, Pat summarizing it as a threat to "kick her butt." Pat's mother lived on the same property in another house nearby, and she came outside to ask if she should summon the sheriff. Appellant threatened that they would all be dead by the time the sheriff arrived. He left, taking a load of belongings, and made repeat trips.

The objectionable testimony came from appellant's wife, who stated on the stand that her husband of thirty-two years had a drinking problem. An objection as to relevancy was entered. The prosecutor and defense counsel approached the bench. The prosecutor explained that Pat's testimony would be that he had a

drinking problem and that he would get into rages while drunk. Defense counsel argued that this was highly prejudicial. The objection was overruled. Then, Pat testified that appellant was like Dr. Jekyll and Mr. Hyde; one was the nicest guy but the other was angry and agitated when under the influence of alcohol. Pat testified that when appellant arrived at the residence that afternoon he had been drinking, a fact appellant did not deny.

Later that evening at approximately 10:00 p.m., Pat, her mother, and Pat's friend Donna were in the house that Pat's mother occupied when Pat heard a tap at the window. Pat, fearing that appellant had a gun, screamed for them all to get down on the floor. Pat crawled to the telephone and called the sheriff. Two deputies, Marty Williams and Floyd Harper, responded to the call, but when they arrived, appellant was gone. Williams left to answer another call, while Harper remained on the premises, eventually seeing appellant drive by, whereupon, Harper followed and initiated a traffic stop.

Harper testified that after appellant pulled over, appellant exited the vehicle. Harper approached appellant at his truck, and appellant grabbed Harper's vest and forced a gun to his ear. Harper smelled the odor of intoxicants about appellant's person. Harper reached for appellant's gun and simultaneously reached for his own service revolver. Harper testified that appellant told him that if he did not get his hand off his (Harper's) gun, he would "blow my damned head off." Harper stated that appellant attempted to take Harper's service revolver, and they struggled for control. Hearing the radio dispatch from Harper's vehicle, appellant told Harper that if another officer came, he was going to blow Harper's head off. Appellant told Harper to lay down on the pavement, but Harper refused. Appellant then told Harper that when another officer arrived, "you're dead."

Williams had been recalled as backup to Harper, and when Williams arrived, he observed appellant holding Harper at gunpoint and heard appellant threatening to kill Harper. Williams retreated and watched the two from a distance. Appellant told Harper that he wanted Harper to get Pat to stop harassing him. Harper tried to calm appellant, assuring him that he would go talk

to her. Thereafter, appellant released Harper, got into his vehicle, and drove away, purportedly to his mother's house to await information. The deputies followed his vehicle and eventually pulled him over again, arresting appellant without serious incident in the second stop.

Chief Deputy Rodgers assisted in the arrest of appellant, and Rodgers testified that appellant had to be removed from his vehicle; that he possessed fourteen 380 hollow-point shells in his pocket; that his vehicle contained a holster, more ammunition, and a half-full vodka bottle; that he was not cooperative; and that he was very intoxicated. Williams testified that appellant's driving indicated impairment and that he could barely walk when he was brought to the sheriff's office due to intoxication; appellant continued to threaten to kill the officers as he was placed in a cell.

Appellant's testimony as to the encounters with law enforcement differed sharply. Appellant stated that in the first stop, the officer told him to leave the county and not to come back. Appellant denied ever holding a gun to the deputy's head. Appellant stated that he was upset at being stopped and challenged the officers to arrest him when he had done nothing wrong. He said that when the officers engaged blue lights the second time, he pulled over near his mother's house, and he was arrested without incident. Appellant acknowledged that he had a drinking problem that resulted in him seeking treatment in 1994, that he remained sober from 1994-1997, but that he had some drinks since then. He did not deny drinking about a pint of liquor the night he was arrested. He also agreed that his wife knew the signs of his drinking and that he sometimes became belligerent.

Appellant argues on appeal, as he did at trial, that the admission of his wife's opinion about his prior drinking was not relevant to the issues on trial and that if relevant, the relevance was outweighed by its unfair prejudice. Appellant concedes that his intoxication on the night in question was relevant. Appellant also argues that this was impermissible evidence of prior bad acts as prohibited by Ark. R. Evid. 404(b), but he did not raise this objection at trial. Because appellant's arguments are confined to the objections raised to the trial court, we do not consider this

aspect of his appellate argument. *See Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998).

■ ■ "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401. A decision whether to admit relevant evidence rests in the sound discretion of the trial court, and that decision will not be disturbed absent an abuse of discretion. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999); *Easter v. State*, 306 Ark. 615, 816 S.W.2d 602 (1991).

■ ■ Appellant states that permitting irrelevant and unduly prejudicial evidence of his drinking problem and associated behavior to the jury tainted appellant's credibility and mandates that we reverse. We disagree. First, the testimony regarding appellant's drinking problem and his typical behavior after having consumed alcohol was relevant to the issues at trial. He was undisputedly drunk that night, and Pat's testimony was probative of whether it was more or less likely that appellant would have behaved in a belligerent or angry manner toward the deputy while inebriated. Arkansas Rule of Evidence 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The balancing mandated by Rule 403 is a matter left to a trial court's sound discretion, and we will not reverse absent a showing of manifest abuse. *Mixon v. State*, 330 Ark. 171, 954 S.W.2d 214 (1997). There was no such manifest abuse of discretion here, for the most obvious reason that appellant cannot demonstrate prejudice. He cannot make such a showing in light of the fact that appellant testified after his wife completed her testimony and admitted that he was drinking that night, that his wife correctly stated that she knew the signs of his drinking, and that he sometimes became belligerent. Nothing in Pat's testimony varied from appellant's own on this topic. *See Griffin v. State*, 322 Ark. 206,

909 S.W.2d 625 (1995); *Brown v. State*, 66 Ark. App. 215, 991 S.W.2d 137 (1999). *See also* 1 John W. Strong, *McCormick on Evidence* § 55, at 246 (5th ed.1999) ("If a party who has objected to evidence of a fact himself produces evidence from his own witness of the same fact, he has waived his objection").

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

Sterling K. WALBURN *v.* Bill LAW,
Executor of the Estate of Irene Lessing

CA 01-1053 72 S.W.3d 543

Court of Appeals of Arkansas
Division III
Opinion delivered April 24, 2002

Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A., by: *Edwin N. McClure*, for appellant.

Everett Law Firm, by: *John C. Everett* and *John M. Scott*, for appellee.

LARRY D. VAUGHT, Judge. Appellant argues that appellee, the personal representative of the decedent's estate, failed to prove that the decedent's last will and testament was properly executed. Specifically, appellant contends that the trial court's ruling that the will was properly admitted to probate, in spite of the fact that the attestation clause was not notarized, amounts to reversible error. Additionally, appellant requests that on remand this court apply the "rule of the case" and disallow any additional evidence concerning the genuineness of the attesting witnesses' signatures. We affirm.

On November 17, 1997, attorney Robert Boyer met with the decedent, Irene Lessing, regarding the execution of a new will. On November 20, 1997, Mr. Boyer returned to the hospital (where Ms. Lessing was a patient) and completed the execution of

the will. Two nurses at the hospital; Susan Herrick and Beth Watson (now Main), witnessed the will and signed the attestation clause. Ms. Lessing died on November 30, 1997, and her will was admitted to probate on December 3, 1997, upon the filing of the petition for probate of the will and appointment of a personal representative.

On March 6, 1998, appellant, Sterling Walburn (the decedent's nephew), filed his petition to set aside the will, alleging legal incapacity, undue influence, and procurement of the will. On November 16, 1999, appellant filed an amended petition essentially alleging the same three grounds for setting aside the will. The case was heard on March 20, 2001. During the trial, appellant argued (for the first time) that the will in question was improperly admitted to probate because it did not contain a proof of will that was notarized. At trial, appellee put on proof that the will was properly witnessed. In its order, dated April 2, 2001, the trial court found that:

> [T]he order admitting the [w]ill to probate dated December 30, 1997, is conclusive on the issue that the [w]ill was properly signed and witnessed in accordance with [the] law; and furthermore, the evidence was presented from one of the attesting witnesses stating that she signed the [w]ill in the presence of the other subscribing witnesses and in the presence of the Testator, Irene Lessing.

Appellant dismissed his claim of lack of legal capacity, and the court directed verdicts in favor of appellee on the claims of undue influence and procurement. On April 9, 2001, appellant filed a timely notice of appeal. On appeal, appellant challenges the trial court's finding that the will was properly witnessed.

As a preliminary matter, appellee suggests that appellant's failure to raise the issue of proper execution of the will until the day of trial bars our review of the issue on appeal. We disagree. The trial court specifically addressed the valid admission of the will to probate in its final order, and appellee waived any objection to the propriety of the issue being heard when he put on testimony at trial on the issue. Therefore, the question is properly before our court.

■ ■ We review probate proceedings de novo, and we will not reverse the decision of the probate court unless it is clearly erroneous. *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 259 (2001). When reviewing the proceedings, we give due regard to the opportunity and superior position of the probate judge to determine the credibility of the witnesses. *Id.*

In his first two points on appeal, appellant argues that Ms. Lessing's will should not have been admitted to probate because appellee failed to prove that the will had been properly executed. Specifically, appellant argues that appellee failed to prove the genuineness of the attesting witnesses' signatures. His primary evidence to support this claim is that the attestation clause submitted to probate bearing the signatures of the two nurses who witnessed the will was not notarized.

Arkansas Code Annotated section 28-25-103 (1987) outlines the procedure to be followed when executing a will. The statute provides:

> (a) The execution of a will, other than holographic, must be by the signature of the testator and of at least two (2) witnesses.
>
> (b) The testator shall declare to the attesting witnesses that the instrument is his will and either:
>
> (1) Himself sign; or
>
> (2) Acknowledge his signature already made; or
>
> (3) Sign by mark, his name being written near it and witnessed by a person who writes his own name as witness to the signature; or
>
> (4) At his discretion and in his presence have someone else sign his name for him. The person so signing shall write his own name and state that he signed the testator's name at the request of the testator; and
>
> (5) In any of the above cases, the signature must be at the end of the instrument and the act must be done in the presence of two (2) or more attesting witnesses.
>
> (c) The attesting witnesses must sign at the request and in the presence of the testator.

Arkansas Code Annotated section 28-40-117 (1987) explains the procedure whereby a party proves the validity of an attested will. The statute in relevant part states:

> (a) An attested will shall be proved as follows:
>
> (1) By the testimony of at least two (2) attesting witnesses, if living at known addresses within the continental United States and capable of testifying; or
>
> (2) If only one (1) or neither of the attesting witnesses is living at a known address within the continental United States and capable of testifying, or if, after the exercise of reasonable diligence, the proponent of the will is unable to procure the testimony of two (2) attesting witnesses, in either event the will may be established by the testimony of at least two (2) credible disinterested witnesses. The witnesses shall prove the handwriting of the testator and such other facts and circumstances, including the handwriting of the attesting witnesses whose testimony is not available, as would be sufficient to prove a controverted issue in equity, together with the testimony of any attesting witness whose testimony is procurable with the exercise of due diligence.
>
> * * *
>
> (d) The provisions of this section as to the testimony of subscribing witnesses shall not exclude the production of other evidence at the hearing on the petition for probate, and the due execution of the will may be proved by such other evidence.

In reaching our conclusion that Mrs. Lessing's will was properly witnessed in accordance with the statutory scheme set out above, we rely heavily on two points of trial testimony. First, Mrs. Lessing's attorney testified:

> [t]here were two nurses there to witness the will. So I presented it to her and she read it. My secretary Clara Holbrook again was there to notarize the will, the attestation, proof of will, and after she read it I asked her if that is what she wanted to do. She said that it was in the presence of the two nurses and in my presence and in the presence of Clara Holbrook, and she executed the will.

Second, one of the attesting witnesses (Beth Main) was asked "did you see Mrs. Lessing at the St. Mary's hospital in Rogers?" Ms. Main replied, "yes, I did." She was then asked "did you have occasion to witness her signature on a will?" She again replied, "yes, I did." Additionally, Ms. Main testified that she witnessed the other attesting witness, Susan Herrick, sign the will.

Arkansas Code Annotated section 28-40-117(a)(2) provides an alternative means of proving a will, if the proponent of a will is unable to procure the testimony of the two original attesting witnesses. The will may be established by the testimony of at least two credible disinterested witnesses. In this case, one of the attesting witnesses (Beth Main) and the attorney who prepared Mrs. Lessing's will testified that they witnessed the execution of the will. The testimony of the attorney who drafted a will, but who was not named as a beneficiary in the will, can satisfy the "credible disinterested witness" testimony requirement of section 28-40-117(a)(2). *Upton v. Upton*, 26 Ark. App. 78, 759 S.W.2d 811 (1988).

In *Upton, supra*, one of the witnesses to the decedent's will was unavailable[1] to testify at trial. The attorney who prepared the will testified by deposition upon written interrogatories that he prepared the will for the decedent, that he reviewed the contents of the will with the decedent before its execution, that he was satisfied that the decedent understood its provisions, and that those provisions represented the decedent's wishes. *Id.* We concluded that, when a will is presented that appears to have been properly executed, and the attestation is established by proof of the handwriting of the witnesses, it will be presumed, in the absence of evidence to the contrary, that the will was executed in compliance with the requirements of the statute. *Id.*

Here, the evidence is ample to support the trial court's ruling that the will was properly executed. It is clear from the evidence that Mrs. Lessing wished to leave a will disposing of her property in a way that is contrary to intestate succession. She signed the will in the presence of four disinterested parties (her attorney, her attorney's secretary, and two nurses). Two of the four witnesses testified at trial.

The decision of the trial court is affirmed, and, therefore, we need not address appellant's third point of appeal requesting a specific instruction from our court regarding the application of the rule-of-the-case doctrine on remand.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

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[1] The attesting witness had predeceased the decedent.

WAL-MART STORES, INC. *v.* UNITED STATES FIDELITY & GUARANTY COMPANY, *et al.*

CA 01-1140 76 S.W.3d 895

Court of Appeals of Arkansas
Division III
Opinion delivered April 24, 2002

Michael S. Cessna and *Todd P. Guthrie*, for appellant.

Clausen Miller P.C., by: *Edward M. Kay* (*pro hac vice*) and *Barbara I. Michaelides* (*pro hac vice*); *Warner, Smith & Harris, P.L.C.*, by:

G. Alan Wooten; and *Edward M. Kay* (*of counsel*), *James R. Swinehart* (*of counsel*), and *Barbara I. Michaelides* (*of counsel*), for appellees.

KAREN R. BAKER, Judge. This case involves the application of the doctrine of *forum non conveniens*. The Benton County Circuit Court dismissed a suit filed by Wal-Mart, whose corporate headquarters are in Benton County, on the ground that Pennsylvania would be a more convenient forum. The lawsuit involved Wal-Mart's attempt to seek insurance coverage from appellees United States Fidelity & Guaranty and Lexington Insurance Company for losses involving a Dickson City, Pennsylvania Wal-Mart store. We affirm the trial court's decision.

The following facts are taken from Wal-Mart's complaint and the insurance policies attached thereto. On December 6, 1996, a large boulder fell from a rock face behind the Dickson City Wal-Mart store, damaging the rear of the building. Geo-Science Engineering Company and Irwin & Leighton, a construction company, told Wal-Mart that a dangerous situation existed. Geo-Science reported that there were other unstable cracks in the rock face that could cause further damage. The company provided Wal-Mart with a list of remedial measures that could reduce the risk, such as relocating gas and electric utilities, moving overhead power lines underground, evacuating part of the store, and constructing a twenty-foot buffer against the rock face; however, the company stated that, if those measures could not be implemented within twelve to fifteen days, the store should be abandoned.

Wal-Mart decided to abandon the store. In January 1997, it resumed operations at a smaller, temporary location, and in March 1998, opened a new, permanent location. During this process, Wal-Mart allegedly incurred relocation expenses and experienced lost sales, which together totaled $4,822,790.95. Wal-Mart sought coverage from appellees, who had contracted to provide property loss and business interruption coverage to Wal-Mart for the period beginning April 1, 1996, and ending April 1, 1997.[1] Appellees

[1] The policies stated that their coverage territory included all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and Canada. Despite this wide area of coverage, the policies contained no forum-selection clause or choice-of-law clause.

denied coverage, and Wal-Mart filed suit in Benton County Circuit Court.

Wal-Mart sought coverage, in part, based on the policies' "sue and labor" provision. That provision permitted Wal-Mart to "sue, labor, and travel" in order to defend or safeguard property in case of actual or imminent loss to the property, and it further provided that appellees would contribute to the expenses Wal-Mart incurred in doing so. According to a pleading later filed by Wal-Mart, appellees denied coverage because "the geological condition of the hillside did not threaten 'imminent loss or damage' to the building, and the relocation of retail operations . . . was not necessary to 'safeguard the insured property.' Additionally, each insurer has questioned whether the loss was fortuitous."

Appellees filed motions to dismiss Wal-Mart's complaint on the basis of *forum non conveniens*. Neither insurer attached affidavits, depositions, or other exhibits to its motion, but each argued that Pennsylvania was the more convenient forum for the lawsuit based on the following factors: 1) Pennsylvania is where the property loss occurred; 2) Pennsylvania is where witnesses such as the store employees, store manager, the owner of the store property, the engineering company that investigated the damage, and Dickson City municipal employees were located; 3) other lawsuits concerning the rock slide were pending in Pennsylvania; and 4) Pennsylvania law would likely apply. Wal-Mart responded by characterizing the lawsuit as one merely involving the construction of insurance agreements, and therefore the case would involve legal issues not dependent on a factual inquiry into the circumstances of the loss. It argued that the negotiation, delivery, and performance of the insurance policies occurred not in Pennsylvania but in Arkansas and New York (where Wal-Mart's insurance broker is located). The relevant witnesses, therefore, were not the Pennsylvania witnesses but Wal-Mart's corporate personnel who had knowledge of the claim. Wal-Mart also argued that dismissal of its complaint would deprive it — an Arkansas resident — of the right to litigate in the courts of its own state.

Attached to Wal-Mart's response were the affidavits of Rita Stephens, Wal-Mart's Director of Risk Management, and Dale

Snowden, Wal-Mart's Property Claims Manager. Stephens's affidavit set out the following pertinent information: Either she or her colleague, both of whom are located in Benton County, are required to ratify an insurance policy before coverage is bound; insurance premiums are paid from Wal-Mart's Benton County office; the insurance broker's representative involved in the adjustment of the claim would be willing to travel to Benton County for trial; and all records relating to the administration of insurance policies and coverage claims are maintained in Benton County. Snowden stated in his affidavit that he was responsible for investigating and preparing the claim in this case and that he and others in his department have knowledge of the circumstances attendant to the claim.

On August 10, 2001, a hearing was held on the motion to dismiss. Appellees' attorney told the court that the issues at trial would be fact-intensive and would involve such inquiries as whether Wal-Mart knew that there was an unsafe condition prior to the policy period, whether Wal-Mart should have done something to prevent the rock slide, whether there had been a history of rock slides at that location, and whether the danger involved was imminent. According to the attorney, persons located in Pennsylvania would have knowledge of such matters. He stated that Wal-Mart store personnel and employees had supplied information to the insurance companies regarding how much damage was caused by the falling rock and for how long the rock slides had been occurring. Additionally, the insurance adjuster who worked the claim was located in Pennsylvania, and he had visited the site numerous times, taking photographs and talking to witnesses. Further, the property owner, a Pennsylvania company, would have knowledge about the condition of the hillside and whether any measures had been undertaken to prevent a rock slide. The attorney also mentioned that the engineering and construction companies named in Wal-Mart's complaint were located in Pennsylvania, as were two other engineers who had given opinions about the situation. Further, he said, the city council of Dickson City also had an interest in the matter, and the council's consulting engineer had knowledge regarding the hill in question.

Following the hearing, the trial judge granted appellees' motion. The judge stated that he was reluctant to deny an Arkansas citizen access to the state's courts and that he was hesitant to require Wal-Mart to litigate its claim elsewhere. However, he found that, because the case was "heavily burdened with factual issues," it would be more convenient for the trial to be held in Pennsylvania, where the fact witnesses were located. Further, he noted that it would be a minor inconvenience to require Wal-Mart's corporate employees to make the trip to Pennsylvania as compared with attempting to bring the Pennsylvania witnesses to Benton County. He referred to the fact that "the impact on the parties trying to litigate this and take depositions and compel attendance of numerous witnesses to the court just to take depositions, . . . would be an overwhelming burden and a needless burden when there is a court in Pennsylvania that could satisfy all of those needs."

The judge also declared that, while he was awed by the prospect of having Wal-Mart litigate all its insurance cases in Benton County, that prospect was not "much of a factor" because it had yet to materialize. Likewise, he did not consider the choice-of-law question, predicting that it would be answered later in the case.

Forum non conveniens is a doctrine that allows a trial court to decline to hear a case, even though it has jurisdiction to do so. *See Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981). The doctrine is applied when it would be in the interests of the parties and the public to try the case in another forum. *See generally Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The Arkansas Supreme Court formally recognized the doctrine of *forum non conveniens* in *Running v. Southwest Freight Lines, Inc.*, 227 Ark. 839, 303 S.W.2d 578 (1957), *overruled on other grounds, Malone & Hyde, Inc. v. Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992). The doctrine was also recognized by the Arkansas legislature in Act 101 of 1963, which is codified at Ark. Code Ann. § 16-4-101(D) (Repl. 1999):

> INCONVENIENT FORUM. When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

Arkansas courts have utilized the following factors to determine whether a case should be moved to a more convenient forum: 1) the convenience to each party in obtaining documents or witnesses; 2) the expense involved to each party; 3) the condition of the trial court's docket; and 4) any other facts or circumstances affecting a just determination. *Life of America Ins. Co. v. Baker-Lowe-Fox Ins. Marketing, Inc.*, 316 Ark. 630, 873 S.W.2d 537 (1994). Our courts have recognized that we will reverse a trial court's ruling on a *forum non conveniens* question only if the court abuses its discretion. *Id.*; *Country Pride Foods, Ltd. v. Medina & Medina*, 279 Ark. 75, 648 S.W.2d 485 (1983).

■ We hold that there was no abuse of discretion here. As the trial court understood, we should be reluctant to deprive an Arkansas resident of access to its home forum. However, a resident plaintiff's choice of forum is not the only matter to be considered in making a *forum non conveniens* decision, although it is of "high significance." *See generally Koster v. Lumbermen's Mut. Cas. Co.*, 330 U.S. 518, 525 (1947). We note that a plaintiff such as Wal-Mart, who has chosen to acquire property and engage in extensive business dealings in numerous locations throughout the country, might be expected, more than the average plaintiff, to find that its resident forum is not convenient for all purposes.[2]

■ Further, we find no fault with the trial court's ruling that the location of the Pennsylvania witnesses and the relative

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[2] In *Scottish Union & National Insurance Co. v. Hutchins*, 188 Ark. 533, 66 S.W.2d 616 (1934) and *American Railway Express Co. v. H. Rouw Co.*, 173 Ark. 810, 294 S.W. 401 (1927), Arkansas plaintiffs were permitted to sue foreign insurers in an Arkansas court, even though the property loss occurred in another state. However, both cases were decided before we recognized the doctrine of *forum non conveniens* and were approached from the standpoint of whether the trial court had jurisdiction rather than whether the chosen forum was convenient.

Additionally, Wal-Mart has cited cases from other jurisdictions in which plaintiffs sued insurers in the plaintiffs' home forum, despite the fact that the loss occurred elsewhere. We do not find those holdings persuasive, given the facts of this case.

inconvenience that would ensue from attempting to compel their attendance in Benton County weigh in favor of having the trial in Pennsylvania. The court made a determination, which we think is supportable based on experience and logic, that the issues in Wal-Mart's lawsuit would involve not just legal questions, but factual questions as well. While the testimony of those corporate personnel who executed the insurance contracts and managed the claims process could be of some relevance, the testimony of those persons in Pennsylvania who were employed by the store and who inspected the hillside and rendered opinions on its condition appear highly relevant to the question of whether coverage was owed in this case and, if so, to what extent. Several cases have recognized that the location of witnesses is a significant factor viewed by the courts in making a *forum non conveniens* determination. *See, e.g., Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997); *Kempe v. Ocean Drilling & Expl. Co.*, 876 F.2d 1138 (5th Cir. 1989), *cert. denied*, 493 U.S. 918 (1989); *TV-3, Inc. v. Royal Ins. Co. of Amer.*, 28 F. Supp. 2d 407 (E.D. Tex. 1998); and *So-Comm, Inc. v. Reynolds*, 607 F. Supp. 663 (N.D. Ill. 1985). *See also Sandvik, Inc. v. Contenental Ins. Co.*, 724 F. Supp. 303 (D.N.J. 1989) (case transferred to site of loss where coverage issues involved more than mere contractual interpretation and would require reference to "site-specific" facts).

■ ■ A trial court abuses its discretion when it acts improvidently or arbitrarily in making a finding. *See Bonds v. Lloyd*, 259 Ark. 557, 535 S.W.2d 218 (1976). *See generally Hogan v. Holliday*, 72 Ark. App. 67, 31 S.W.3d 875 (2000), (holding that a trial court abuses its discretion by acting thoughtlessly and without due consideration). The trial court in this case gave due consideration to Wal-Mart's status as a resident plaintiff, thoughtfully analyzed the potential issues and witnesses in the case, and carefully weighed the relative convenience to the parties and the witnesses. Under these circumstances, we cannot say that an abuse of discretion occurred.

Wal-Mart also argues that the record before the trial court did not afford an adequate evidentiary basis for a ruling on the *forum non conveniens* question. In particular, it points to the fact that appellees did not rely on affidavits or other evidence to sup-

port their motion to dismiss, but on the pleadings, insurance policies, and representations of counsel at the hearing.

In *Running v. Southwest Freight Lines, Inc., supra*, the case that first recognized the doctrine of *forum non conveniens* in Arkansas, the supreme court held that the parties' pleadings, which showed only the residence of the parties and where the cause of action arose, did not contain sufficient information to allow the trial court to exercise its discretion on the convenient forum question. However, when *Running* was decided, *forum non conveniens* was a novel concept in Arkansas, and our courts had not yet declared the factors that a trial court should consider. Further, the pleadings in this case contain considerably more information than those in *Running*. Additionally, the record contains the insurance policies at issue and states the coverage issues involved. Also, appellees identified potential witnesses in the case, and Wal-Mart did not dispute either the existence of those witnesses, their location, or the matters to which they might testify. In *Country Pride Foods Ltd. v. Medina & Medina, supra*, the supreme court likewise held that the record should contain facts upon which the trial court bases its decision. However, that case is also distinguishable because there, the trial court raised the issue of *forum non conveniens* sua sponte. Therefore, it was necessary to remand the case to discover the basis for the court's decision.

It must be remembered that, in most instances, the *forum non conveniens* determination is made at the dismissal stage, before a lawsuit is fully developed; were it not, there would be little point in having the doctrine because the parties would be required to begin the litigation process in what might prove to be an inconvenient forum. So, while the moving party has the burden of showing the trial court why the chosen forum is not convenient, we do not read *Running* and *Country Pride Foods* to say that extensively developed proof is required, especially when the authenticity of the matters placed before the court is not seriously called into question by the opposing party. Under the circumstances of this particular case, the record was sufficient to allow the trial court to exercise its discretion.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.

CLAYTON KIDD LOGGING COMPANY and
American Interstate, TPA *v.* Kevin McGEE

CA 01-1256 72 S.W.3d 557

Court of Appeals of Arkansas
Division I
Opinion delivered April 24, 2002

[redacted]

Michael Ryburn, for appellants.

Dale Grady, for appellee.

ANDREE LAYTON ROAF, Judge. Clayton Kidd Logging Company (Clayton Kidd), appeals from an order of the Workers' Compensation Commission. The Commission found that appellee, Kevin McGee, is entitled to receive additional compensation for a compensable injury, in the form of weekly benefits pursuant to Ark. Code Ann. § 11-9-505 (Repl. 1996) because Clayton Kidd refused to allow him to return to work. On appeal, Clayton Kidd argues that the Commission erred in awarding the additional compensation because McGee 1) quit or was terminated after returning to work, and 2) was not already receiving disability benefits as required for entitlement to the additional benefits. We do not agree with Clayton Kidd's arguments and affirm.

On April 8, 1999, McGee sustained an injury to his lower back while employed as a log-truck driver with Clayton Kidd. McGee reported the injury when he went to work the next day, took a few days off, and went back to work driving the log trucks. According to McGee, on April 15, 1999, Clayton Kidd advised him that "they didn't need him any longer." However, Clayton Kidd claimed that McGee had been terminated for allowing his wife to ride with him in the log truck after he was advised several times not to do so.

McGee was diagnosed with a lumbar sprain. Clayton Kidd controverted the claim, and the ALJ found that McGee had suffered a compensable injury arising out of and in the course of his employment. McGee subsequently sought additional benefits pursuant to Ark. Code Ann. § 11-9-505(a). However, the ALJ found that McGee was not entitled to such benefits. The ALJ relied on *Davis v. Dillmeier Enter., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997), in which the supreme court determined that the "in addition to other benefits" provision in § 11-9-505(a) "does not apply to termination of employment or to a claimant not receiving weekly benefits for a compensable injury." The Commission found *Davis, supra*, which was a discrimination case brought pursuant to the Arkansas Civil Rights Act, not applicable and reversed and remanded for a determination of whether McGee was entitled

to the additional benefits in line with the four-part test outlined by this court in *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

On remand, the ALJ found that the requirements of *Torrey* had not been met and again denied McGee's request for additional benefits. The Commission once again reversed, noting that the ALJ had concluded that McGee's termination was without reasonable cause. The Commission found that McGee had established that he returned to work, was capable of performing his work, was doing his pre-injury job at the time he was unreasonably fired, and there was work available within his restrictions at the time of his termination. The Commission held that McGee met all the elements of the *Torrey* test to establish entitlement to § 11-9-505(a) benefits in the amount of $11,513 for his loss in average weekly wages during the one-year period in question. Clayton Kidd appeals from this order.

On appeal, Clayton Kidd argues that the Commission erred in finding that McGee is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1) because the statute provides for additional benefits only when an employer refuses to return an employee to work and when the employee is already receiving compensation benefits for disability. It contends that 1) McGee did not receive disability benefits during the one-year period in question, and 2) he was terminated or quit. Clayton Kidd further asserts that both *Davis, supra*, and *Torrey, supra*, support the denial of additional benefits to McGee.

When reviewing a decision of the Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission and affirms that decision if it is supported by substantial evidence. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion one way or another. *Id.* The Commission's decision will not be reversed unless it is clear that fair-minded persons, presented with the same facts, could not have reached the same conclusion. *Id.*

Arkansas Code Annotated section 11-9-505(a)(1) (Repl. 1996) provides that

> Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of refusal, for a period not exceeding one (1) year.

Act 796 of 1993 mandates that the Commission and the courts construe the provisions of the Act strictly. *Wheeler, supra.* Strict construction is narrow construction which requires that nothing be taken as intended that is not clearly expressed and that the plain meaning of the language be employed. *Id.*

■ We agree that Clayton Kidd's reliance on *Davis v. Dillmeier* is misplaced. In *Davis*, the supreme court construed the language in Ark. Code Ann. § 11-9-505(a)(1) as "providing benefits *in addition* to those workers' compensation benefits already being received by the claimant." The court further stated that such construction is evident because additional benefits are designed to provide the employee with a total amount equal to his average salary, thereby making the employee whole. However, the supreme court found that the statutory remedy for refusal to return an injured employee to work was not available to Davis because she had returned to work while she was receiving medical treatment and was terminated only after she had entered into a joint petition that fully concluded her claim for workers' compensation. Accordingly, the court reversed the circuit court's dismissal of Davis's complaint against her employer for discrimination pursuant to the Arkansas Civil Rights Act. We agree with the Commission that *Davis* is not applicable to the case at hand.

■ However, this court has construed Ark. Code Ann. § 11-9-505(a) in the context of a workers' compensation case. In *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996), we held that before Ark. Code Ann. § 11-9-505(a) is applicable, several requirements must be met. The employee must prove by a preponderance of the evidence 1) that he has sustained

a compensable injury, 2) that suitable employment which is within his physical and mental limitations is available with the employer, 3) that the employer refused to return him to work, and 4) that the employer's refusal to return him to work is without reasonable cause. This court further stated that "[i]n reviewing the pertinent sections of the Act, we find that the legislative intent that the injured worker be allowed to reenter the work force permeates the language of sections of the Act." *Id.* at 230, 934 S.W.2d at 239. In addition, this court concluded that the period of refusal lasts not only until a position is filled, but continues as long as the employer is doing business not to exceed the one-year limitation for payment of additional benefits. *Id.*

Here, McGee was found to have a compensable injury. There was also suitable employment within McGee's physical and mental limitations. Although he testified that he was in pain, McGee stated that he could continue doing his job. A few days after his injury, McGee returned to Clayton Kidd and was terminated. The Commission found that McGee's testimony with regard to the circumstances of his termination was credible, that Clayton Kidd had in effect refused to return him to work by terminating him, that the refusal was without reasonable cause, and that McGee was not required to prove that his position remained unfilled for any particular period of time after the refusal. We cannot say that the evidence does not support the Commission's findings, or that the Commission erred in its construction of the statute in question and its application of the relevant case law.

Affirmed.

VAUGHT and BIRD, JJ., agree.

JAG CONSULTING *a/k/a* Glad Industries, Inc. *v.*
Gerald EUBANKS

CA 01-1183 72 S.W.3d 549

Court of Appeals of Arkansas
Division II
Opinion delivered April 24, 2002

[redacted]

[redacted]

Streetman, Meels, & McMillan, by: *Thomas S. Streetman*, for appellant.

The Harper Law Office, P.L.L.C., by: *Greg Fallon* and *Kenneth A. Harper*, for appellee.

ANDREE LAYTON ROAF, Judge. This tort case results from a lawsuit filed by appellee, Gerald Eubanks, against appellant, JAG Consulting, for its conversion of tools and equipment that belonged to appellee. The jury returned a verdict awarding appellee $18,000.00 in compensatory damages and $11,000.00 in punitive damages. JAG Consulting has appealed, arguing four points of error: (1) that the trial court erred in denying its motion for directed verdict because there was no substantial evidence to establish the fair market value of the tools and equipment allegedly converted; (2) that the trial court erred in permitting appellee to testify from a list he prepared based on the replacement cost of the tools and equipment; (3) that the trial court erred in permitting appellee's wife to testify to lost income that appellee sustained as a result of the conversion of the tools and equipment; (4) that the trial court erred in allowing appellee's wife to testify to the value of her property because she was not a party to the litigation. We agree with the first and fourth points and reverse and remand.

On December 22, 1993, officers from the Ashley County Sheriff's Department and the Hamburg Police Department executed search warrants on appellee's home and shop. The officers were searching for tools and equipment belonging to appellant, then known as Glad Industries (Glad). During the search, the officers were assisted by Jim Atkins, Glad's safety and security officer, who helped identify Glad's tools. A deputy made a list of the seized items during the search, which was later introduced at trial as Defendant's Exhibit 1. Some of the items seized had been purchased by appellee at an auction that Glad conducted in 1983.

Before the auction, Glad had used orange paint to mark its tools. After the auction, Glad used an orange and yellow paint scheme to mark its tools. Some of the tools and equipment claimed by appellee bore an orange and yellow paint scheme. The tools and equipment seized during the search were delivered to Glad where its employees went through the seized items and identified those that did not belong to Glad. Those items were returned to the Sheriff's Department and later to appellee.

Criminal charges were filed against appellee and Eddie Anthony in April 1994. Anthony, who was Glad's purchasing agent in charge of its tool room, was terminated on the day of the search. Glad had a policy at that time of allowing employees to take Glad's tools and equipment home for their personal use. The criminal charges were later dismissed against both appellee and Anthony.

After the criminal charges were dismissed, appellee filed suit against Glad alleging that Glad had converted the seized items by not returning them to him and sought unspecified compensatory damages. Appellee amended his complaint to seek punitive damages. As noted, the jury returned a verdict in appellee's favor, and this appeal followed.

In its first point, appellant alleges that the trial court erred in denying the appellant's motion for a directed verdict because there was no substantial evidence to establish the fair market value of the tools and equipment allegedly converted by appellant.

[redacted] It has been repeatedly held that, when reviewing a denial of a motion for a directed verdict, we determine whether the jury's verdict is supported by substantial evidence. *Pettus v. McDonald*, 343 Ark. 507, 36 S.W.3d 745 (2001). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond mere suspicion or conjecture. *Id.* We review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.*

In *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979), the supreme court held that the proper measure of damages for the conversion of personal items was their fair market value at the time and place of the conversion. The court went on to hold that evidence based upon purchase, replacement, or rental prices was improper. *Id.* Because of the lack of evidence of fair market value, the supreme court reversed a judgment in favor of Herring. This measure of damages has been restated several times since *Herring*. *See McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998); *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991); *Burdan v. Walton*, 286 Ark. 98, 689 S.W.2d 543 (1985). Fair market value is defined as the price the personalty would bring between a willing seller and a willing buyer in the open market after negotiations. *Minerva Enters., Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992); *Southern Bus Co. v. Simpson*, 214 Ark. 323, 215 S.W.2d 699 (1948). *See also* AMI Civil 4th, 2221.

In his pretrial deposition, appellee provided a list of items that he alleged were converted by appellant containing values for each item. At trial, appellee testified from this list. The values were derived either from wholesale price lists or from receipts that appellee had for the items. A copy of the list without the values was introduced as Plaintiff's Exhibit 1.

Furthermore, this list was virtually identical to the list made by the deputy during the search, but appellee had also added the contents of four tool boxes that had been seized during the raid. Most of the evidence regarding the value of the tools and equipment seized from appellee came from the testimony of appellee himself. When counsel first began questioning appellee about the value of items on his list, appellant objected because appellee was going to testify as to replacement values that had been obtained from two wholesale price lists and from receipts he had for the purchase of some of the items. The objection was that the values given were not determined by the fair market value measure found in *Herring*, specifically citing the case. Appellee testified that he did not understand the meaning of "fair market value" and that he thought it meant replacement cost. Appellee also testified

that many of the tools came with lifetime guarantees, without identifying the specific items.

Throughout his testimony, appellee referred to the current cost of a *new* item, less ten percent. Appellee testified to the replacement costs of items. Appellee also testified that he had used several items over the years and still gave the current replacement cost instead of the fair market value at the time of the conversion. All of the values given were before ten percent was subtracted for depreciation. Appellee testified at trial that his opinion was based on the replacement cost, less ten percent. Appellee was qualified as an expert by the trial court. As such, he could base his opinion on information he gained from others, including other experts. *See Phillips v. Graves*, 219 Ark. 806, 245 S.W.2d 394 (1952). No effort was made to relate the value at the time of the 1993 seizure. The trial court instructed the jury during this testimony to disregard appellee's answer that the tools and equipment had a total value of $20,655.37, and appellee offered no other testimony on value in response to this ruling. Appellant moved for a directed verdict at the conclusion of appellee's case, at the conclusion of all the proof, and also moved for a judgment notwithstanding the verdict at the conclusion of the trial. The motions were denied, and appellant now argues that there was insufficient evidence to support the jury's verdict.

It is the duty of the judge to instruct the jury, and each party to the proceeding has the right to have the jury instructed upon the law of the case with clarity and in such a manner as to leave no grounds for misrepresentation or mistake. *Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (1996); *Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992). In *Lewis v. Phillips*, 223 Ark. 380, 266 S.W.2d 68 (1954), the court stated:

> In *Benton Gravel Co. v. Wright*, 206 Ark. 930, 175 S.W.2d 208, we said: "It is often difficult for a court to determine the true measure until all the evidence is in. . . . If there be different modes of measuring the damages, depending on the circumstances, the proper way is to hear the evidence, and to instruct the jury afterwards according to the nature of the case."

Lewis, 223 Ark. at 383, 266 S.W.2d at 69-70. Here, appellant called the trial court's attention to the proper measure of damages and cited the *Herring* case. The trial court also realized the proper measure of damages when it sustained appellant's motion to strike appellee's testimony as to the total value of the items taken when that testimony was based upon book value less ten percent without consideration of the value at the time of the 1993 seizure. The transcript of the instructions being read to the jury indicates that the jury was *not* given any instruction based on AMI 2221, which would describe the measure of damages as to the fair market value of the tools and equipment at the time and place of the conversion. The jury was not instructed as to *any* method by which to determine appellee's damages. The written instructions are not included in the record.

Evidence must exist which affords a basis for measuring the plaintiff's loss with reasonable certainty, and the evidence must be such that the jury may find the amount of the loss by reasonable inferences from established facts, and not by conjecture, speculation or surmise. *Bank of Cabot v. Ray*, 279 Ark. 92, 648 S.W.2d 800 (1983); *Missouri & Ark. Ry. v. Treece*, 210 Ark. 63, 194 S.W.2d 203 (1946); *Willis v. Triplett*, 10 Ark. App. 247, 663 S.W.2d 201 (1984). Once appellee's valuations are excluded, there simply is no evidence in the record that the jury could look to in determining appellee's damages without resorting to speculation or conjecture. Therefore, the trial court erred in not granting the motion for a directed verdict.

Appellant argues a related issue for its second point, that the trial court erred in permitting appellee to testify from a list that appellee prepared based on the replacement cost of the tools and equipment. Appellee prepared a list of the items taken by the Sheriff's Department and police during the search. This list, without values, was introduced into evidence without objection by appellant. The objections to appellee's testimony were based on hearsay and the fact that the values were based on replacement cost instead of fair market value. This list was identical to the list prepared during the search by the deputy sheriff and introduced into evidence as Defendant's Exhibit 1. The introduction of the *list itself* was not error. First, the list does not contain

any values. Second, the same information was before the jury earlier in the form of Defendant's Exhibit 1, which had been introduced into evidence through the testimony of former Sheriff Bill Hudson, *prior* to testimony from appellee. It has long been the rule that there is no prejudice in admitting evidence that is merely cumulative or repetitious of other evidence admitted without objection. *See Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001); *Eliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000); *Callahan v. Clark*, 321 Ark. 376, 901 S.W.2d 842 (1995).

In its third point, appellant argues that, because it was a violation of the "best-evidence rule," the trial court erred in permitting appellee's wife to testify to income that appellee lost as a result of the conversion of appellee's tools and equipment. Appellee attempted to establish through the testimony of Raynell Eubanks, his wife, a loss of income from appellee's business resulting from the seizure and conversion of the tools and equipment. Appellant objected on the grounds that the best evidence of lost income would be appellee's income tax returns. The trial court overruled the objection. When appellee sought to introduce testimony from Ms. Eubanks from the tax returns, appellant objected because the returns had not been disclosed or produced during discovery. The trial court agreed and refused to allow Ms. Eubanks to testify from the records but still allowed her to testify as to the amount of appellee's lost income. Ms. Eubanks testified that she kept the books for her husband and prepared the information for submission to the accountant to prepare the tax returns.

Arkansas Rule of Evidence 1002 provides that, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court . . . or by statute." When a transaction occurs where a written record is made, it is not necessary to produce the record when there is testimony to prove the transaction. It is only when the *writing itself* must be proved that the writing must be produced. *Canady v. Canady*, 285 Ark. 378, 687 S.W.2d 833 (1985); *Lin Mfg. Co. v. Courson*, 246 Ark. 5, 436 S.W.2d 472 (1969). In the instant case, the issue was not the contents of a writing — the tax returns — but rather the amount of lost income

that had been suffered by appellee. The best-evidence rule does not apply where a party seeks to prove a fact which has an existence independent of any writing, even though the fact might have been reduced to, or is evidenced by, a writing. *R&R Assocs., Inc. v. Visual Scene, Inc.*, 726 F.2d 36 (1st Cir. 1984); *Herzig v. Swift & Co.*, 146 F.2d 444 (2d Cir. 1945); *Sayen v. Rydzewski*, 387 F.2d 815 (7th Cir. 1967); *Continental Ill. Nat'l Bank & Trust Co. v. Eastern Ill. Water Co.*, 31 Ill. App. 3d 148, 334 N.E.2d 96 (1975).

Ms. Eubanks testified that she kept the books and records for her husband's business and compiled the figures concerning income and expenses prior to giving it to the accountant for preparation of the tax returns. Thus, she has firsthand knowledge of the information. No evidentiary rule prohibits a witness from testifying to a fact simply because the fact also can be supported by written documentation. *R&R Assocs., supra.*

Appellant argues for his fourth point that, because Ms. Eubanks was not a party to the action, the trial court erred in allowing her to testify as to the value of personal property belonging to her and allegedly converted by appellant. On the first day of trial, appellee testified that certain items included on the list of items actually belonged to his wife. Appellant filed a motion *in limine* seeking to prohibit Ms. Eubanks from testifying as to the value of any items belonging to her. The trial court overruled the motion, and Ms. Eubanks was permitted to testify as to which of her tools were seized. She valued those tools at $925.

It is a fundamental principle that the:

> courts are instituted to afford relief to persons whose rights have been invaded . . . by the defendant's conduct, and to give relief at the instance of such persons; a court may and properly should refuse to entertain an action at the instance of one whose rights have not been invaded or infringed, as where he seeks to invoke a remedy in behalf of another who seeks no redress.

59 AM. JUR. 2D *Parties* § 26 (1971). Furthermore, it is a general rule that "[I]f an injury is done to personal property, the right of action is in the then owner alone, and not in any subsequent purchaser or successor in the title." *Id.*

Daughhetee v. Shipley, 282 Ark. 596, 599, 669 S.W.2d 886, 887-88 (1984).

In *Daughhetee*, Ray Shipley owned a truck that was damaged in a collision with Daughhetee's cow. After the collision but prior to suit being filed, Shipley died of causes unrelated to the accident. His heirs brought suit for damages to the truck without having a personal representative appointed to sue on behalf of the estate. Daughhetee's motion to dismiss because of the heirs' lack of standing to sue was overruled by the trial court, and judgment was entered against Daughhetee. On appeal, the supreme court agreed that the heirs lacked standing because they were not the proper party and reversed the judgment in favor of Shipley's heirs. *Daughhetee* also held that it was not harmless error to allow a non-party to institute legal action. In *Norman v. Norman*, 347 Ark. 682, 66 S.W.3d 635 (2002), the supreme court defined a "party" as:

> [A] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is a person whose name is designated on record as plaintiff or defendant. [The] term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from a judgment.
>
> "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently are persons interested but not parties.

Norman, 347 Ark. at 685-86, 66 S.W.3d at 638 (quoting *Black's Law Dictionary* 1122 (6th ed. 1990)).

Appellee argued to the jury in closing arguments that he should be allowed to recover for his wife's property. Because Ms. Eubanks was not a party, it was error for the trial court to allow her to testify as to the value of her separate property. Where the jury's verdict is rendered on a general verdict form, it is an indivisible entity or, in other words, a finding upon

the whole case. *J.E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001); *Pearson v. Henrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999); *The Home Co. v. Lammers*, 221 Ark. 311, 254 S.W.2d 65 (1952). Because it is impossible to determine from the jury's verdict whether damages for Ms. Eubanks's property were included in the award, this case must be reversed.

Appellant asks that the case be reversed and dismissed. We agree that the trial court erred in not granting the directed verdict, but we find it appropriate in this situation to remand. This practice has been followed in other situations where the case was reversed because of insufficiency of the evidence. The supreme court has stated:

> Our ordinary procedure in reversing judgments in law cases is to remand for another trial, rather than dismiss the cause of action. It is only where it clearly appears that there can be no recovery that we consider it proper to dismiss the cause. . . . The evidence might well have been much more developed than it was. This Court has held even where a judgment based on a jury verdict is reversed for insufficiency of the evidence to support it, there may be circumstances which justify remanding the case for new trial.

Hayes Bros. Flooring Co. v. Carter, Adm'x, 240 Ark. 522, 525, 401 S.W.2d 6, 8 (1966).

In *St. Louis S.W. Ry. Co. v. Clemons*, 242 Ark. 707, 415 S.W.2d 332 (1967), the court said:

> The general rule is to remand common law cases for new trial. Only exceptional reasons justify a dismissal. One of the exceptions is an affirmative showing that there can be no recovery. *Pennington v. Underwood*, 56 Ark. 53, 19 S.W. 108 (1892). There it was said that when a trial record discloses "a simple failure of proof, justice would demand that we remand the cause and allow plaintiff an opportunity to supply the defect."

See also Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (1983); *Home Ins. Co. v. Harwell*, 263 Ark. 884, 568 S.W.2d 17 (1978); *Southwestern Underwriters Ins. v. Miller*, 254 Ark. 387, 493 S.W.2d 432 (1973). We have held this procedure applicable even when no proof was offered on an issue, and where it was demanded by simple justice or where it was not impossible

that the deficiency in proof could be supplied. *Follett v. Jones*, 252 Ark. 950, 481 S.W.2d 713 (1972); *Southern Farm Bur. Cas. Ins. v. Gottsponer*, 245 Ark. 735, 434 S.W.2d 280 (1968). In this case, it does not clearly appear from the record that there can be no recovery, nor has there been any affirmative showing that such is the case.

Reversed and remanded.

STROUD, C.J., and PITTMAN, J., agree.

Damion YOUNG *v.* STATE of Arkansas

CA CR 01-1293 72 S.W.3d 895

Court of Appeals of Arkansas
Division IV
Opinion delivered May 1, 2002

James P. Clouette, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. After a bench trial, Damion Young was found guilty of possession of a controlled substance (cocaine) with intent to deliver and simultaneous possession of drugs and firearms. He was sentenced to concurrent terms of ten years in prison. Appellant contends on appeal that the evidence is not sufficient to sustain either conviction. We disagree and affirm.

When the sufficiency of the evidence is challenged, we consider only the evidence that supports the verdict, viewing the evidence in the light most favorable to the State. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000). The test is whether there is substantial evidence to support the verdict. *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999). Substantial evidence is evidence that is forceful enough to compel a conclusion one way or the other beyond speculation or conjecture. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). It is the responsibility of the trier of fact to determine the credibility of the witnesses. *Kelley v. State*, 75 Ark. App. 144, 55 S.W.3d 309 (2001).

Under Ark. Code Ann. § 5-64-401(a) (Supp. 2001), it is unlawful for any person to possess a controlled substance with intent to deliver. A person commits the offense of simultaneous possession if he commits a felony violation of § 5-64-401 while in possession of a firearm. Ark. Code Ann. § 5-74-106(a)(1) (Repl. 1997).

At trial, it was shown that officers of the Little Rock Police Department executed a warrant for the search of the home of appellant's father. Appellant, his father, his brother, and two other individuals were at the residence when the officers arrived. When the officers entered, those present in the front room, including appellant, ran to the back of the house. Appellant and his brother were apprehended in the bathroom. The officers found a plastic baggie in the toilet containing off-white rocks later determined to be crack cocaine. Several small, off-white rocks were also found on the floor next to the toilet. Two plastic bags containing crack cocaine were removed from appellant's pocket. The cocaine

found in appellant's pocket weighed 13.5 grams. It was estimated that this quantity had a street value of $1,300.

The front room of the house was furnished with two sofas separated by a coffee table. On the coffee table, officers found a bag of marijuana, three individually wrapped bags of crack cocaine, and a plate on which sat several more off-white rocks. Three rocks were found on a sofa, and one rock was found underneath the cushion. A total of three handguns were also found in the front room.

A set of scales and two large glass tubes were found in a kitchen cabinet. Crumbs of crack cocaine were found on top of the refrigerator, and a pipe was found on the kitchen floor.

Officer Ray Moreno was the first to enter the home. He testified that a loaded Mach 10 nine-millimeter, semi-automatic handgun was found on one of the sofas. He said that appellant had been the only person seated on that couch and that the weapon had been near the area of appellant's left leg.

Appellant first contends that the evidence is not sufficient to show that he possessed the nine-millimeter handgun. We disagree.

To sustain a conviction for possession, neither exclusive nor actual physical possession is necessary. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994). Constructive possession, which is control or right to control, is sufficient. *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998). Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995).

Where there is joint occupancy of the premises where the contraband is seized, some additional factor must be found to link the accused to the contraband. *Embry v. State*, 302 Ark. 608, 792 S.W.2d 318 (1990). In such instances, the State must prove that the accused exercised care, control, and management over the contraband and also that the accused knew that the object possessed was contraband. *Mayo v. State*, 70 Ark. App. 453, 20

S.W.3d 419 (2000). This control and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991).

In *Mayo v. State, supra*, marijuana was found on a coffee table near a couch where the appellant had been sitting. The appellant had no connection with the house, and there was another individual in the room with the appellant when the police entered the house. We reversed, holding that there was no substantial evidence to support the conclusion that the appellant "exercised care, control, and management over the contraband." Likewise, in *Mosley v. State*, 40 Ark. App. 154, 844 S.W.2d 378 (1992), the appellant was one of seven people in a room where drugs were found. The appellant was sitting on a couch along with two other persons. A cigarette package containing rocks of crack cocaine and some twenty-eight loose rocks were found under a cushion of the couch where the appellant had been sitting. A bag containing thirty-three rocks of crack cocaine was stuffed between a chair and the wall. There was no evidence that appellant lived in the apartment, and no drugs were found on the appellant's person. We concluded that the evidence was not sufficient to sustain the appellant's conviction of possession because the contraband found under the cushion was not in an area exclusively under appellant's control and because the contraband located behind the chair was not in plain view.

The facts in the case at bar are materially different from those in either *Mayo* or *Mosley*. Here, there was testimony that the gun was found, in plain view, on a couch. It was said that appellant was the only person who had been sitting on that couch and that the gun was located near appellant's left leg. Moreover, it is also relevant that appellant was in possession of 13.5 grams of cocaine. It has been recognized that a logical connection exists between the possession of drugs and firearms. *See Jackson v. State*, 52 Ark. App. 7, 914 S.W.2d 317 (1996). On this record, we conclude that there is substantial evidence to support the guilty verdict.

[redacted] Appellant also contends that there is insufficient evidence to support the conviction for possession with intent to deliver. He bases this argument on his testimony that he possessed the cocaine for his own personal use. Arkansas Code Annotated section 5-64-401(d) (Supp. 2001) creates a rebuttable presumption that the possession of more than one gram of cocaine demonstrates an intent to deliver. The appellant was in possession of 13.5 grams of cocaine. Although appellant testified that the cocaine was for his own personal use, the trier of fact was not obligated to believe him. *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000). In addition, evidence of appellant's possession of a firearm is relevant to prove intent to deliver. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). We cannot say that there is no substantial evidence to support this conviction.

ROBBINS and CRABTREE, JJ., agree.

[redacted]

Antonio LENOIR *v.* STATE of Arkansas

CA CR 01-849 72 S.W.3d 899

Court of Appeals of Arkansas
Division IV
Opinion delivered May 1, 2002

[redacted]

Daggett, Donovan, Perry & Flowers, PLC, by: *Joe R. Perry*; and *Durrett & Coleman*, by: *Gerald A. Coleman*, for appellant.

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., and *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Antonio Lenoir was convicted by a jury of first-degree murder and sentenced to thirty-five years in prison. Mr. Lenoir now appeals, raising four points for reversal.

Mr. Lenoir's first argument is that he was denied a fair trial when the trial court excluded the testimony of his expert witness on cross-racial identification. His second argument is that the trial court erred in refusing his proffered jury instruction on the issue of cross-racial identification. Next, he contends that there was insufficient evidence to support the verdict. Finally, Mr. Lenoir raises three evidentiary issues. Under this point on appeal, he asserts that the trial court erred in excluding photographs of him, in granting the State's motion to exclude evidence that purported to incriminate others, and in failing to exclude the testimony of a rebuttal witness who was present in the courtroom during trial. We affirm.

The preservation of an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994). The test for determining the sufficiency of the evidence is whether the verdict is

supported by substantial evidence, direct or circumstantial. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Goodman v. State*, 74 Ark. App. 1, 45 S.W.3d 399 (2001). In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998).

Officer George Pettigrew of the Wynne Police Department testified for the State. He stated that he received a call about a problem at City Liquor in Wynne at about 8:05 p.m. on September 23, 1997. Upon arriving at the scene, he found Joe Cannon, who was bent over on one knee and advised that he had been shot. Mr. Cannon was taken to the hospital by ambulance, and later died from the gunshot wound. At the scene of the crime, Officer Pettigrew asked Mr. Cannon's wife, Patricia Cannon, to describe the assailant. Mrs. Cannon, who is white, described him as a light-complected black male, approximately 5' 4" to 5' 5" in height, and wearing a white t-shirt with red trim and light-colored pants.

Teresa Jones, who performed secretarial duties for the Wynne Police Department, testified that she became involved in the murder investigation. She stated that a few days after the murder, she showed Mrs. Cannon a book of photographs and that Mrs. Cannon identified Mr. Lenoir stating, "I know this is him because of his eyes." Mrs. Cannon continued to examine the photographs, found an additional yet different picture of Mr. Lenoir, and again stated, "This is him." Based on Mrs. Cannon's identification of Mr. Lenoir, he was arrested.

Captain Oscar Wilson testified that he was the criminal investigator assigned to the case. He stated that he spoke with Mrs. Cannon and that she described the assailant as a black male who was 5' 8" to 5' 9", and weighed 140 to 150 pounds. Captain Wilson placed Mr. Lenoir in a six-man lineup with other black males of similar description.

Captain Wilson testified that the lineup was in a room with a video system, but that the system malfunctioned. Thereafter, he directed Mrs. Cannon to look at the lineup through the window of a door, and she identified Mr. Lenoir. Captain Wilson obtained a warrant to search Mr. Lenoir's sister's residence because that is where he was arrested. During the search, the police found a white shirt with red trim in the living room among some dirty clothes, and Mrs. Cannon identified it as the shirt Mr. Lenoir wore on the night of the shooting. Captain Wilson acknowledged that the shirt contained the lettering "CHICAGO," which was not mentioned by Mrs. Cannon when she described it earlier.

Mrs. Cannon testified about the murder. She stated that at about 8:00 p.m. on September 23, 1997, she was working at City Liquor and was arranging beer on some shelves while her husband was in the bathroom. She heard the door-chime ring, and when she turned around a man put a gun in her face and said, "Give me your money." Mrs. Cannon stated that she recognized his voice because he was an occasional customer, and thought he was joking until he said, "I'm serious." Mrs. Cannon testified that the man held her at gunpoint with the gun touching her forehead for about two minutes until Mr. Cannon emerged from the back of the store.

When Mr. Cannon came through the door, the assailant threw Mrs. Cannon to the floor and shot Mr. Cannon. He then told Mrs. Cannon to "get up and give me your money, or I'll blow you away." Mrs. Cannon testified that she told him to wait a minute until she regained her senses, and then walked to the cash register and opened it. The assailant then took all the money from the register and fled.

Mrs. Cannon recalled identifying Mr. Lenoir from the book of photographs and stated that when she saw his picture, "It turned me inside out and I lost it." During the lineup procedure at the police station, Mrs. Cannon heard Mr. Lenoir state, "I did not shoot no one," and she recognized that as the same voice that said, "Give me your money." When she looked through the window at the lineup, all of the men looked at Mrs. Cannon except

Mr. Lenoir, who initially did not look up. When he finally made eye contact, Mrs. Cannon identified him.

Mrs. Cannon also identified Mr. Lenoir as the murderer at trial. She testified:

> I positively identified Antonio Lenoir. I am positive today. When I die and go to my grave, me and the good Lord knows I've got the right guy. I have never had a shadow of a doubt in over three years.

Mr. Lenoir testified on his own behalf and stated that he was in Parkin drinking beer with friends on the evening of the murder, and that he did not go to Wynne that night. He presented other defense witnesses who corroborated his testimony that he could not have committed the murder because he was in Parkin when it occurred.

We first address Mr. Lenoir's argument that there was insufficient evidence to support his conviction for first-degree murder. He argues that there was an absence of evidence to connect him with the crime other than the identification by Mrs. Cannon, which he asserts was insufficient in light of the circumstances surrounding the murder and inaccuracies in the descriptions she gave to the police.

Mr. Lenoir notes that the incident occurred suddenly, that Mrs. Cannon admitted she was "in shock," and that her view of the assailant was restricted because she was looking down the barrel of a gun. Based on these factors, he submits that she could not have been able to accurately identify the assailant.

Mr. Lenoir also makes reference to the fact that he is 5' 6" and Mrs. Cannon described him at different times as being anywhere from 5' 4" to 5' 9". Moreover, Mrs. Cannon described him as having short hair, and Mr. Lenoir maintains that his hair was not short at the time of the robbery. Mr. Lenoir has a missing front tooth and several tatoos on his arms and hands, and Mrs. Cannon did not mention any of those distinguishing features when talking with the police. As for the shirt that he allegedly wore, Mr. Lenoir notes that it says "CHICAGO," but this fact was absent from Mrs. Cannon's description of his clothing. Due to

the suddenness of the crime and the inconsistencies and inaccuracies of Mrs. Cannon's descriptions, Mr. Lenoir contends that there was no substantial evidence to support the jury's finding that he was the person who committed the murder.

We hold that Mr. Lenoir's conviction is supported by substantial evidence. The testimony of one eyewitness alone is sufficient to sustain a conviction. *Wesley v. State*, 318 Ark. 83, 883 S.W.2d 478 (1994). In this case, Mrs. Cannon identified Mr. Lenoir as the perpetrator by selecting him from a book of photographs and from a lineup, and she also identified him at trial. She testified that she was positive about the identification. Mr. Lenoir relies on the inaccuracies of her prior descriptions given to police officers. However, the appellate court does not weigh the evidence presented at trial or weigh the credibility of witnesses, as these are matters to be resolved by the finder of fact. *See Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001). The jury credited the testimony of Mrs. Cannon, as it was entitled to do, and her testimony supported the jury's finding that Mr. Lenoir was guilty of first-degree murder.

We next address Mr. Lenoir's argument that he was denied a fair trial because the trial court excluded the testimony of his expert witness on cross-racial identification. He notes that in the first trial in this case, which resulted in a hung jury, the testimony of such an expert was permitted. In the subsequent trial resulting in conviction, Mr. Lenoir had retained John C. Brigham, Ph.D., an alleged expert on the problems with cross-racial eyewitness identification, but the trial court granted the State's motion to exclude his testimony.

Mr. Lenoir asserts that, because the State's case was based entirely on the identification by Mrs. Cannon, the expert testimony should have been admitted pursuant to Ark. R. Evid. 702, which provides:

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

Mr. Lenoir asserts that, as his expert testified in the first trial, the expert in this case would have testified that Caucasians have difficulty identifying African-Americans, and that victims of a crime tend to focus on the weapon if one is used. Mr. Lenoir further asserts that Mr. Brigham would have testified that there is no correlation, and can even be a reverse correlation, between the certainty of the witness and reliability of her testimony.

Mr. Lenoir acknowledges that there is no Arkansas law directly on point to support his argument.[1] However, he cites *Brodes v. Georgia*, 551 S.E.2d 757 (Ga. App. 2001), where the Georgia Court of Appeals reversed appellant's armed robbery conviction based on its holding that the trial court abused its discretion in excluding the testimony of an expert on the reliability of witness identification. In that case, the only evidence against the appellant was his cross-racial identification by the victims, and the court of appeals stated that the expert's testimony about the effects of cross-racial identification, tendency of the victim who is being robbed to focus on the gun instead of the culprit's face, and lack of relationship between a victim's confidence and accuracy were not otherwise likely to be fully understood by jurors and were highly relevant. The court further held that the trial court's erroneous exclusion of the expert testimony was not harmless because the only evidence of appellant's involvement in the robbery was the victim's eyewitness identification, and appellant's sole defense was mistaken identity.

Mr. Lenoir also cites *People v. Drake*, 728 N.Y.S.2d (2001). In that case, the New York Supreme Court ruled that expert testimony on eyewitness identification was appropriate in appellant's trial for numerous charges, including attempted murder. In reaching its decision, the court relied on several factors, including the violence and stress involved, the weapon used, and the cross-racial aspect of the identification of the appellant, and ruled that these identification issues might not be apparent to an ordinary person.

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[1] We attempted certification of this case to the supreme court pursuant to Ark. Sup. Ct. Rule 1-2(b)(1)(5). The supreme court declined certification.

In the instant case, Mr. Lenoir contends that the identification made by Mrs. Cannon was suspect given the use of a weapon by the culprit, the stress involved, the short time that elapsed, and the cross-racial aspect of the identification. He argues that the testimony of his expert witness was essential to his defense and would have helped the jury understand the reliability of such an identification.

The trial court has discretion in the admissibility of expert-witness testimony, which will not be reversed absent an abuse of discretion. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998). We hold that the trial court did not abuse its discretion in refusing to admit Dr. Brigham's testimony.

In reaching our decision we rely on *Utley v. State*, 308 Ark. 622, 826 S.W.2d 268 (1992). In that case, our supreme court declined an invitation by the appellant to follow cases from other jurisdictions, and held that the trial court did not abuse its wide discretion in excluding expert testimony about factors affecting the reliability of eyewitness testimony. The appellant in *Utley v. State, supra,* was convicted of aggravated robbery based on the testimony of the two victims. Although the crime occurred suddenly and quickly and appellant held the victims at gunpoint, our supreme court ruled that the effect of stress on the reliability of identification was easily understood by the jury without expert testimony, and that the testimony could have hindered the jury's ability to judge impartially the credibility of and weight to be accorded the witnesses' testimony.

Our supreme court in *Utley v. State, supra,* declined to follow other jurisdictions in reaching its holding on the admissibility of expert identification testimony, and in the case at bar we are not persuaded to follow the authorities cited by Mr. Lenoir. As sole judge of the credibility of witnesses, the jury was adequately equipped to consider Mrs. Cannon's testimony in light of their own personal experiences and common sense and decide whether her identification was reliable. The exclusion of the expert witness's testimony was not error.

Mr. Lenoir next argues that the trial court erred in refusing to give a jury instruction on the question of cross-racial identifica-

tion. At the close of the case, Mr. Lenoir proffered the following instruction:

> You know the identifying witness is of a different race than the defendant. When a witness who is a member of one race identifies a member who is of another race, we say there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness's original perception and/or accuracy of a subsequent identification.

For his argument, Mr. Lenoir cites *State v. Cromedy*, 727 A.2d 457 (N.J. 1999), where the New Jersey Supreme Court held in a case of first impression that, in a rape case where a white victim identified her African-American assailant, it was error for the trial court to deny the appellant's requested jury instruction on cross-racial identification. Mr. Lenoir argues that the proposed instruction in the present case would have helped focus the jury on the problems of cross-racial identification. He contends that the failure to give the instruction violated due process because the cross-racial eyewitness identification was the only evidence presented against him.

■ ■ In determining if the trial court erred in refusing an instruction in a criminal trial, the test is whether the omission infects the entire trial such that the resulting conviction violates due process. *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001). We hold that refusal to give the instruction did not violate due process. In this case, the jury was instructed to weigh the evidence and credibility of witnesses in light of their observations and experiences, and the proposed jury instruction was not necessary for the jury to assess the testimony given by Mrs. Cannon. Mr. Lenoir has cited no binding authority to support his position on this issue, and we again decline to follow the authority he cites from another jurisdiction.

We now turn to the improper evidentiary rulings asserted by Mr. Lenoir. The first of these rulings was the trial court's exclusion of proffered photographs of Mr. Lenoir that showed a small mustache, missing front tooth, and multiple tattoos on his arms and hands. He argues that these photographs were relevant and admissible to show distinguishing marks and features not men-

tioned in Mrs. Cannon's descriptions to the police, thereby attacking the credibility of her identification testimony.

Admission of photographs rests within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion. *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). The trial court's refusal to admit the photographs was not an abuse of discretion because they were merely cumulative of other evidence and were thus properly excluded under Ark. R. Evid. 403. It is undisputed that, during his testimony, Mr. Lenoir displayed a missing tooth and his numerous tatoos to the jury, and in refusing to admit the photographs the trial court announced, "I am going to deny them as they show exactly what the defendant has shown the jury in person." Moreover, even had the trial court erred in excluding the photographs, such error resulted in no prejudice, and we will not reverse an evidentiary ruling absent a showing of prejudice. *See Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996).

Mr. Lenoir next argues that the trial court erred in granting the State's motion to exclude the testimony of one of the investigating officers who, eighteen minutes after responding to Mrs. Cannon's report of the shooting, found three males in close proximity to the liquor store. According to the officer, the males fled as he approached them. Mr. Lenoir contends that the jury should have been allowed to weigh the evidence of the other subjects' possible involvement in the crime against the evidence presented by the State.

The testimony proffered by Mr. Lenoir was inadmissible pursuant to *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993), where our supreme court stated:

> A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible.

Id. at 75, 852 S.W.2d at 323 (citing *State v. Wilson*, 367 S.E.2d 589 (N.C. 1988)). In the instant case, there was no evidence that the three males were involved in the crime given that there was no evidence that they were ever present in the liquor store, and their identities or other information about them was never ascertained.

The trial court did not abuse its discretion in excluding the testimony.

Finally, we address Mr. Lenoir's argument that the trial court erred in failing to exclude the testimony of a rebuttal witness who had been sitting in the courtroom during the trial. He correctly asserts that Ark. R. Evid. 615 had been invoked, which provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

After the defense rested, the State called the victim's son, Joseph Cannon, Jr., as a rebuttal witness. Mr. Lenoir objected, but the trial court allowed the witness to testify, notwithstanding the fact that the witness was not excused by "the rule" and was present during the trial. Mr. Lenoir contends that Mr. Cannon's testimony was opposite that of the defense's alibi witnesses, was prejudicial, and should have been excluded.

We hold that any possible error in permitting Mr. Cannon to testify was rendered harmless by the rebuttal testimony of Deputy Larry Williams. Mr. Cannon testified that it was raining hard on the night of the murder, which contradicted Mr. Lenoir's testimony in this regard. However, after Mr. Cannon testified, Deputy Williams also testified, without objection, that it was raining hard on the night at issue. Moreover, in the State's case-in-chief, Officer Pettigrew testified, "It was raining steadily." The admission of evidence that is merely cumulative of other evidence admitted without objection is not prejudicial. *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995).

Upon reviewing each of the points argued by Mr. Lenoir on appeal, we hold that no reversible error occurred. Therefore, his conviction for first-degree murder is affirmed.

Affirmed.

HART and BAKER, JJ., agree.

Benjamin C. DUKE *v.* STATE of Arkansas

CA CR 01-967 72 S.W.3d 907

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 2002

Bryan P. Christian, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Appellant, Benjamin C. Duke, was convicted of battery in the second degree stemming from a dog attack involving his pit bulldogs. He was sentenced to three years in the Arkansas Department of Correction. On appeal, he alleges the evidence was insufficient to support his conviction. We affirm.

On June 27, 2000, the victim, Matt Schnider, was walking along Blaney Hill Road when a dog approached him from appellant's yard. The victim paused, and as he went to walk on the other side of the road, several other dogs came from appellant's yard and started barking at him. As the victim began to back away the dogs ran up and started biting him on his legs, arms, and back. He sought refuge in an old truck parked along the side of the road. As he climbed in the truck, a black and white dog bit him on the leg. Once in the truck, the victim managed to flag down a passing motorist who took him to his sister's house and then to the hospital. After undergoing surgery, the victim talked to Lieutenant Bill Milburn and Detective Chuck Townsend of the Conway Police Department. As a result of the attack, appellant was charged with battery in the second degree.

At appellant's April 25, 2001, trial, the victim described the incident as follows:

> On June 27th of 2000, I was walking down the road and saw a dog come from [appellant's house]. I was going to a [friend's] house and had to walk by the [appellant's]. I stopped as the dog looked at me and began walking on the other side of the road. When the dogs came from his yard they stopped and started barking at me. I started to walk backwards and then turned forward again. The dogs ran up to me and started biting me. I fell into the bushes on the other side of the road. The dogs were biting me on my legs, arm, and back. I couldn't feel anything at the time. I felt like I was going to die. I was in the ditch near bushes and they were still biting me.
>
> I began to move toward the truck but was pushed to the other side of the road. I was trying to get them off so I could get to the truck and one dog began to get the others off of me. A black and white one bit my leg and held on until I got to the truck. I got to the truck and slammed the door on the dog's

> head a couple of times. I had trouble getting to the truck because the dogs kept jumping on me, holding on to me and pushing me to the ground. I do not know how many times I was bitten. I bled a lot.
>
> When I got into the truck, I was hurting a lot. I started taking paper that was in the truck and covered my wounds so I wouldn't bleed as bad.

During his testimony, he was shown photographs of appellant's dogs. From the photos he identified the dogs involved in the attack. He described the first dog that approached him as brown. The victim stated that he is now afraid of dogs and that he is undergoing counseling. As a result of the attack, the victim stated that he has scars on his arms, legs, and back and that the scars sometimes bother him.

Lieutenant Bill Milburn also testified. He stated that when he arrived at the emergency room he took pictures of the victim's injuries. The photos were admitted into evidence. Milburn described the victim as looking "chewed up or mauled." After talking to the victim, Milburn went to the scene of the attack. He stated that he noticed fresh blood in the middle of the road. He followed a trail of blood over to the side of the road where the truck was parked. Milburn saw blood and flesh on the outside of the door and on the floor of the truck. Milburn also noticed prints on the outside of the door.

While at the scene, Milburn stated that he saw appellant trying to catch two dogs that were loose in his yard. He described one of the dogs as a brindle-colored dog. Appellant managed to pen the other dog, a mixed breed, only to have it jump out of the pen and run off. Milburn stated that he found several pit bulls at appellant's residence and that a white pit bull had fresh wounds on its head. Milburn testified that appellant told him the dogs had "pinned" a neighbor the day before. Milburn stated that he looked in the white dog's mouth and found no evidence of the attack. He believed that the color of the other dogs may have camouflaged any injuries, so he did not inspect them.

Milburn testified that his investigation focused on the area near appellant's home, and that there were no other dogs in the area. Milburn said he drove through the area on several occasions looking for other dogs and that he never saw dogs running loose.

Detective Chuck Townsend testified that he spoke with the victim and received an account of what happened. Townsend stated that the victim told him four dogs were involved in the attack, a brown pit bull, a white pit bull, a black and white pit bull and a light brown mixed breed. Townsend also stated that the white pit bull was sacrificed for rabies testing and that the results were negative. Townsend stated that appellant asserted that the dogs involved were not his because, if they had been, the victim would not have lived.[1]

Townsend stated that he did not consider any dogs other than appellant's because the victim indicated that the dogs had come from appellant's yard. Townsend also stated that he questioned appellant's neighbors about stray dogs in the neighborhood. Appellant's neighbors informed Townsend that appellant's dogs were often loose, but they had also seen other stray dogs.

Townsend further testified that when he went to appellant's house to pick up two dogs, he discovered that appellant had disappeared with one of the dogs. Appellant had fled to Missouri with the dog; however, he eventually turned the dog over.

Mark Roberts, age twelve, testified that he lived near appellant and that he would go by his house two to three times a week. Roberts also testified that he has had encounters with appellant's dogs. He stated that when he would ride his bike past appellant's house, the dogs would come after him growling and barking. Sometimes appellant would be there and he would call the dogs back. Roberts described the dogs as pit bulls. He stated that the dogs would always come from appellant's house. Although the dogs never bit him, Roberts stated that he is afraid of them.

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[1] Townsend's notes indicated that appellant said "If they were my dogs, the boy would be dead, he would have never gotten away."

Patrick Worm, age fourteen, testified that he used to live by appellant and his dogs "would get after him." On one occasion, the brown and white pit bull came running after him while he was on his bike. Worm stated that he jumped off his bike and hit the dog with a rock before getting back on his bike and riding off.

Danny Carter, appellant's next-door neighbor, testified that around midnight on May 19th or 20th, 2000, two pit bulls came over and started "barking and snapping" at him while he was sitting in his front yard. Carter stated that he called out to appellant's family to come get the dogs. As he walked toward appellant's house, one of the dogs bit him on the back of the legs. Carter stated that he reported the incident to the police. Carter further testified that a week later, two white pit bulls came into his yard and began "snapping and barking" at him. When he tried to go into his house, the dogs would try to bite the back of his legs. Carter stated that he has seen appellant's dogs running loose and that they would get into the trash and eat his dog's food. Carter also stated that the dogs bit his German Shepherd and that his dog later died.

Janette Daniel, an animal-control officer, testified that animal control had contact with appellant at his old residence, located at 1720 Highway 64 West, on several occasions. The address was a regular stopping place due to the number of calls about appellant's pit bulls running loose. Daniel stated that on one occasion the brindle pit bull chased a man into a nearby business. She stated that the dog was growling and trying to bite the man. Daniel testified that on June 27, when she arrived at the scene, there was blood on the front steps of the house. While there, the white pit bull came running into the yard. Daniel stated that she was unaware appellant had moved to Blaney Hill Road because she had received no calls about the dogs being loose in the area.

Dr. Timothy Callicott, an emergency-room physician, testified that he treated the victim on June 27th. He stated that the victim had forty to sixty wounds varying from small punctures to deep muscle lacerations. Callicott described the victim as scared, upset, and in pain. He explained that in order for a laceration to reach the muscle, it must be one-half to three-quarters of an inch

deep. Callicott stated that he was unable to close the wounds in the emergency room, so a surgeon had to be called in to close some of the wounds. He explained that in a normal situation the wounds would be closed in the emergency room. Callicott further explained that a surgeon was required due to the number of wounds and their depth. Callicott also testified that the wounds appeared to be animal bites. Callicott stated that the most serious wounds were on the victim's lower legs and that there were also wounds on his lower back and arms.

Sheldon Cain testified for the defense. He testified that he lived near appellant and that on June 27th, he passed appellant's house while going to work. Cain stated that he saw several dogs in the area including a German Shepard and a beagle. Cain also stated that it was common to see dogs running loose in the neighborhood. Cain further testified that he has been around appellant's dogs before. He described the dogs as being nonaggressive, but territorial. He also stated that the dogs were allowed to run loose most of the time. Cain admitted that on one occasion the dogs charged at him when he came over to visit appellant.

Appellant admitted owning five pit bulls, a brindle bull dog, a black bull dog, a white bull dog with brown markings, a buck-skin bull dog with a black mask and a solid white bull dog. He testified that the dogs provided security on his property. He stated that he left home on the 27th at around nine and returned around twelve. He stated that when he left, most of the dogs were secure. He also stated that he showed everyone at the scene that his dogs did not have blood on them. Appellant explained that the wound on the head of the white pit bull was from the dog scratching itself. He denied washing the blood off the dogs. Appellant also stated that he had never seen his dogs bite anyone, but he had seen them growl and bark. Appellant testified that he had never seen the dogs act aggressively toward the neighborhood kids. Appellant also denied using the dogs for fighting. During his testimony, appellant accused Officer Milburn of lying about his dogs "pinning" a neighbor the day before the attack. Although he never was told how much blood was on the porch, appellant stated that the blood was from a dog tick. He also denied any knowledge of his dogs biting Carter. Appellant stated that when he arrived

home, he parked across the road in front of the truck and that he never saw any blood on the road. He further stated that he never saw any bits of flesh in the blood spots. Appellant also denied saying "if they were my dogs, the boy would be dead, and would have never gotten away."

At the conclusion of the State's case and again at the close of all the evidence, appellant made a motion for directed verdict. He alleged that the State failed to prove he recklessly caused a serious physical injury to another person by means of a deadly weapon. He also alleged there was no evidence that the victim faced a substantial risk of death, nor was there evidence that the dogs were a deadly weapon. The court denied the motions.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Enoch v. State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State, and consider only that evidence which supports the verdict. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997). Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Id.* This court does not, however, weigh the evidence presented at trial, as this is a matter for the fact-finder. *Id.* Nor will this court weigh the credibility of the witnesses. *Id.*

Appellant argues there was insufficient evidence to support the jury's determination that he committed battery in the second degree. We disagree. A person commits battery in the second degree if he "recklessly causes serious physical injury to another person by means of a deadly weapon." Ark. Code Ann. § 5-13-202 (Supp. 2001).

Appellant first asserts that the State failed to prove that he acted recklessly. A person acts recklessly "when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the results 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. 1997).

The evidence elicited at trial clearly shows that appellant acted recklessly. There was evidence that appellant knew his dogs had "pinned" a neighbor the day before the attack. The dogs also had a history of attacking without provocation. Accordingly, we hold that there was substantial evidence that appellant acted recklessly.

Appellant next asserts that the State failed to show that the victim sustained a serious physical injury. Serious physical injury is defined as "physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss protracted impairment of the function of any bodily member or organ." Ark. Code Ann. § 5-1-102(19) (Supp. 2001). Whether a victim has suffered serious physical injury is an issue for the jury to decide. *Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001). Serious physical injury has been found where the victim was struck three times with a fist, causing facial fractures and impairment of vision for about two weeks, and where the victim suffered a broken leg, fractured toe, and bruised heel and pelvis. *Enoch v. State, supra.*

In this case, the victim testified that he has scarring on his lower back, legs and arms. Dr. Callicott testified that the victim sustained forty to sixty wounds that varied in size and depth. Dr. Callicott explained that under normal circumstances they would close the wounds in the emergency room; however, due to the number and depth of the victim's wounds, surgery was required. In addition, graphic photos of the victim's wounds were admitted into evidence. We cannot say that the fact-finder could not reasonably infer from the evidence that the victim sustained a serious physical injury. We therefore conclude that substantial evidence to support the finding of a serious physical injury existed.

Appellant's last argument is that the State failed to establish that his dogs were a deadly weapon. The concept of a dog being a deadly weapon is a novel issue in Arkansas. A deadly weapon is defined as "anything that in the manner of its use or intended use

is capable of causing death or serious physical injury." Ark. Code Ann. § 5-1-102(4)(B) (Supp. 2001). Appellant concedes that a dog can be used or made into a deadly weapon; however, he asserts that there was no evidence that he used his dogs in a manner that could be considered deadly.

Appellant testified that the dogs provided security and as such they were allowed to roam at will. While roaming, the dogs had twice bitten appellant's next-door neighbor. The dogs have also chased a man into a nearby business. There was evidence that quite often when the dogs began to "snap and growl" at someone, they would only stop when appellant called them off. Appellant's dogs had a history of attacking other animals in the neighborhood. The State presented evidence that the day before the attack, the dogs had "pinned" a neighbor. The State also presented evidence that appellant asserted that if his dogs were involved the victim would not have survived the attack. Further, appellant's own witness testified that the dogs had charged him when he came to visit appellant. Based on the applicable statute, the fact-finder could reasonably infer that these dogs were used in such a manner as to constitute deadly weapons.

Viewing the evidence in a light most favorable to the State, we conclude that there was substantial evidence to support the appellant's conviction of battery in the second degree.

Affirmed.

HART and BIRD, JJ., agree.

SMITH-BLAIR, INC., and Pacific Employers Insurance Company *v.* Cal L. JONES

CA 01-1068 72 S.W.3d 560

Court of Appeals of Arkansas
Division I
Opinion delivered May 1, 2002

Hart, Shaw & Freeze, L.L.P., for appellants.

Garnet E. Norwood, for appellee.

OLLY NEAL, Judge. This is an appeal from the Workers' Compensation Commission (Commission), reversing the decision of the administrative law judge (ALJ) and awarding appellee additional benefits. On appeal, appellants argue that the Commission erred in holding that Cal Jones is entitled to addi-

tional benefits because the decision is not supported by substantial evidence. We affirm.

The facts are as follows. Appellee Cal Jones was employed with appellant Smith Blair when he injured his right wrist on December 1, 1998, while testing and loading water meters at its, Texarkana, Arkansas, plant. Dr. Mark Gabbie, the initial treating physician, referred Jones to Dr. Hamlin, who then referred Jones to Dr. Frazier for surgery.

Dr. Frazier diagnosed appellee with having a painful ulna styloid nonunion right wrist and recommended he undergo surgery, which was performed on April 2, 1999. On April 10, 1999, Dr. Frazier released appellee to return to work. When appellee returned to work, he was unable to perform his job duties for more than two hours due to the pain in his right upper extremity. On April 28, 1999, appellee requested a change of physicians. The request was denied, but appellee filed a request for a hearing. The ALJ, following the August 6, 1999 hearing, concluded that appellee was entitled to a change of physician and selected Dr. DeHaan, a Texarkana orthopedic surgeon.

After several examinations, Dr. DeHaan diagnosed appellee with having a nonunion ulna styloid fracture and a congenital ulna positive wrist. Dr. DeHaan recommended an ulna shortening procedure. After the procedure was performed, Dr. DeHaan recommended that appellee undergo physical therapy. Appellants refused to pay for the therapy, and appellee filed a claim requesting additional temporary total disability. The ALJ determined that appellee failed to prove by a preponderance of the evidence that he was entitled to additional medical treatment or benefits for temporary total disability. The Commission reversed the ALJ's finding, and this appeal follows.

In reviewing a decision of the Commission, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Smith v. County Market/Southeast Foods*, 73 Ark. App. 333, 44 S.W.3d 737 (2001); *Campbell v. Randal Tyler Ford Mercury*, 70 Ark. App. 35, 13 S.W.3d 916 (2000). The question is not whether the evidence would have supported findings contrary to those made by

the Commission, but only whether the Commission's decision is supported by substantial evidence. *Matlock v. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001). Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). If reasonable minds could reach the result found by the Commission, we must affirm the decision. *Wal-Mart Stores, Inc. v. Brown*, 73 Ark. App. 174, 40 S.W.3d 835 (2001).

It is well settled that the employer takes an employee as he finds him. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). Being a new injury with an independent cause, an aggravation must meet the requirements for a compensable injury. *Id.* To sustain a compensable injury, one must prove by a preponderance of the evidence that (1) the injury arose out of and in the course of the employment, (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death, and (3) the injury was a major cause of the disability or need for treatment. *Id.*

Whether there is a causal connection between the injury and a disability and whether there is an independent intervening cause are questions of fact for the Commission to determine. *Oak Grove Lumber v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). Further, a compensable injury must be established by medical evidence supported by objective findings. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. *See Crudup; supra.* Speculation and conjecture cannot substitute for credible evidence. *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (Ark. App. 1980).

Appellants contend that there are four basic reasons the evidence is not substantial to support the Commission's finding that appellee is entitled to additional benefits. First, appellants argue that appellee was ordered to return to work by Dr. Frazier follow-

ing his surgery without restrictions and that Dr. Frazier is the physician best qualified to examine appellee; thus, because Dr. Frazier found no impairment to his right upper extremity or right wrist, appellee was able to return to work. Further, appellants argue that because Dr. Frazier, in his June 29, 1999, report, opined that appellee could return to work, his healing period ended on June 29, 1999.

A claimant who has suffered a scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work. Ark. Code Ann. § 11-9-521(a) (Supp. 1999); *see also Wheeler Constr. Co. v. Armstrong, supra.* The "healing period" continues until the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve that condition. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Appellee attempted to return to work; however, he suffered severe pain when he went back to work. Thereafter, Jones requested that he be allowed to see another physician. He was eventually seen by Dr. DeHaan, who later diagnosed appellee with another condition that was causing his continued pain. Dr. DeHaan diagnosed a congenital ulna positive wrist condition that he opined was aggravated by claimant's injury. In his deposition, Dr. DeHaan stated, "I think whatever injury he had aggravated or injured that thing which he was born with or that deformity which he was born with." The Commission recognized that only Dr. DeHaan diagnosed appellee's condition and opined that it was aggravated by and causally related to his employment. It therefore found that appellee proved that the aggravation to his congenital ulna positive wrist condition was job-related and compensable. We agree.

Second, appellants argue that evidence is not substantial to support the Commission's finding that appellee is entitled to additional benefits because appellee did little to further his rehabilitation and instead primarily relied on obtaining pain control medications. Appellants outline appellee's medical records

chronologically in an effort to show that appellee was, in essence, addicted to pain medication, and failed to complete the necessary therapy to rehabilitate himself. They rely on the fact that Dr. Frazier prescribed no pain medication when he released Jones to return to work; nor did Dr. Gabbie when he saw appellee in July. However, Dr. DeHaan noted that claimant had a legitimate reason for his continued pain and there is no indication in the medical records that his efforts to relieve pain with prescription medication was unreasonable or excessive. We note that the Commission is not required to believe the testimony of any witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Also, this argument lacks any citation to authority, and we will not consider the merits of an argument when an appellant fails to cite any convincing legal authority in support of that argument, and it is otherwise not apparent without further research that the argument is well taken. *Matthews v. Jefferson Hosp. Assoc.*, 341 Ark. 5, 14 S.W.3d 482 (2000).

Third, appellants contend that after his surgery, appellee exhibited a lack of effort at rehabilitation and failed to follow the orders of his physician. Appellants recount the record of physical therapy sessions that appellee either canceled or did not complete as evidence of his lack of effort. Appellants also point to the fact that it was recommended that appellee undergo a home program and that there is no evidence that appellee even attempted the program. However, as the Commission correctly points out, "there is no evidence that Jones tried to implement the home therapy, but there is likewise no evidence that claimant has not tried it either."

Finally, appellants argue that "appellee's credibility is questionable and inconsistent." Appellants fail to recognize that questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). 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. *Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

We affirm.

Jose Luis VERGARA-SOTO *v.* STATE of Arkansas

CA CR 01-912 74 S.W.3d 683

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 2002

George R. Spence, for appellant.

Mark Pryor, Att'y Gen., by: *O. Milton Fine II*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. A Washington County Circuit Court jury found appellant, Jose Luis Vergara-Soto, guilty of the offenses of possession of methamphetamine with intent to deliver and simultaneous possession of drugs and a firearm. He was sentenced to the Arkansas Department of Correction for 180 months for each offense, with the sentences to run concurrently. Vergara-Soto's sole point on appeal is that the trial court erred in denying

his motion for directed verdict on the charge of simultaneous possession of drugs and firearms because there was insufficient evidence to show that the handgun was "readily accessible for use." We affirm.

Directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Harris v. State*, 73 Ark. App. 185, 44 S.W.3d 347 (2001). When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001). Substantial evidence, whether direct or circumstantial, is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another, without resort to speculation or conjecture. *Id.* Only evidence supporting the verdict is considered. *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000).

The evidence established that while Fayetteville police officers were conducting a search of another residence, Vergara-Soto was asked by the officers if he would consent to a search of his residence, and Vergara-Soto agreed to the search. Officer Mike Henderson testified that after the search of the other residence was concluded, he and the other officers followed Vergara-Soto three or four miles to his residence that was located in a trailer park. Henderson testified that when they arrived at the trailer park, Vergara-Soto gave him the keys to his trailer and that he and the other officers entered Vergara-Soto's trailer and began to search. Vergara-Soto remained outside the trailer while the officers conducted their search. Craig McKee, a detective with the Fourth Judicial District Drug Task Force, testified that he searched through a pile of clothes in a bedroom of Vergara-Soto's trailer and located a pair of jeans that had a bulge in one of the legs. When he picked up the jeans, a white sock that contained methamphetamine and a nine millimeter handgun fell to the floor.

Arkansas Code Annotated section 5-74-106(a)(1) (Repl. 1997) provides that no person shall unlawfully commit a felony violation of section 5-64-401 (Repl. 1997) (manufacturing, delivering, or possessing with intent to manufacture or deliver a con-

trolled substance) or unlawfully attempt, solicit, or conspire to commit a felony violation of section 5-64-401 while in possession of a firearm. Section 5-74-106(d) provides that it is a defense to the crime described in section 5-74-106(a) "that the defendant was in his home and the firearm was not readily accessible for use."

In order to obtain a conviction under section 5-74-106(a)(1), the State must prove two elements: (1) that the defendant possessed a controlled substance and a firearm, and (2) that a connection existed between the firearm and the controlled substance. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998); *see also Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997) (holding that some link between the firearm and drugs is required; mere possession of a firearm is not enough).

Vergara-Soto does not challenge the sufficiency of the evidence to prove that the methamphetamine and handgun were found together in his trailer. Nor does he contend that there was no connection between the methamphetamine and the handgun or that the handgun was not susceptible of use as a weapon. Rather, he argues that the evidence proved the existence of the defense provided by section 5-74-106(d), that he "was in his home and the firearm was not readily accessible for use." We do not agree. In order to avail himself of this defense, Vergara-Soto had to establish, first, that he "was in his home" and, second, that "the firearm was not readily accessible for use." Ark. Code Ann. § 5-74-106(d). Both of these elements must be established in order for Vergara-Soto to prevail on the defense. However, by his very argument, Vergara-Soto admits that he was not in his home; therefore, he has not fulfilled the first requirement in proving the defense.

The concurring opinion does not support our interpretation of the statutory defense provided in Ark. Code Ann. § 5-74-106(d), but, instead, interprets the statute's first requirement, that the defendant be "in his home," to mean that the defendant need not be in his home to avail himself of the defense. The concurring opinion suggests that the requirement that the defendant be "in his home" does not mean what it says, but that it actually means

that the "possession" at issue, whether actual or constructive, must occur in the defendant's home, whether the defendant is in his home or not. We find no basis in the language of the statute to support such an interpretation.

■ ■ While we recognize that criminal statutes are strictly construed and any doubts are resolved in favor of the defendant, we are first and foremost concerned with ascertaining the intent of the General Assembly. *Sansevero v. State*, 345 Ark. 307, 45 S.W.3d 840 (2001). In statutory interpretation matters, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Langley v. State*, 343 Ark. 324, 34 S.W.3d 364 (2001). In adopting section 5-74-106(d), the General Assembly obviously intended to create a very narrow exception to the crime of simultaneous possession of drugs and firearms where "the defendant was in his home and the firearm was not readily accessible for use." We see nothing in this clear and unambiguous language that permits an interpretation other than, first, that the defendant must be in his home and, second, that the firearm is not readily accessible for use in order for a defendant to avail himself of the defense.

The concurring opinion apparently prefers to affirm this case on the basis of Vergara-Soto's failure to establish the second element of the statutory defense, that the firearm was not readily accessible for use, citing *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000), in which the supreme court also took that approach. However, in *Gilbert*, while there was a dispute as to whether Gilbert was in *his home* or whether he actually resided elsewhere, there was no dispute that Gilbert was in the house where the drugs and firearm were located. Thus, the supreme court noted that, even if he had proved that he was in *his home*, Gilbert had failed to prove that the firearm (that was in an open case in the living room) was inaccessible for use; thus, he could not avail himself of the defense.

■ *Gilbert* is clearly distinguishable from the case at bar. Here, it is not disputed that the handgun *was* found in Vergara-Soto's home and it is not disputed that Vergara-Soto *was not* in his home when the handgun was discovered. Under these circum-

stances, clearly Vergara-Soto has failed to establish that he was "in his home," as the statutory defense requires.[1]

On the other hand, to hold, as the concurring opinion apparently would, that constructive possession of a firearm by one who is not present in his home when a firearm is discovered is equivalent to the firearm's being "readily accessible for use," is to eliminate the availability of the statutory defense to anyone, whether or not they are present in their home where drugs and firearms are discovered. Since constructive possession can be implied when contraband is found in a place that is immediately and exclusively accessible to the defendant and subject to his control, *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001), under the analysis employed by the concurring opinion, the known presence of illegal drugs and firearms in a defendant's home would preclude the defendant from relying upon the statutory defense afforded by section 5-74-106(d), regardless of whether the firearm was readily accessible for use, thereby rendering the statutory defense a nullity.

■ However, we hold that where the evidence was undisputed that the methamphetamine and handgun were found together in a sock in Vergara-Soto's trailer, and that Vergara-Soto was not in his home when the methamphetamine and handgun were discovered, the trial court did not err in denying Vergara-Soto's motion for directed verdict.

Affirmed.

VAUGHT, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in affirming this case but do not agree that Vergara-Soto had to be literally inside his home when the contraband and gun were found in order to avail himself of the defense set out in Ark. Code Ann. § 5-74-106(d). Vergara-Soto was charged with simul-

[1] The concurring opinion says that the statutory defense contained in Ark. Code Ann. § 5-74-106(d) requires proof that the defendant was "in his own home"; however, the statute does not contain the word "own."

taneous possession of drugs and firearms. He was away from his trailer home and was brought there by officers, remaining outside while the officers conducted a search that resulted in the discovery of a handgun and contraband together in a sock, and three clips of ammunition in another room. A common-sense reading of the statutory defense relied upon by Vergara-Soto suggests that the "possession"[1] at issue, whether actual or, as in this case, constructive, must occur in the defendant's *own home*, as opposed to another location, for the defense to attain.

In *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000), the supreme court said that the record was conflicting on whether the appellant was "in his own home" as the statutory defense requires, or another home not his primary residence, but found the defense unavailable to him because the gun was not inaccessible for use. It would indeed be ludicrous for this defense to be available to a defendant who is found inside his own home at the time of a search and necessarily in much closer proximity to a weapon, but not to one who remains outside or is even away from home during a search. Statutory construction requires a common-sense approach. *Rosario v. State*, 319 Ark. 764, 894 S.W.2d (1995). Even penal statutes should not be construed to reach absurd results. *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985).

To establish the offense at issue, the State must prove two elements 1) Vergara-Soto possessed a firearm, and 2) a connection existed between the firearm and the controlled substance. *Gilbert v. State, supra.* In this instance, there was a close connection between Vergara-Soto's firearm and the controlled substance, Vergara-Soto does not contest on appeal that he possessed these items, and does not contend that the gun was not readily accessible for use because the ammunition clips were located in a different room of the trailer. A gun with three ammunition clips in a small trailer is clearly "readily accessible for use," and I agree in affirming this conviction.

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[1] Vergara-Soto does not argue on appeal that he was not "in possession" of the items found. Thus, his "possession," and our analysis of the argument he does raise, must necessarily place him in the home with the contraband and gun.

James Andrew TAYLOR *v.* STATE of Arkansas

CA CR 01-215 75 S.W.3d 708

Court of Appeals of Arkansas
Division III
Opinion delivered May 8, 2002

James Law Firm, by: *Clay T. Buchanan*, for appellant.

Mark Pryor, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. James Andrew Taylor challenges his conviction for possession of drug paraphernalia with intent to manufacture methamphetamine. He contends on appeal that the trial court erroneously denied his motion for continuance in order to obtain substitute counsel. The State concedes error and requests that appellant's conviction be reversed because the record does not reflect that appellant knowingly and intelligently waived his right to counsel at trial. We agree and reverse and remand for a new trial.

Facts and Procedural History

On September 8, 1999, Officer Dan Morales of the Arkansas State Highway Police observed appellant driving a vehicle with defective windshield wipers. After the officer pulled appellant over, appellant agreed that the wipers were defective and told Morales that he had borrowed the car from a friend.

After conversing with appellant, Morales became suspicious and requested appellant's permission to search the vehicle. Appellant consented. When Officer Morales asked appellant to open the trunk, the passenger in the vehicle immediately responded, "there's nothing in the trunk." Appellant proceeded to open the trunk, and Morales discovered several items of drug paraphernalia. Appellant was charged with possession of drug paraphernalia with intent to manufacture methamphetamine.

On November 1, 1999, appellant appeared before a trial judge and was found indigent. The court appointed a public defender, Scott Freydl, to represent appellant at trial, which was scheduled for February 14, 2000. Although appellant met with

Freydl to discuss his case, Freydl left the Public Defender's Office and the court appointed David Mark Gunter to represent appellant. Between November 1, 1999, and February 14, 2000, appellant appeared before the trial court once for a pretrial hearing on discovery motions.

In a hearing conducted on the day of jury selection, appellant informed the court that he no longer wanted Gunter to represent him. When the court inquired further, appellant told the court that he had been incarcerated for five months, that he had received his tax returns, and that he now had the money to hire a lawyer. Appellant stated that he had not had the opportunity to go over the case file with an attorney and that he was requesting a continuance to hire a lawyer. He informed the court that if it granted the motion, "we could take care of this matter at the next court date." The following colloquy took place:

THE COURT: I am not going to continue this matter. You were in here on the 10th and I told you the trial date would remain the same. We will proceed to trial with either you representing yourself or Mr. Gunter representing you. The jury will be selected today and the trial will be conducted — (*to Mr. Wright, Prosecuting Attorney*) do you have the witnesses subpoenaed for tomorrow?

MR. WRIGHT: For tomorrow.

THE COURT: The trial will be conducted tomorrow. Do you desire [that] Mr. Gunter continue to represent you at this time?

APPELLANT: No, sir, I still beg for the mercy of the court to let me have the opportunity to hire an attorney. I've got the means and I've been in contact with my father in Colorado. He says that he will help me in any way.

THE COURT: You appeared in court last week on the 10th?

APPELLANT: Yes, sir. I wanted to ask for a continuance at that time but I was just rushed in and rushed right back out.

THE COURT: I am going to deny your motion for continuance. Do you understand that you have a right to have Mr. Gunter represent you?

APPELLANT: No, sir, I do not wish that.

THE COURT: Do you wish to represent yourself?

APPELLANT: At this time, no, sir. I wish to obtain a paid lawyer.

THE COURT: If you can obtain a lawyer by the time we start the jury trial, you may do so. The trial is going [to] continue. Do you understand that?

APPELLANT: I understand that you're denying me — that I cannot obtain a lawyer at this time.

THE COURT: No. You have a lawyer. Mr. Gunter is a competent lawyer.

APPELLANT: Yes, sir, but he has not come down and went over [*sic*] this case file with me and I need some of this evidence suppressed. There are some allegations here that are not true and I am asking for a chance to go over this with a lawyer. The first time I saw Mr. Gunter, he didn't even have this case file with him.

THE COURT: At this time, you understand — do you desire Mr. Gunter to continue to assist you at this time?

APPELLANT: No, sir. At this time, I do not because I have the means to afford a lawyer.

THE COURT: We are going to select the jury in a few minutes for trial tomorrow. Understand that?

APPELLANT: I understand.

THE COURT: I am going to require that Mr. Gunter, although not representing [appellant], advise him should he have any legal or procedural questions. You understand that?

APPELLANT: Yes, Your Honor.

THE COURT: For the record, [appellant] has been in jail since September of — and the charges — since November 1, 1999. This matter has been set for trial today and the Public Defender's Office has been appointed, I believe at the first appearance, at that time. I'm going to take about a five minute recess at this time and we will come back to select the jury.

Following deliberations, the jury found appellant guilty of possession of drug paraphernalia with intent to manufacture methamphetamine. It sentenced him to ten years' imprisonment and fined him $5,000. This appeal followed.

Appellant's Right to Counsel

For his sole point on appeal, appellant asserts that the trial court erroneously denied his motion for continuance in order to obtain substitute counsel. As support for his argument, appellant contends that he never waived his right to counsel, and that the trial court failed (1) to inquire of his understanding of the procedure and charges against him, and (2) to warn him of the danger of proceeding *pro se*. Thus, appellant reasons that the record does not support a conclusion that he knowingly and intelligently waived his right to counsel. The State concedes that the record fails to demonstrate that appellant knowingly and intelligently waived his right to counsel. We agree.

Recently, in *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001), our supreme court addressed the issue of whether an appellant knowingly and intelligently waived his right to counsel by stating as follows:

> [T]his court has long recognized the crucial aspect of informing an accused of his right to represent himself, along with the attendant risks. Furthermore, our court has held that the trial court maintains a weighty responsibility in determining whether an accused has knowingly and intelligently waived his right to counsel. Every reasonable presumption must be indulged against the wavier of fundamental constitutional rights; and the burden is upon the State to show that an accused voluntarily and intelli-

> gently waived his fundamental right to the assistance of counsel. Determining whether an intelligent waiver of the right to counsel has been made depends in each case on the particular facts and circumstances, including the background, the experience, and the conduct of the accused.
>
> A criminal defendant may invoke his right to defend himself *pro se* provided that (1) the request to waive the right to counsel is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. A specific warning of the dangers and disadvantages of self-representation, or a record showing that the defendant possessed such required knowledge from other sources, is required to establish the validity of a waiver. The "constitutional minimum" for determining whether a waiver was knowing and intelligent is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forego the aid of counsel.

Id. at 325-26, 57 S.W.3d at 700-01 (citations omitted).

The assistance of standby counsel may rise to a level sufficient for our court to moot an assertion of involuntary waiver of right to counsel based on our determination that the appellant had counsel for his defense. *See Bledsoe v. State*, 337 Ark. 403, 989 S.W.2d 510 (1999). Whether the assistance rises to this level is a question that is answered by looking at the totality of the circumstances. *See id.* To moot an assertion of involuntary waiver, the assistance must be substantial, such that standby counsel was effectively conducting the defense. *See id.*

After applying the guidelines governing knowing and intelligent waiver to the facts and circumstances in *Hatfield, supra*, the *Hatfield* court determined that the trial judge failed to adequately advise Hatfield of the consequences of proceeding *pro se*. The court noted that the trial judge erred by failing to make even a limited inquiry into Hatfield's understanding of the legal process, although the judge allowed standby counsel to remain in the case. However, the court held that deficiencies in the judge's inquiry were rendered moot because standby counsel actively participated

throughout the trial such that Hatfield waived his right to proceed *pro se*. *See Hatfield v. State, supra.*

In *Bledsoe, supra,* our supreme court determined that there was no evidence of an inquiry by the trial court into Bledsoe's waiver of the right to counsel, and that Bledsoe's appointed standby counsel did not actively participate in his defense. Because Bledsoe was left to represent himself, and because Bledsoe's appointed counsel did not actively represent him, the court determined that Bledsoe was denied his right to counsel. *See Bledsoe v. State, supra.*

The record in the present case demonstrates that the trial court made no inquiry as to whether appellant understood the risk or danger in representing himself. Instead, the record contains ample support for appellant's contention that he did not waive his right to counsel. Appellant told the court that he did not wish for Gunter to represent him, and that he did not wish to represent himself. He repeatedly asked the court for permission to obtain a "paid lawyer," because he "had the means to do so." When the court told appellant that he already had a lawyer (Gunter), appellant expressed dissatisfaction with Gunter's services. He told the court that Gunter had visited him once and on that occasion Gunter did not have the case file with him. Appellant also advised the court that although he wanted certain items suppressed, Gunter failed to file a motion to suppress evidence. We note that Gunter did not dispute appellant's assertions or claim that he was ready for trial. Based on our review of the record, we hold that the trial court's failure to inquire as to appellant's understanding of the legal process, or to warn appellant about the possible consequences and disadvantages of representing himself constitutes reversible error.

In rendering our decision, we note that the trial court's denial of appellant's request for counsel cannot be justified based on appellant's belated request for a continuance on the day of trial. As observed by the State, the record fails to reveal that appellant had previously requested any continuances. Indeed, appellant was incarcerated pending trial and told the court that he had received his tax returns and had the money to hire a lawyer. Appellant also

told the court that if the motion was granted, he would "take care of this matter at the next court date." The record unequivocally supports a conclusion that appellant's request for a continuance in order to obtain counsel was not an attempt to delay the trial or to obstruct the criminal justice system.

Moreover, the record does not support a conclusion that appellant's involuntary waiver of counsel was rendered moot because of the assistance of standby counsel. Instead, the record demonstrates that during jury selection and throughout the trial, appellant actively represented himself by questioning potential jurors, making opening and closing arguments, cross examining a witness, and raising a relevance objection, which was overruled, to a videotape that the State sought to introduce into evidence. On the other hand, the record indicates that Gunter's role throughout the proceeding was minimal. Gunter advised appellant on the number of jury strikes, informed the court that appellant did not wish to testify in his own defense, and reviewed prospective jury instructions. Gunter raised no objections to evidence or exhibits, and did not cross-examine any witnesses. Viewing the totality of the circumstances, we conclude that Gunter's level of participation did not rise to the level such as to moot appellant's involuntary waiver.

We hold that appellant was denied his right to counsel, and we reverse his conviction and remand for a new trial. Because of our conclusion that appellant did not knowingly and intelligently waive his right to counsel, there is no need to address appellant's contention that the trial court erroneously denied his motion for a continuance, as this issue is not likely to arise again on remand.

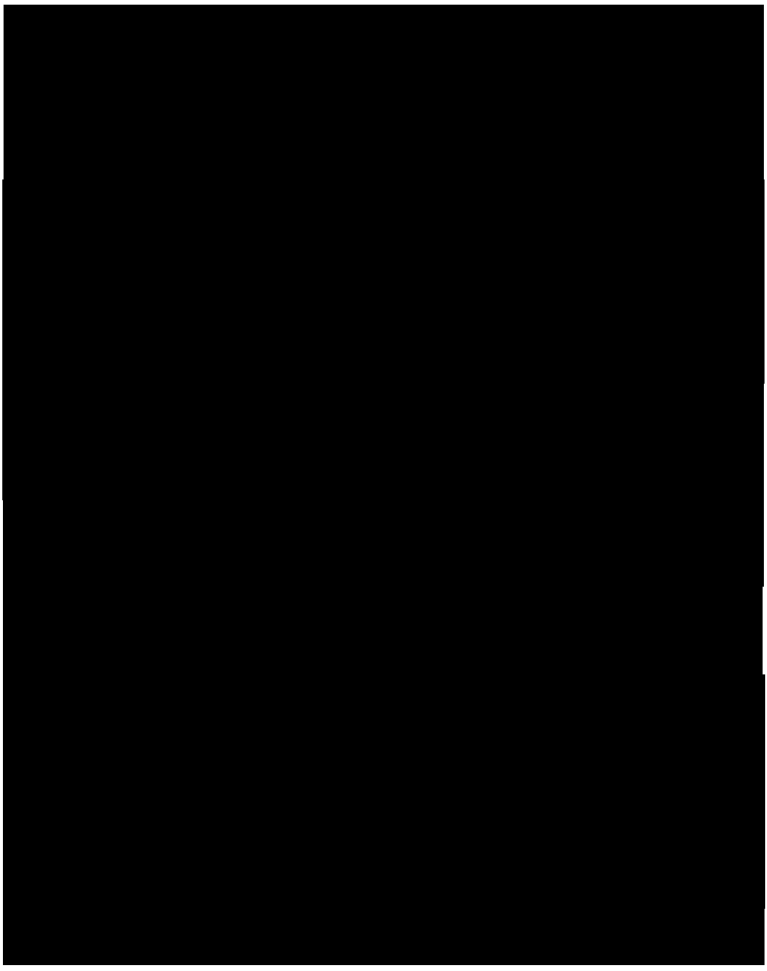
Reversed and remanded.

VAUGHT and BAKER, JJ., agree.

Len CARVER *v.* ALLSTATE INSURANCE COMPANY

CA 01-1319 76 S.W.3d 901

Court of Appeals of Arkansas
Division IV
Opinion delivered May 8, 2002
[Petition for rehearing denied June 26, 2002]



Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles* and *Gail O. Matthews*, for appellant.

Anderson, Murphy & Hopkins, L.L.P., by: *Penny B. Wilbourn*, for appellee.

TERRY CRABTREE, Judge. This is an insurance-coverage case. Appellant Len Carver is the owner of a home in Little Rock. In November 2000, appellant's home was covered by a "Deluxe Homeowner's Policy" issued by appellee, Allstate Insurance Company (Allstate). On November 21, 2000, a portion of a Little Rock Municipal Water Works water main burst adjacent to appellant's property. Water from the burst main flooded appellant's home, causing the house to be moved from its foundation. Windows were broken, and the floors and the ceilings collapsed. There was also extensive damage to the roof. The home was insured for $76,000 and the garage was insured for $7,600. Appellant made a claim on the policy, which appellee denied based on exclusionary language in the policy. The language of the policy provides: "Losses we cover under Coverages A and B: We will cover sudden and accidental direct physical loss to property described . . . except as limited or excluded in this policy." The policy then lists various exclusions as follows:

> Losses we do not cover under Coverages A and B:
>
> We do not cover loss to the property described . . . consisting of or caused by:
> 1. Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.
> 2. Water or any other substance that backs up through sewers or drains.
> 3. Water or any other substance that overflows from a sump pump or a sump pump well. . . .
> 4. Water or any other substance on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on or flows, seeps, or leaks through any part of the residence premises.

Appellant filed this suit seeking payment under the policy, the twelve percent penalty, interest, and attorney fees. Appellee denied coverage in its answer. Appellee moved for summary judgment, alleging that the policy language, specifically exclusion 4, was clear and unambiguous and excluded the loss from the policy. Neither party filed any affidavits or other factual material either supporting or opposing the motion for summary judgment. Appellee did attach to its motion for summary judgment answers to interrogatories concerning the approval by the insurance commissioner of the policy language at issue. The trial court granted the appellee summary judgment. Neither the judge's comments from the bench nor the order granting summary judgment set out the reasons for granting the motion.

Appellant raises three points on appeal: (1) the trial court erred in granting summary judgment because the exclusion relied upon does not apply under the facts of this case; (2) the trial court erred in granting summary judgment because the exclusion is ambiguous and therefore should be construed to afford coverage; (3) in the alternative, the exclusion is overly broad, was not properly presented to the Arkansas Insurance Commission, and is against public policy. The first two points are actually the same, that is, whether the policy exclusion is ambiguous. The third point was pled and argued before the trial court. However, no specific ruling was made by the trial court. Therefore, we cannot address the issue because the failure to secure a ruling constitutes a

waiver of the issue, precluding its consideration on appeal. *Jones v. Ellison*, 70 Ark. App. 162, 15 S.W.3d 710 (2000). We affirm.

Summary judgment is a remedy that should be granted only when there are no genuine issues of fact to litigate and when the case can be decided as a matter of law. *Birchfield v. Nationwide Ins.*, 317 Ark. 38, 875 S.W.2d 502 (1994). Once the movant has made a *prima facie* showing of entitlement to summary judgment, the responding party must demonstrate that there remain genuine issues of material fact to preclude a summary judgment. Our review is limited to a determination as to whether the trial court was correct in finding that no material facts were disputed. *Wright v. Compton, Prewitt, Thomas & Hickey, P.A.*, 315 Ark. 213, 866 S.W.2d 387 (1993).

When the terms of a written contract are ambiguous, the meaning of the contract becomes a question of fact. *Stacy v. Williams*, 38 Ark. App. 192, 834 S.W.2d 156 (1992). In order to be ambiguous, a term in an insurance policy must be susceptible to more than one equally reasonable construction. *State Farm Fire & Cas. Co. v. Amos*, 32 Ark. App. 164, 798 S.W.2d 440 (1990); *Watts v. Life Ins. Co. of Ark.*, 30 Ark. App. 39, 782 S.W.2d 47 (1990); *Wilson v. Countryside Cas. Co.*, 5 Ark. App. 202, 634 S.W.2d 398 (1982). On motion for summary judgment, the court, viewing the evidence in the light most favorable to the nonmoving party, ascertains the plain and ordinary meaning of the language in the written instrument, and if there is any doubt about the meaning, there is an issue of fact to be litigated. *Moore v. Columbia Mut. Cas. Ins. Co.*, 36 Ark. App. 226, 821 S.W.2d 59 (1991). When the intent of the parties as to the meaning of a contract is in issue, summary judgment is particularly inappropriate. *Camp v. Elmore*, 271 Ark. 407, 609 S.W.2d 86 (Ark. App. 1980).

Under Arkansas law, the intent to exclude coverage in an insurance policy should be expressed in clear and unambiguous language, and an insurance policy, having been drafted by the insurer without consultation with the insured, is to be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Nationwide Mut. Ins. Co. v. Worthey*, 314 Ark. 185,

861 S.W.2d 307 (1993); *Baskette v. Union Life Ins. Co.*, 9 Ark. App. 34, 652 S.W.2d 635 (1983). If the language in a policy is ambiguous, or there is doubt or uncertainty as to its meaning and it is fairly susceptible of two or more interpretations — one favorable to the insured and the other favorable to the insurer — the one favorable to the insured will be adopted. *Nationwide Mut. Ins. Co. v. Worthey, supra; Drummond Citizens Ins. Co. v. Sergeant*, 266 Ark. 611, 588 S.W.2d 419 (1979); *McGarrah v. Southwestern Glass Co.*, 41 Ark. App. 215, 852 S.W.2d 328 (1993); *Pizza Hut of Am., Inc. v. West Gen. Ins. Co.*, 36 Ark. App. 16, 816 S.W.2d 638 (1991).

When contractual language is unambiguous, however, its construction is a question of law for the court. *Moore v. Columbia Mut. Cas. Ins. Co., supra.* If the language is not ambiguous, it is unnecessary to resort to the rules of construction. *Birchfield v. Nationwide Ins., supra.* When the language is clear, it must be given its plain and obvious meaning and should not be interpreted to bind an insurer to a risk which it plainly excluded and for which a premium was not collected. *General Agents Ins. Co. of Am. v. People's Bank & Trust Co.*, 42 Ark. App. 95, 854 S.W.2d 368 (1993); *Baskette v. Union Life Ins. Co., supra.*

It is the appellant's position with respect to exclusion 4 that water below the surface of the ground, under proper rules of construction, means water that is defined as ground water. Appellant, citing *Ebbing v. State Farm Fire & Cas. Co.*, 67 Ark. App. 381, 1 S.W.3d 459 (1999), argues that courts that have considered insurance coverage for damage caused by burst water mains have "generally" held that there is coverage. In *Ebbing*, a claim for water damage as a result of a water main that burst and ran through the home was denied by State Farm on the basis of the following exclusion: "(C) Water damage, meaning: (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, all whether driven by wind or not. . . ." *Id.* at 385, 1 S.W.3d at 461. This court reversed, holding that the terms "flood" and "surface water" in an insurance policy exclusion did not include water from a burst water main because those terms contemplated water from natural causes or sources.

We find *Ebbing* to be distinguishable. The exclusion in *Ebbing* is almost identical to exclusion 1 in the policy at issue in the present case. Appellee did not, however, deny coverage based upon exclusion 1. Rather, appellee denied coverage based on exclusion 4. That exclusion states "water or any other substance on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on or flows, seeps or leaks through any part of the residence premises." When the exclusion is read as a part of the contract its plain meaning is to limit the coverage that might otherwise fall within the policy language. Where the language is unambiguous, as here, summary judgment is an appropriate method to resolve issues of contract construction. *Moore v. Columbia Mut. Cas. Ins. Co., supra.*

Appellant also argues that exclusion 4 does not apply because the water from the broken main formed a geyser, which actually caused the damage, and that the geyser was not "water . . . on or below the surface . . ." because it was water above the surface. Here, the water from the broken water line was still "water below the surface of the ground" within the meaning of the exclusion because it originated underground. We find nothing in the exclusion to support the conclusion that it is limited only to naturally occurring water or ground water. The exclusion clearly and unambiguously indicates that damage from any water on or below the surface which flows into the premises is not covered by the policy, regardless of whether the source is natural or artificial. *Buttelworth v. Westfield Ins. Co.*, 41 Ohio App. 3d 288, 535 N.E.2d 320 (1987).

In conclusion, we hold that the trial court did not err in entering summary judgment for the appellee in this case.

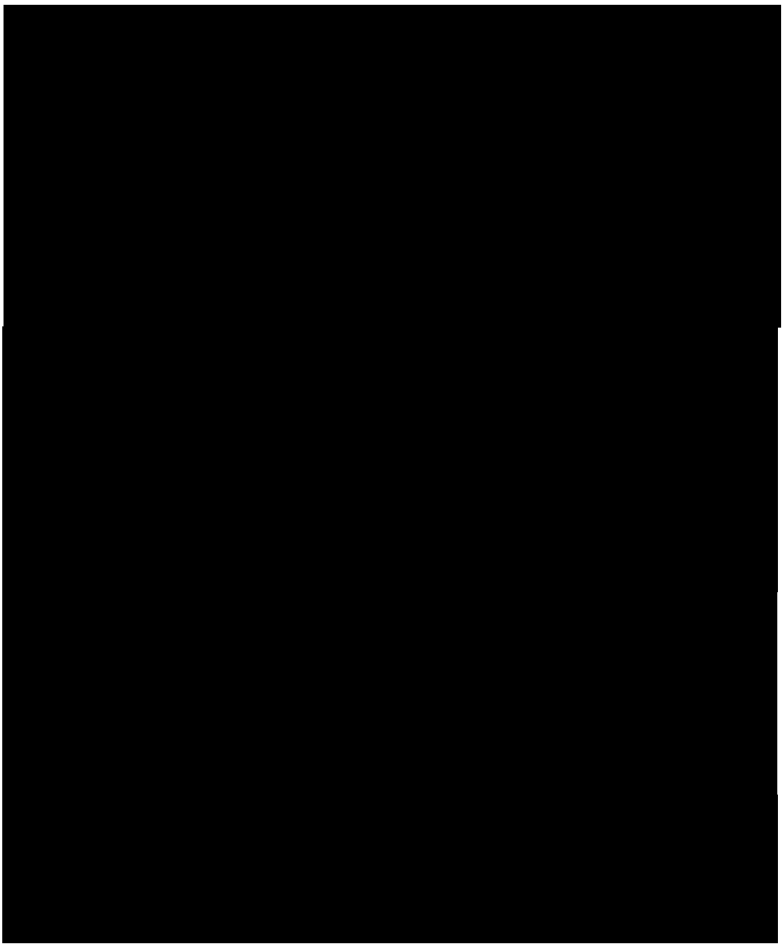
Affirmed.

JENNINGS and ROBBINS, JJ., agree.

Willie COLLINS *v.* LENNOX INDUSTRIES, INC.;
American Motorist Insurance Company

CA 01-1109 75 S.W.3d 204

Court of Appeals of Arkansas
Division IV
Opinion delivered May 8, 2002



Baim, Gunti, Mouser, Robinson & Havner, PLC, by: *Michael W. Boyd*, for appellant.

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellee.

KAREN R. BAKER, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission's denial of appellant's request for a change of physician. We hold that the Commission's finding that the employer had fulfilled the obligation of providing adequate medical treatment, diagnostic testing, and consultation with specialists, under the provisions of Ark. Code Ann. § 11-9-508 (Repl. 2002), was not supported by substantial evidence. Arkansas Code Annotated section 11-9-514(a)(3)(ii) (Repl. 2002) established an absolute, statutory right to a one-time change of physician under the Workers' Compensation Act where the employer has contracted with a managed-care organization and has exercised the right to select the initial primary-care physician. The employer's denial of the one-time change of physician as a matter of law fails to fulfill the obligation imposed by section 11-9-508. Accordingly, we reverse.

Facts

On January 4, 2000, appellant (while employed by Lennox Industries) reached for a coil weighing between thirty and fifty pounds that was stacked above his head. As he flipped the coil over to remove it from the stack, he injured his back. The injury was reported in a timely manner, and appellant was sent to Dr. N.B. Daniel.

Dr. Daniel diagnosed appellant with a lumbosacaral strain. Appellant requested and received a referral to an orthopedist (Dr.

John Wilson). On January 27, 2000, Dr. Wilson diagnosed appellant with "mild sciatia." Dr. Wilson also noted that appellant had "tenderness over the right sciatic notch," and that his straight-leg raising was "mildly positive." Dr. Wilson released appellant to return to work with no restrictions. On February 16, 2000, appellant returned to Dr. Wilson. After seeing appellant, Dr. Wilson noted:

> [Appellant] was reassured that he does not have operative problems with his back and should attempt to continue his normal activities at work. He wanted an MRI done on his back and, quite frankly, without objective findings or radicular findings, I do not feel the study would be necessary. He seems a bit upset with me because of my position. At any rate, this gentleman has been released to return to his normal activities at work.

On February 22, 2000, appellant returned to Dr. Daniel, who reported:

> On exam today he moves very well . . . My impression still is that he has a lumbosacral strain . . . [Appellant] has it in his mind that neither myself or the specialty physician, that I don't personally know, don't care about him and we are limiting services in that we haven't done a MRI and we haven't done a myelogram and we are not trying to really find out what is wrong with his back. He doesn't believe me when I tell him that the likelihood of finding something abnormal on a MRI of his back, or a myelogram is very small and even if we did find that he has for instance a bulging disc with the degree of symptoms that he has — nothing would be done therapeutically such as surgery, trigger point injection, epidural steriods, so forth, so forth.

Despite these two reports, appellant continued to request a MRI, and appellees eventually approved of the diagnostic test. Dr. Wilson performed the test and on March 9, 2000, reported that the findings revealed nothing "of an operative nature." He also noted that the MRI showed early disc degenerative disease and again released appellant to return to work. On March 22, 2000, appellant presented to Dr. Wilson again. After the visit, Dr. Wilson reported:

> I have advised [appellant] that he does not have an operative problem with his back and that he has some early degenerative

> disc disease and superimposed lumbosacral strain but certainly nothing that needs surgery and this is something that he should be able to work through. He asked for medication and related that he had been scheduled for a myelogram. When asked the circumstances of who was doing this, he said he was not supposed to tell me. At any rate, I do not suggest a myelogram. His MRI did not reveal anything of an operative nature.

On March 27, 2000, appellant returned to Dr. Daniel and was approved for an independent medical examination by Dr. Bruce Safman, which was conducted on April 12, 2000. Dr. Safman's findings were consistent with Dr. Wilson's. Additionally, Dr. Safman noted that appellant wanted to tape-record the examination and was not happy with the fact his degenerative changes were not related to the injury. Finally, on May 10, 2000, appellant saw Dr. Wilson again. Dr. Wilson reported "mild restriction of motion of the lumbar spine with tenderness," "mild spasm," and "early degenerative disk disease" and "significant herniation."

On May 23, 2000, appellant (through counsel) requested a change of physician. The request was denied by appellee. Appellee responded that further medical treatment was not reasonable and necessary.

On October 4, 2000, the Administrative Law Judge, filed a pre-hearing order stating, in relevant part, "By agreement of the parties, the issues to be litigated at the hearing are limited to the following: Continuing medical treatment; change of physician; controversion and attorney's fees. All other issues are reserved." The parties stipulated that appellant suffered a compensable injury on January 4, 2000, that an employee-employer-carrier relationship existed on that date, that his compensation rate for TTD purposes was $371.00, and that Lennox was associated with a managed-care organization.

The ALJ fashioned her opinion around an analysis of "whether or not additional medical treatment is reasonable, necessary and related to the compensable injury." Although she did not directly address the change of physician request in her findings, the opening sentence of her March 5, 2001, order states that "A hear-

ing was conducted to determine the claimant's entitlement to payment of continuing medical treatment, a change of physician, and attorney's fees." The ALJ in its finding and conclusions found that the employer had fulfilled the obligation of providing adequate medical treatment, diagnostic testing, and consultation with specialists under the provisions of Ark. Code Ann. § 11-9-508. Further findings stated as follows:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employee-employer-carrier existed among the parties on January 4, 2000, at which time the claimant sustained a compensable injury at a compensation rate of $371. Medical expenses and temporary total disability were paid.

2. The respondents have paid all appropriate benefits and expenses.

3. The claimant has failed to prove by a preponderance of the credible evidence of record that further medical treatment is reasonable, necessary, or related to the compensable injury.

The Full Commission affirmed these findings, and this appeal followed.

Appellant asserts two points on appeal: (1) Arkansas Code Annotated § 11-9-514 provides claimant employee an absolute right to a one-time-only change of physician, so long as he has not selected the initial physician, and (2) the Commission, by adopting the decision of the Administrative Law Judge, incorrectly placed a burden of proof upon the claimant employee for purposes of deciding the issue of a change-of-physician request.

On appeal, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission and will affirm the Commission's decision if it is supported by substantial evidence. *See* Ark. Code Ann. § 11-9-711(b)(4)(d) (Repl. 2002); *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 909 (2001); *Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to sustain a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark.App. 162, 11 S.W.3d 1 (2000). 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. *Geo Specialty Chem. v. Clingan*, 69 Ark.App. 369, 13 S .W.3d 218 (2000).

Our analysis focuses on the issue of whether an injured employee is entitled as an absolute right to a one-time change of physician. Arkansas Code Annotated section 11-9-514(a)(3)(ii) (Repl. 2002) provides a claimant with an absolute one-time right to a change of physician. The language in subsection (a)(3)(ii) mandates that "where the employer has contracted with a managed care organization certified by the commission, the claimant employee, however, *shall be allowed* to change physicians by petitioning the commission one (1) time only for a change of physician." (Emphasis added.) The Commission's lack of discretion regarding the grant or denial of the employee's right to a change becomes especially clear when considering the language of § 11-9-514(a)(1) and (2), which became null and void with the adoption of the managed health-care system in Arkansas. The now inapplicable section included the phrase "if the Commission approves the change," which allowed the Commission the discretion to approve or disapprove any change of physician. *See Torrey v. City of Fort Smith,* 55 Ark. App. 226, 934 S.W.2d (1996); *Byars Const. Co. v. Byars,* 72 Ark. App. 158, 34 S.W.3d 797, (2000) (requiring claimant to provide a compelling reason or circumstance justifying a change).

Appellee argues that appellant's request for a change of physician is simply his effort to obtain additional treatment which the Commission found was not warranted upon the facts in this case and the provisions of section 11-9-508. However, even under the former standard where the Commission had discretion in granting a change-of-physician request, the healing period of an employee who had no initial choice of physicians at time of his injury, was of no significance in a proceeding by employee to have change of physician approved by the Commission. *See Wright Contracting Co. v. Randall,* 12 Ark. App. 358, 676 S.W.2d 750 (1984).

The currently applicable subsection, (a)(3), contains no discretionary phrase regarding approval of the change, but simply states that the right to a one-time change "shall be allowed, by petitioning the commission." Therefore, there is no discretion left to the Commission. The majority of the section deals with "how" the physician for this change will be selected, not "if" the physician will be selected.

The only suggestion of any type of discretion available to the Commission in the application of this statute is in the method by which one acquires such a change. The statute orders that one acquires the change by petitioning the Commission. The code section goes on to order that the Commission "shall" expedite the petition for change and that "a request *for a hearing* on a change of physician by either the employer or the injured employee shall be given preference on the Commission's docket over all other matters." (Emphasis added.)

Because we find that a one-time change of physician is mandatory, we hold that the Commission's finding that the employer had fulfilled the obligation of providing adequate medical treatment, diagnostic testing, and consultation with specialists, under the provisions of Ark. Code Ann. § 11-9-508 was not supported by substantial evidence and accordingly reverse. We do not address appellant's second argument in light of our reversal on the first issue. Therefore, we reverse and remand with instructions to order a change of physician.

GRIFFEN and VAUGHT, JJ., agree.

Lee Roy DAVIS *v.* STATE of Arkansas

CA CR 01-503 74 S.W.3d 671

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 8, 2002

Katherine S. Streett, for appellant.

Mark Pryor, Att'y Gen., by: *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Lee Roy Davis was charged with possession of a controlled substance with intent to deliver and possession of drug paraphernalia. After the trial court denied his motion to suppress the cocaine and crack pipe that were found in a pat-down search of his person by police. Davis entered a conditional guilty plea, reserving his right to appeal the denial of the motion to suppress. On appeal, Davis argues that the trial court erred in denying his motion to suppress because the detention, questioning, and search of his person violated the Fourth and Fourteenth Amendments and Arkansas Rules

of Criminal Procedure 3.1 and Rule 3.4. We agree, and we reverse and remand.

Lieutenant Billy White and Sergeant Brandon Ivy were on bicycle patrol in a "troubled" area of El Dorado. White observed five men in the yard of a vacant house, two of whom, Davis and another man, were standing together. When the two men observed the officers, they turned and walked away quickly. Ivy stopped the men and requested that Davis state his name and date of birth. Ivy relayed to the Arkansas Crime Information Center (ACIC) the name and date of birth that Davis gave to him. ACIC returned no record for such name and birth date. When Ivy requested consent to search, Davis responded with an inquiry into the basis of Ivy's probable cause. Davis then told Ivy that he would "give you my sh**" and reached into his pocket. Ivy told him that he would get it and then pulled a crack pipe from Davis's pocket.

Officer White testified that the southeast area of El Dorado, near Detroit and Roosevelt Streets, was an area known for drug activity. He testified that he observed five persons in the front yard of a vacant house near this intersection, that two of them were standing side by side next to the house, and that it appeared as if they were exchanging something. Officer White admitted that he "did not see them exchange anything. They just gave the appearance as though they were exchanging something. One of them actually had his hands out as though he was receiving or giving something to the other. I didn't see anything actually being handed back and forth." He further testified that when these two individuals saw the officers, they "hurriedly walk[ed] away."

Sergeant Brandon Ivy testified that he observed Davis and another person immediately separate. He stated that he intended to stop and detain Davis in order to identify him. He told Davis that he had detained him because he had been seen making a hand-to-hand transaction. Upon request for his name, Davis incorrectly told Ivy that his name was John Davis and gave an

incorrect birth date. Ivy testified that ACIC returned no record of such a person.

In reviewing the denial of a motion to suppress evidence, we make an independent examination based upon the totality of the circumstances and reverse only if the decision is clearly against the preponderance of the evidence. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997); *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978); *McDaniel v. State*, 65 Ark. App. 41, 985 S.W.2d 320 (1999).

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain for no more than a few minutes any person whom he reasonably suspects is committing, has committed, or is about to commit a felony or a misdemeanor involving danger of forcible injury to persons or appropriation of or damage to property. *See* Ark. R. Crim. P. 3.1. The justification for the investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied*, 459 U.S. 882 (1982). Reasonable suspicion is defined as suspicion based upon facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. Ark. R. Civ. P. 2.1; *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998).

Additionally, Ark. Code Ann. § 16-81-203 (Repl. 1999) sets forth a list of factors to be considered in determining whether an officer has grounds for reasonable suspicion. Among these factors are the gait and manner of the suspect; whether the suspect is carrying anything; time of the day or night the suspect is observed; the particular streets and areas involved; any information received from third persons, whether they are known or unknown; whether the suspect is consorting with others whose conduct is "reasonably suspect"; the suspect's proximity to known criminal conduct; incidence of crime in the immediate neighbor-

hood; and the apparent effort of the suspect to avoid identification or confrontation by the police. Ark. Code Ann. § 16-81-203.

This court recently considered a case involving the propriety of an initial detention in *Jefferson v. State*, 76 Ark. App. 300, 64 S.W.3d 791 (2002), and reversed the conviction based on the illegality of the initial detention. In *Jefferson,* officers stopped the appellant after observing him walking from between two mobile homes and crossing the street; the officers became suspicious of him because of the time of night, and turned their patrol car headlights on him. When Jefferson saw the headlights, he quickly changed direction and went back to the other side of the street. The officers then ordered Jefferson to stop. As Jefferson approached the officers, he pulled something out of his pocket and dropped it on the ground. The officers later retrieved the object, which contained cocaine. This court found that the initial stop was improper as the officers were not investigating a particular crime as required by Ark. R. Crim. P. 2.2.

The Arkansas Supreme Court likewise reversed a denial of a motion to suppress in another case involving facts similar to the instant case. In *Stewart v. State*, 332 Ark. 138, 864 S.W.2d 793 (1998), an officer was patrolling a known drug-trafficking area when he observed the defendant standing on the street corner. Given the late hour (almost 2 a.m.), the fact that the area was known for drug activity, and that the officer had personally made numerous arrests in that area, he suspected Stewart may have been dealing narcotics. *Stewart v. State, supra.* The officer approached Stewart, asked her what she was doing, and asked her to remove her hands from her jacket pockets. When Stewart kept trying to place her right hand back into her jacket pocket, the officer performed a pat-down search for weapons and felt a bulge in her pocket. The officer removed the bulge, which turned out to be $135 and a matchbox containing crack cocaine. The supreme court held that the initial encounter with Stewart was impermissible under Ark. R. Crim. P. 2.2 and 3.1 because the officer lacked reasonable suspicion to stop Stewart.

In the case at bar, the officers simply saw two men standing side by side in an alleged high-crime area. The officers did not observe any criminal activity, nor did they observe a suspicious transaction. The officers did not have reasonable suspicion as defined by Rule 2.1, and they were not investigating a particular crime as required by Rule 2.2. Consequently, they failed to comply with Rule 3.1 because they lacked reasonable suspicion to stop and detain Davis.

The officers further attempted to justify the stop by showing the existence of other factors that arose afterwards, *see* Arkansas Code Annotated. § 16-81-203, *supra, i.e.* Davis's attempt to conceal his identity, as well as his "fidgety" behavior when questioned. However, this evidence is not relevant to the determination of whether the initial stop was reasonable because it was not known at the time the officers decided that a stop was warranted. *See Ornelas v. United States*, 517 U.S. 690 (1996)(holding that denial of motions to suppress evidence obtained in warrantless searches should be reviewed *de novo*, including a determination of the historical facts *leading up to the stop* or search)(emphasis added). The only factors known prior to the stop were the time of day, 2:30 p.m., and the incidence of crime in the neighborhood. Even if Davis's effort to avoid the police by turning away when they approached is considered, the information known to the officers at the time they decided to detain Davis is insufficient to supply the requisite reasonable suspicion to stop.

Reversed and remanded.

ROBBINS and BAKER, JJ., agree.

BIRD and NEAL JJ., concur.

PITTMAN, J., dissents.

SAM BIRD, Judge, concurring. I concur in the reversal of this case, but I do not agree with the basis of the majority's decision. Unlike the majority, I believe that reasonable suspicion existed to detain Davis; but I would reverse and remand with instructions to the trial court to grant Davis's suppression motion

because the search of his outer clothing (commonly referred to as a "frisk") violated Rule 3.4.

In *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998), the court reversed a trial court's denial of a motion to suppress when Stewart was detained by officers because she was standing on a street corner in a known drug area. On appeal, the supreme court stated that the officer's "only justification for stopping Stewart was simply that she was standing in the wrong place at the wrong time." *Id.* at 146, 964 S.W.2d at 797.

In *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980), the court held that Rule 3.1 did not permit officers to stop and detain airline passengers who quickened their pace and continued to look back when followed by the officers. In *Jefferson v. State*, 76 Ark. App. 300, 64 S.W.3d 791 (2002), this court reversed a denial of a motion to suppress on facts similar to the case at bar. Police stopped Jefferson in a high-crime area late at night. Jefferson appeared startled when the police shined their car headlights upon him, and he began walking in the other direction. Ultimately, he did return to the officers, but as he did, he attempted to discard a package that contained cocaine. This court held that the officers possessed no reasonable suspicion to stop Jefferson. The only factors present were that Jefferson was walking in a high crime area, late at night, was startled by the police, and initially ignored the officers when they shined their headlights upon him. We held that reasonable suspicion could not be grounded upon such facts.

The case at bar, however, is distinguishable from *Stewart*, *Meadows*, and *Jefferson*. Davis was observed acting as if he was handing something to another individual, on a street known for drug trafficking, and Davis attempted to avoid confrontation with the officers by walking away hurriedly when he observed them. Under *Stewart*, *Meadows*, and *Jefferson*, these factors, when each is viewed in isolation, cannot support a finding of reasonable suspicion under Rule 3.1. Davis's mere presence in a known drug area cannot support reasonable suspicion under *Stewart* and *Jefferson*. Nor can Davis's walking quickly away when he observed the

officers, under *Meadows*, by itself support a finding of reasonable suspicion.

However, the United States Supreme Court, in *United States v. Arvizu*, 534 U.S. 266 (2002), held that reasonable suspicion existed even though, when viewing each factor in isolation, none of the individual factors, by themselves, provided a basis for reasonable suspicion. In discussing the Ninth Circuit Court of Appeals' reversal of the denial of the motion to suppress, the Court stated that the lower court's

> evaluation and rejection of . . . the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by [the police officer] that was by itself readily susceptible to an innocent explanation was entitled to "no weight." *Terry*, however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation."

Id. at 751.

The Court further stated that "[t]o the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule." *Id.* at 752. Thus, while our precedent dictates that mere presence or walking hurriedly away cannot, by itself, constitute a basis for reasonable suspicion, such precedent cannot preclude our review of these factors as part of the totality of the circumstances.

Davis was in a known drug area, walked quickly away when the officers approached, and had been observed by one of the officers to be engaging in actions that appeared to be a hand-to-hand transaction. Viewing the totality of these factors and circumstances as we must, it is my opinion that reasonable suspicion

existed for the Rule 3.1 detention of Davis. I take a different view, however, of the frisk. Arkansas Rule of Criminal Procedure 3.4 provides that:

> 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 or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others.

Essentially, the question is whether a reasonably prudent person in the officer's position would be warranted in the belief that the safety of the police or that of other persons was in danger. *Terry v. Ohio*, 392 U.S. 1 (1968); *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998). The officer's reasonable belief that the suspect is dangerous must be based on "specific and articulable facts." *Terry*, 392 U.S. at 21.

In *Howe v. State*, 72 Ark. App. 466, 39 S.W.3d 467 (2001), we refused to uphold a weapons pat-down where the officer testified at the suppression hearing that at no time did he believe that Howe was armed and dangerous. The court stated that:

> In this case, [Officer] Martin testified at the suppression hearing that at no time did he believe Howe was armed or dangerous. Nor did Martin place Howe under arrest or have probable cause to arrest him before conducting the pat-down search. Based on this testimony by Martin, the only basis upon which his pat-down search of Howe can be deemed constitutional is if the search was based on consent.

Id. at 470, 39 S.W.3d at 470. In the case at bar, Ivy never testified he held a belief, reasonable or not, that Davis was armed and presently dangerous to justify a Rule 3.4 pat-down. The dissent contends that the lack of a subjective belief of danger to the officer does not invalidate an otherwise valid frisk. Even if this accurately describes the United States Supreme Court's interpretation of the Fourth Amendment, then the effect of *Howe v. State, supra*, can

only be to have broadened the protection for Arkansas citizens, requiring a subjective belief of danger, coupled with objective, "specific and articulable" facts that support the belief upon review.

An "officer must be able to point to particular facts from which he reasonably inferred that the person searched was armed and dangerous." *Peters v. New York*, 392 U.S. 40, 64 (1968). Ivy did testify to particular facts on which he based his decision to search; however, these facts, even with reasonable inferences drawn, cannot provide the requisite reasonable suspicion under Rule 3.4. The reasons articulated by Sergeant Ivy for the pat-down were that "[Davis] kept giving indications he was possibly fixing to run. He was very fidgety, his legs were visibly shaking. His carotid artery in his throat was throbbing." Ivy testified that he asked Davis whether he had weapons or drugs on him, but Ivy articulated no facts, such as a bulge or furtive movements, that gave rise to a belief that he or others were in danger. At another point in his testimony, Ivy stated, "I determined to do a pat-down search at that point because there were several individuals there with well documented drugs and weapons violations." Officer Ivy additionally testified that because of Davis' attitude, he was certain that Davis was lying or concealing something and that he "didn't feel comfortable with [Davis]."

Preparing to flee cannot objectively give rise to a reasonable fear that the suspect is armed and presently dangerous. The United States Supreme Court has held that fleeing upon sight of police can be a factor in finding reasonable suspicion to conduct a *Terry* stop. *Illinois v. Wardlow*, 528 U.S. 119 (2000). However, the Court was not analyzing the propriety of a *Terry* weapons frisk. Moreover, in this case, Davis did not flee; Ivy testified that he believed that Davis would "possibly" flee. I do not believe that possible flight gives rise to an objective fear of present danger to the officers. The fact that other persons in the vicinity had prior weapon and drug violations also cannot objectively give rise to a reasonable fear that Davis himself was armed and presently dangerous. Ark. Code Ann. § 16-81-201 provides that "[t]his subchapter shall not be construed to: (1) Permit an officer to stop just

any passerby and search him, nor allow the search of any person merely because he has a criminal record[.]" If the frisk of Davis could not be solely based upon his criminal record, the frisk surely cannot be based solely upon the criminal record of those around him. Ivy's testimony that he did not feel comfortable with Davis possessed none of the requisite specific and articulable facts; it only supports a generalized, unsubstantiated feeling. Viewed in the totality, these proffered reasons cannot support a reasonable suspicion that Davis was armed and presently dangerous.

Arkansas Code Annotated section 16-81-203 provides factors that may be considered in determining whether reasonable suspicion existed such as, *inter alia*, the time of day, the incidence of crime in the area, demeanor of the suspect, the particular streets involved, and the gait and manner of the suspect. Ivy did not support his decision to frisk Davis for weapons based upon these factors, although some of these factors were present. He instead premised his decision on the observations that Davis was possibly going to run because he was fidgety, his legs were shaking, Davis's carotid artery was throbbing, there were other individuals there who had drug and weapons violations, and that he didn't feel comfortable with Davis. These reasons, even in the totality of the circumstances, cannot support a reasonable suspicion that Davis was armed and presently dangerous.

I note that there were factors in this case, such as the incidence of crime in the immediate neighborhood, the apparent effort by Davis to avoid the police, Davis reaching into his pocket and telling the officers that he would give them his "sh*t," that could provide some basis for reasonable suspicion. I agree with the dissent that a suspect reaching into his pocket in response to confrontation by police can present a present danger that would justify a weapons search; however, in the case at bar, this action was not a basis for the officer's decision to frisk Davis. The officer explicitly identified the factors upon which he based his decision to perform the weapons frisk, and they did not include the fact that Davis reached into his pocket and told the officers that he would give them his "sh*t." The reasons the officer gave to sup-

port his decision to search are not reasons that support a search under Rule 3.4.

In summary, it is my opinion that although the officers had reasonable suspicion under Rule 3.1 to detain Davis, they did not have reasonable suspicion that Davis was armed and presently dangerous on which to base a Rule 3.4 search. Therefore, I would reverse the trial court's denial of the motion to suppress and remand to the trial court for further proceedings.

OLLY NEAL, Judge, concurring. I concur in reversing this case. However, I write separately to simply express my concern about the standard of review the State has asked us to apply. The State has asked us "to make an independent determination based on the totality of the circumstances and view the evidence in a light most favorable to the State."

The standard of review for motions to suppress evidence obtained in warrantless searches is set forth in *Ornelas v. United States*, 517 U.S. 690 (1996), wherein the Supreme Court held that such cases should be reviewed *de novo*, and includes 1) "a determination of the historical facts" leading up to the stop or search, and 2) a decision whether these historical facts viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.[1] *See id.* The Supreme Court further stated that:

> [A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. *Id.*

More recently, in *United States v. Arvizu*, 534 U.S. 266 (2002), the Supreme Court reaffirmed that appellate courts must look at the "totality of the circumstances" of each case and consider all factors giving rise to an officer's basis for suspecting

[1] The Court characterizes the second part of this analysis as a mixed question of law and fact.

wrongdoing rather than evaluate and reject certain factors in isolation from the others. *See id.*

The often-repeated standard employed by Arkansas appellate courts can be found in *Owen v. State*, 75 Ark. App. 39, 53 S.W.3d 62 (2001). In that case, we stated:

> When we review a ruling on a motion to suppress, we make a independent determination based on the totality of the circumstances, *viewing the evidence in the light most favorable to the State*, and reverse only if the ruling is clearly against the preponderance of the evidence.

Id. at 44, 53 S.W.3d at 65. (Emphasis added.) This standard seems to have surfaced in 1990, in *Ryan v. State*, 303 Ark. 595, 798 S.W.2d 674 (1990), in which the court cited to *Holden v. State*, 290 Ark. 458, 721 S.W.2d 614 (1986), for the proposition. In *Holden*, the court stated:

> Was the trial court right? Was this seizure justified because some articles were in plain view? Was the look under the bed justified to insure the safety of the officers? Was the seizure justified? We think it was. *First, we view the facts on appeal most favorably to the appellee. Dix v. State, 290 Ark. 28, 715 S.W.2d 879 (1986).* Next we only overrule a trial court's decision if it is clearly wrong. Hicks v. State, 289 Ark. 83, 709 S.W.2d 87 (1986).

Id. at 472, 721 S.W.2d at 621. (Emphasis added). However, the problem with the *Holden* court's reliance upon *Dix v. State* is that the language in *Dix* was taken from an analysis of the sufficiency of the evidence to support the verdict, and did not deal with a motion to suppress:

> Our burden on appeal is to decide whether the jury's verdict is supported by substantial evidence. Mason v. State, 285 Ark. 479, 688 S.W.2d 299 (1985). *We view the evidence in the light most favorable to the jury's verdict. Westbrook v. State*, 286 Ark. 192, 691 S.W.2d 123 (1985).

Dix v. State, 290 Ark. at 33, 715 S.W.2d at 881. (Emphasis added).

The correct pre-1990 standard of review for motion to suppress was clearly set forth in *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978), where the supreme court stated:

> We have never stated our standard for appellate review of the trial court action granting or denying motions to suppress evidence obtained by means of a warrantless search. Although the substantial evidence rule has been followed by this court in nearly every instance of review of any fact finding by circuit judge, even on questions pertaining to admissibility of evidence, there has been at least one outstanding exception since our decision in *Harris v. State*, 244 Ark. 314, 425 S.W.2d 293, cert. den. 393 U.S. 941, 89 S.Ct. 308, 21 L.Ed.2d 278. We then decided that we would make an independent determination of the voluntariness of a confession as a basis for its admission into evidence, giving respectful consideration to the findings of the trial judge on the critical issue. This review was crystalized into a standard articulated in *Degler v. State*, 257 Ark. 388, 517 S.W.2d 515 and followed thereafter. See, e.g., *Smith v. State*, 259 Ark. 849, 537 S.W.2d 158. We have also extended it to at least one other situation pertaining to admissibility of evidence. See *Hammers v. State*, 261 Ark. 585, 550 S.W.2d 432.
>
> Pursuant to *Degler*, we make an independent determination based upon the totality of the circumstances, but will not set aside a trial judge's finding of voluntariness unless it is clearly against the preponderance of the evidence. In this approach, we have given considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts. *Harris v. State, supra.* We must defer to the superior position of the trial judge to pass upon the credibility of witnesses. *Whitmore v. State*, 263 Ark. 419, 565 S.W.2d 733 (1978).
>
> The "clearly erroneous" rule (which is equated with the "clearly against the preponderance of the evidence" rule, see Degler), governs in many of the federal circuit courts of appeal. (Citations omitted.) There is also considerable state case law support for this type of review. (Citations omitted.)
>
> Since we feel that it is the better approach, and since it involves the same type of questions (often mixed questions of law and fact) that arise with reference to Suppression of confessions,

> and the same placing of the burden of proof, we will review this case, and all those arising hereafter relating to a motion to suppress evidence obtained by a warrantless search, in the same manner we do when Voluntariness of a confession is the issue. This is similar to the approach taken in other jurisdictions (Citation omitted.)

State v. Osborn, 263 Ark. at 557-58, 566 S.W.2d at 140-41. However, the mandate to view the evidence in the light most favorable to the State has, since *Osborn*, supplanted the more logical requirement that we instead defer only to the trial court in matters of credibility and in resolving conflicts in the evidence.

Moreover, these two standards are in conflict in an important respect. The standard as corrupted by *Holden* and *Ryan, supra,* requires that in reviewing a challenge to the sufficiency of the evidence, "we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict . . . . We affirm a conviction if substantial evidence exists to support it." *Barnes v. State*, 346 Ark. 91, 97-98, 55 S.W.3d 271, 275-76 (2001). Clearly, this level of review is not compatible with the mandate of an independent, *de novo* review as required by *Ornelas v. United States, supra*; we should consider all of the evidence when determining where the preponderance of the evidence lies. Deferring to the trial courts in matters of credibility and giving due weight to the inferences drawn by them is not the same as viewing the evidence in the light most favorable to the State. Moreover, the Arkansas Supreme Court explicitly disavowed the substantial-evidence rule in the review of a trial court's decision or a motion to suppress in *Osborn, supra.*

As this court has previously noted in *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001), the supreme court was recently confronted with this conflict in our standard of review in *Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000), but did not resolve it. The court expressly declined to address whether the standard that includes the "light-most-favorable-to-the-State" language was improper, and contrary to the holding in *Ornelas v. United States, supra.* However, the court stated:

> Without additional argument and citation of authority, we are unable to say our standard is in conflict with that set out in *Ornelas*. The Supreme Court directed reviewing courts to examine the factual findings of trial courts "only for clear error" and give "due weight to inferences drawn from those facts by resident judges"; our standard, as set forth in *Osborn*, requires us to do the same.

Stephens v. State, 342 Ark. at 160, 28 S.W.3d at 265.

The supreme court thus reaffirmed the standard set out in 1978 in *Osborn* without either addressing or even acknowledging that it differed in either form or substance from the recent version. Moreover, our courts have cited to both *Osborn* and other Arkansas cases employing the conflicting language in the same cases. *See Shaver v. State*, 332 Ark. 13, 963 S.W.2d 598 (1998).

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent because I believe that the police officer had a reasonable suspicion to stop and question appellant, and that the officer could reasonably believe, on the basis of specific and articulable facts, that appellant was armed and dangerous.

I agree with Judge Bird's criticism of the majority's analysis of the initial stop. Although the majority opinion gives lip service to the totality-of-the-circumstances test, it is quite apparent that they are in fact engaging in precisely the sort of "divide and conquer" analysis forbidden by *United States v. Arvizu*, 122 S. Ct. 744 (2002). Certainly, the appellant's conduct in the present case was ambiguous; there may have been an innocent explanation for the appellant's engaging in a perceived hand-to-hand transaction in the yard of a vacant house in a high-crime area, especially known for drug activity, and for his nervous, evasive behavior upon noticing the police. However, this was equally so of the conduct justifying the stop in the seminal case of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Terry* recognized that police officers could detain the individuals to resolve the ambiguity. *Illinois v. Wardlow*, 528 U.S. 119 (2000). I believe the police officer in the present case prop-

erly detained appellant to determine the cause of his ambiguous, but suspicious, behavior.

I disagree with Judge Bird's opinion that the pat-down for weapons in this case was unjustified because no one elicited from the police officer testimony that he actually suspected or feared that appellant was armed and dangerous. First, I am not convinced that the law requires affirmative proof of the officer's subjective belief. *Terry v. Ohio*, *supra*, and its progeny hold that the reasonableness of a police officer's conduct "must be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22. "The test is an objective one, and thus the officer need not later demonstrate that he was in actual fear." W. LaFave and J. Israel, *Criminal Procedure* § 3.8(e), at 212 (2d ed. 1992). I think that this objective standard was met. Second, even if affirmative proof of the officer's subjective belief were required under *Terry*, such a requirement could be satisfied by inferences drawn from other evidence. Here, the circumstances with which the officer was faced, together with his testimony that the other men with appellant had documented weapons violations, and the officer's statement that he intended to pat down appellant "for weapons" permit one to reasonably infer that he believed appellant was armed and dangerous. Third, I believe that Judge Bird has erroneously overlooked the significance of appellant's having reached into his pocket just before the officer grabbed his hand to stop him from pulling anything out, patted him down, and found the crack pipe. It is impossible to overestimate the danger inherent in permitting a suspect to reach into a pocket, particularly in localities known for drug trafficking and in the presence of known weapons offenders. This was not a situation where appellant was yielding to a show of authority, because the officer had merely expressed his intention to pat appellant down for weapons, and had not asked him to empty his pockets or to give the officer anything. Although appellant perhaps felt he was yielding to the inevitable, it nevertheless remains that his action in reaching into

his pocket and withdrawing an item was considerably in excess of anything the officer had expressed an intent to do or had requested, and was inherently threatening to the police officer. Consequently, the fact that appellant reached into his pocket and began to withdraw an unknown item cannot be disregarded in determining whether a protective search was reasonable because the search provision of the Fourth Amendment was not implicated until the frisk actually took place. *See California v. Hodari D.*, 499 U.S. 621 (1991).[1]

From my independent review of the totality of the circumstances presented in this case, after giving due deference to the trial court's superior position to determine the historical facts, I think that the officer's stop and frisk of appellant were supported by the required reasonable suspicion.[2]

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[1] It should be noted that appellant does not argue that the officer's search exceeded the scope of a permissible "pat down" or "frisk." He contends only that the officer lacked reasonable suspicion to stop him or pat him down. In other words, he treats the officer's discovery of the pipe as resulting only from a *Terry* pat down. Therefore, I approach the case in the same manner.

[2] I agree that the standard by which we review decisions on motions to suppress cannot rightly include a requirement that the evidence be viewed in the light most favorable to the appellee. I believe that viewing the evidence in the light most favorable to either party is not only antithetical to the concept of an independent examination/totality of the circumstances/clearly erroneous standard of review, but that it is, in fact, logically impossible to so view the evidence and at the same time engage in the stated standard of review. Several early cases reveal that, among other things, viewing the evidence in the light most favorable to the prevailing party means that we consider only that evidence that tends to support the decision below and that we do not weigh it against evidence favorable to the appellant. *See, e.g., Duncan v. State,* 196 Ark. 171, 117 S.W.2d 36 (1938); *Morgan v. State*, 189 Ark. 981, 76 S.W.2d 79 (1934); *Begley v. State*, 180 Ark. 267, 21 S.W.2d 172 (1929); *see also McGehee Co. v. Fuller*, 169 Ark. 920, 277 S.W. 39 (1925). More recent cases continue to so indicate. *See, e.g., Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995); *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Coon v. State*, 76 Ark. App. 250, 65 S.W.3d 889 (2001).

The Arkansas Supreme Court first decided to independently determine the voluntariness of confessions by examining the entire record in *Harris v. State*, 244 Ark. 314, 425 S.W.2d 293 (1968). There, the court specifically noted that "the weight ordinarily given to a factual determination by the trial judge cannot be applied," but that the appellate court must "examine the entire record." *Id.* at 320. In *Degler v. State*, 257 Ark. 388, 392, 517 S.W.2d 515 (1974), the supreme court reaffirmed the *Harris* standard and explicitly added that the trial judge's finding will not be set aside on appeal unless it is clearly against

the preponderance of the evidence. In *State v. Osborn,* 263 Ark. 554, 566 S.W.2d 139 (1978), the supreme court adopted the same standard as appropriate for determining the correctness of decisions on motions to suppress evidence obtained by means of allegedly illegal searches. There, the court stated that, although it would defer to the superior position of the trial court to pass upon the credibility of the witnesses, the substantial evidence standard of review is inapplicable. *Id.* at 558.

Conspicuous by its absence from the seminal cases of *Harris, Degler,* and *Osborn* is any requirement or direction that the evidence be viewed in the light most favorable to either party. Indeed, it was not until eighteen years after the decision in *Harris* that the supreme court first stated that the evidence should be viewed in the light most favorable to the appellee when reviewing a trial court's decision on a motion to suppress evidence. *See Holden v. State,* 290 Ark. 458, 721 S.W.2d 614 (1986). And *Holden* relied only on *Dix v. State,* 290 Ark. 28, 715 S.W.2d 879 (1986), which was a sufficiency of the evidence case governed by the substantial evidence standard and which did not state the proposition.

My research indicates that, beginning with *Holden,* each case that recites the "light most favorable" rule as applicable to the review of suppression decisions can be traced directly back to simple mistakes. It appears that each case making the statement in question has erroneously sprung from one of eight cases: *Dix v. State,* 290 Ark. 28, 715 S.W.2d 879 (1986) (as noted, a sufficiency case that did not state the proposition); *David v. State,* 295 Ark. 131, 748 S.W.2d 117 (1988) (a sufficiency case that did not state the proposition); *Morris v. State,* 302 Ark. 532, 792 S.W.2d 298 (1990) (does not state the proposition); *Moore v. State,* 303 Ark. 1, 791 S.W.2d 698 (1990) (does not state the proposition); *State v. Villines,* 304 Ark. 128, 801 S.W.2d 29 (1990) (stated the proposition but cited nothing); *Moore v. State,* 304 Ark. 257, 801 S.W.2d 638 (1990) (stated that the evidence was being viewed in the light most favorable to the State, but cited nothing for the proposition and conspicuously failed to recite any portion of the familiar independent determination/ totality of the circumstances/clearly erroneous standard of review); *Smith v. State,* 1 Ark. App. 241, 614 S.W.2d 527 (1981) (stated the proposition but cited nothing; case not subsequently cited); *Cardozo v. State,* 7 Ark. App. 219, 646 S.W.2d 705 (1983) (stated that the evidence was being viewed in the light most favorable to the State, but cited nothing in support; case not subsequently cited for this proposition).

Jackie STOTT *v.* STATE of Arkansas

CA CR 01-1178 82 S.W.3d 170

Court of Appeals of Arkansas
Division II
Opinion delivered May 15, 2002

David W. Talley, Jr., for appellant.

Mark Pryor, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was convicted of DWI, fourth offense, and of driving on a suspended license. He was sentenced to twenty-four months in the Arkansas Department of Community Punishment. This appeal followed.

For reversal, appellant contends that the evidence was insufficient to support his conviction of driving while intoxicated, and that the trial court erred in admitting evidence of the breathalyzer test result. We affirm.

On appeal from a criminal conviction, we review the sufficiency of the evidence prior to the consideration of trial errors. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). We determine the sufficiency of the evidence by viewing the evidence adduced at trial in the light most favorable to the appellee, and the judgment is affirmed if there is substantial evidence to support the verdict. *Id.* Substantial evidence is evidence of sufficient force and character as to compel a conclusion one way or the other with reasonable and material certainty. *Id.*

Viewing the evidence, as we must, in the light most favorable to the appellee, the record reflects that Arkansas State Trooper Charles Watson noticed appellant standing in a yard, near appel-

lant's vehicle, talking to a young woman. Trooper Watson knew appellant's driver's license was suspended. Because Trooper Watson expected appellant to drive his vehicle illegally, he continued to observe. Appellant did enter his vehicle and begin to drive. Trooper Watson pursued appellant and stopped him immediately, appellant turning into a driveway two houses away from where he began driving. When Trooper Watson approached appellant, he noticed an odor of intoxicating beverages about his person and observed an open beer can in his vehicle. After administering field sobriety tests, Trooper Watson took appellant into custody and administered a breathalyzer test that indicated appellant's blood alcohol level was .207.

Arkansas Code Annotated § 5-2-403 provides, in pertinent part, that:

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit it; or
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
>
> (3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

The challenge to the sufficiency of the evidence in the present case is based on the unusual argument that the police officer was an accomplice to the appellant's offense because he testified that he "knew" the appellant was going to drive illegally when he first saw him, but failed to take immediate steps to prevent him from doing so. Thus, the argument goes, the police officer, having a duty to prevent the commission of all crimes, was an accomplice to appellant's crime; consequently, the evidence is insufficient because the only evidence against appellant was obtained from the police officer, an "accomplice" whose testimony must be corroborated for the evidence to be legally sufficient. We disagree.

[redacted] This precise issue has not yet arisen in Arkansas. However, cases from sister jurisdictions with similar statutory provisions regarding accomplice liability indicate that accomplice lia-

bility under subsection (a)(3) arises only when a person with the legal duty to prevent the commission of an offense fails to do so with the intent to promote or assist the commission of the offense. *See Porter v. State,* 570 So.2d 823 (Ala. Crim. App. 1990); *see also Powell v. United States*, 2 F.2d 47 (4th Cir. 1924); *see generally* W. LaFave and A. Scott, *Substantive Criminal Law* § 6.7 (1986). There is no indication in the present case that Trooper Watson intended to promote or assist the commission of the offense. Furthermore, it is indisputable that the police officer in the present case *did* prevent the commission of the crime by apprehending appellant soon after he began driving. There is a difference between *expecting* that a crime is about to be committed and *knowing* that a crime is about to be committed. Here the police officer acted with reasonable speed to stop the offense once he was certain that it was being committed, and he cannot be considered to be an accomplice.

Appellant also argues that the breathalyzer test should not have been admitted into evidence because, although Trooper Watson testified that he observed appellant in excess of the twenty-minute period required by Arkansas Department of Health, Arkansas Regulations for Alcohol Testing § 3.40 (1995 ed.), he could not say with certainty that his watch was synchronized with the timer on the breathalyzer machine. Thus, appellant asserts, the State failed to meet its burden of showing that the officer complied with the regulation requiring that the test subject be observed for twenty minutes prior to the administration of the breathalyzer test.

We find no error. The decision to admit evidence is within the trial court's discretion, and we will not reverse a trial court's ruling on the admission of evidence absent an abuse of that discretion. *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001). The question in the present case is essentially one of the degree of credibility and weight to be afforded the officer's testimony that he observed appellant from 4:00 until 4:21. Given this testimony, the admission of the test result was within the trial judge's discretion.

Affirmed.

STROUD, C.J., and ROAF, J., agree.

Charles HEASLET *v.* STATE of Arkansas

CA CR 01-230 74 S.W.3d 242

Court of Appeals of Arkansas
Division II
Opinion delivered May 15, 2002

[redacted]

William Owen James and *Clay T. Buchanan*, for appellant.

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Pursuant to Ark. R. Crim. P. 24.3(b), Charles Heaslet entered conditional guilty pleas in Lonoke County Circuit Court to charges of possession of methamphetamine, possession of drug paraphernalia, and conspiracy to manufacture methamphetamine in case number CR 99-543 and second-degree forgery in case number CR 99-554, after the trial court denied his motions to suppress the evidence found during the execution of two search warrants at his mobile home. On appeal, Heaslet argues that the trial court erred in: (1) denying his motion to suppress the evidence seized in CR 99-543 because the affidavit in support of the search warrant failed to provide a factual basis for authorizing a nighttime search; (2) denying his motion to suppress evidence seized in CR 99-543 because the trial court took improper judicial notice of the location and surroundings of his residence and violated the requirements of Ark. R. Crim. P. 13.2; (3) denying his motion to suppress evidence seized in CR 99-554 because the affidavit in support of the search warrant failed to provide sufficient facts to find probable cause. We agree that the trial court erred in refusing to suppress the evidence, and we reverse and remand.

On October 12, 1999, Deputy Steve Rich of the Lonoke County Sheriff's Office swore out an affidavit for a search warrant of Charles Heaslet's residence. The warrant authorized a night-

time search, and the search was conducted on the same date the warrant was approved. As a result of the search, Heaslet was charged in CR 99-554-543 with conspiracy to manufacture a controlled substance, possession of drug paraphernalia, and possession of a controlled substance.

On November 10, 1999, Chief Brent Cole of the Carlisle Police Department swore out an affidavit for a second search warrant of Heaslet's residence. After the warrant was issued and the search conducted, Heaslet was charged in CR 99-554-554, as a habitual offender, with five counts of forgery in the second degree.

1. CR 99-543

A. Nighttime Search

When this court reviews a trial court's denial of a motion to suppress evidence, it makes an independent determination based on the totality of the circumstances, but will only reverse if the trial court's decision was clearly against the preponderance of the evidence. *Simmons v. State*, 72 Ark. App. 238, 34 S.W.3d 768 (2000).

As a prerequisite to the issuance of a warrant for a nighttime search, the affidavit or other evidence presented in support thereof must set forth a factual basis that justifies a nighttime search. *Langley v. State*, 66 Ark. App. 311, 990 S.W.2d 575 (1999). Arkansas Rule of Criminal Procedure 13.2(c) provides that before a warrant authorizing a nighttime search is issued, the issuing judicial officer must have reasonable cause to believe that:

> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.

Our supreme court has invalidated nighttime search warrants when the evidence presented in support of the nighttime

search lacked facts supporting one or more of these exigent circumstances. *See, e.g.*, *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999); *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991); *State v. Martinez*, 306 Ark. 353, 811 S.W.2d 319 (1991); *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990); *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980). In *Richardson v. State*, *supra*, the supreme court stated:

> We have consistently held that a factual basis supporting a nighttime search is required as a prerequisite to the issuance of a warrant authorizing a nighttime search. . . . We have held conclusory language . . . unsupported by facts is insufficient to justify a nighttime search. . . . Given that there was nothing to give reasonable cause to believe the items specified in the search warrant would be disposed of, removed, or hidden before the next morning, issuance of the nighttime search warrant was in error.

Id. at 518-19, 863 S.W.2d at 576. In *State v. Broadway*, 269 Ark. 215, 218, 599 S.W.2d 721, 723 (1980), the supreme court held that "[a]n affidavit should speak in factual and not mere conclusory language. It is the function of the judicial officer, before whom the proceedings are held, to make an independent and neutral determination based upon facts, not conclusions, justifying an intrusion into one's home."

In this case, the officers merely checked off the conclusory statements to establish reasonable cause. It is obvious that the affidavit form was drafted to reflect the requirements for reasonable cause as set out in Rule 13.2 because the language is basically the same. However, there were no specific facts presented to show that the place to be searched was difficult of speedy access, that the objects to be seized were in danger of imminent removal, or that the warrant could only be safely or successfully executed at nighttime. The affidavit only contained three statements in addition to the three checked conclusory statements. These statements provided merely that confidential informants had stated that Heaslet was making methamphetamine.

In *Garner v. State*, supra, the judge issued a nighttime search warrant and checked two boxes on the warrant that stated: "the

place to be searched is difficult of speedy access" and "the warrant can only be safely or successfully executed at night time or under circumstances the occurrence of which is difficult to predict with accuracy." In reversing the trial court's denial of appellant's motion to suppress, the *Garner* court stated:

> [C]onclusory statements [do] not suffice to establish the requisite factual basis for reasonable cause. . . . We, therefore, hold that the two statements "checked" were conclusory and unsupported by sufficient facts and, accordingly, did not establish reasonable cause for a nighttime search. Without sufficient factual premises, it was impossible for the municipal judge to make an intelligent finding of reasonable cause to justify a nighttime search.

Id. at 357-58, 820 S.W.2d at 449.

It is our duty as a reviewing court to ensure that the magistrate had a substantial basis for concluding that probable cause existed. U.S. Const. amend. IV; *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). We hold that not only was the search warrant deficient under Ark. R. Crim. P. 13.2(c), but that probable cause was lacking to justify a nighttime search.

B. Good-Faith Exception

We now address the question of whether the police officers acted in good faith in executing this search warrant under *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Court held that the Fourth Amendment exclusionary rule should not be applied to exclude evidence obtained by police officers acting in reasonable reliance on a search warrant that is ultimately found to be invalid. We have held that an objective standard of good faith is not met when a police officer only presents suspicions regarding removal of contraband and the municipal judge only repeats the boilerplate language from Rule 13.2(c). *See Richardson v. State, supra; Garner v. State, supra.* We hold that, under the objective standard, a reasonably well-trained police officer would not have believed that probable cause existed to conduct a nighttime search based on the facts presented in the affidavit.

C. *Judicial Notice*

[redacted] In denying the motion to suppress evidence, the trial court judge stated that he could not look to the testimony of Chief Cole as a basis for his ruling; instead, he could only look at those facts that appeared on the face of the affidavit. The judge then stated that the court took judicial notice that the location of Heaslet's house was such that daytime access may be unsuccessful, unsafe, and that evidence may be destroyed. Arkansas Rule of Evidence 201(b) provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resert [resort] to sources whose accuracy cannot reasonably be questioned."

[redacted] A court may take judicial notice of adjudicative facts in a criminal case, whether requested or not. Ark. R. Evid. 201(c). However, "[c]are should be taken by the court to identify the fact it is noticing, and its justification for doing so." *Colonial Leasing Co. of New England v. Logistics Control Group Int'l*, 762 F.2d 454, 459 (5th Cir. 1985). The reasons the location of Heaslet's house would call for a nighttime search were not appropriate to be judicially noticed in that it was not deducible from the record whether the facts were "generally known" or "capable of accurate and ready determination." *See* Ark. R. Evid. 201(b). The judge merely stated that "the location of the farm is such that there *might* be a clear view . . . and therefore, a daytime approach *might* be unsuccessful . . . some of the evidence *might* be destroyed. . ." (emphasis added). In order that a matter may properly be a subject of judicial notice, it must be "known", that is, well established and authoritatively settled, and uncertainty or difference of belief in respect to the matter in question will preclude judicial notice thereof. *Taylor v. City of Pine Bluff*, 226 Ark. 749, 294 S.W.2d 341 (1956). If a court takes judicial notice of any fact, it must be so notoriously true as not to be subject to reasonable dispute or must be capable of immediate accurate demonstration. *Collier-Dunlap Coal Co. v. Dickerson*, 218 Ark. 885, 239 S.W.2d 9 (1951). The facts judicially noticed by the court do not meet this requirement

in that there is no proof that they are "notoriously true" or that they were "capable of immediate accurate demonstration." *See id.* Because there was no justification provided, it appears that the facts judicially noticed were based upon the personal knowledge of the judge. "The personal knowledge of the judge is not judicial knowledge of the court, for there is no way of testing the accuracy of knowledge which rests entirely within the breast of the court." *Walker v. Eldridge*, 219 Ark. 594, 595, 243 S.W.2d 638, 639 (1951). Facts that are within the personal knowledge of the judge are not subject to judicial notice, unless they fit within the two subcategories set forth in Rule 201(b). Because we have no evidence that the facts were generally known in the area and because the judge's personal knowledge is not subject to cross-examination or review, *see* Ark. R. Evid. 605 ("The judge presiding at the trial may not testify in that trial as a witness."), there was no proper basis for taking judicial notice.

D. Suppression of the Evidence

The next issue is whether the failure to establish reasonable cause with sufficient facts was such a substantial violation of the Rules as to warrant suppression of the evidence obtained. Ark R. Crim. P. 16.2(e) requires that the circuit court consider the following circumstances in determining whether a violation is substantial:

> (i) the importance of the particular interest violated;
>
> (ii) the extent of deviation from lawful conduct;
>
> (iii) the extent to which the violation was willful;
>
> (iv) the extent to which privacy was invaded;
>
> (v) the extent to which exclusion will tend to prevent violations of these rules;
>
> (vi) whether, but for the violation, such evidence would have been discovered; and
>
> (vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

[redacted] *State v. Martinez, supra, Hall v. State, supra,* and *State v. Broadway, supra,* all held that substantial violations occurred under Rule 16.2 due to failure to justify a nighttime search with sufficient factual information. The privacy of the citizens in their homes, secure from nighttime intrusions, is a right of vast importance as attested not only by our Rules but also by our state and federal constitutions. *Garner v. State, supra.* Intrusion without sufficient factual justification substantially violates our Rules, and previous cases have so held. *Id.*

II. CR 99-554

The affidavit in support of a search warrant in CR 99-554, dated November 10, 1999, contained six paragraphs of allegations. The first four paragraphs merely repeated the allegations contained in the affidavit for search warrant in CR 99-543. Paragraph five alleged that on November 8, 1999, a confidential informant told Chief Cole that Heaslet was forging checks using a glass table. Paragraph six alleged that on November 10, 1999, a confidential informant told Chief Cole that Heaslet was forging and cashing checks at a particular store and that Heaslet had again started making methamphetamine. Heaslet contends that the affidavit does not comply with Ark. R. Crim. P. 13.1(b) and is facially deficient for three reasons: (1) there is no reference to the time when the contraband was allegedly in his possession; (2) there is no reference to the place the contraband was seen; (3) there was no basis given for the confidential informant's knowledge or reliability.

[redacted] It is the uniform rule that some mention of time must be included in the affidavit for a search warrant. *Hartsfield v. State*, 76 Ark. App. 18, 61 S.W.3d 190 (2001). Although we have reversed cases based upon the failure of the search warrants to mention time, *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985), and *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986), we have also held that time can be inferred from the information in the affidavit. *See Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983); *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001). Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. *Hartsfield v.*

State, supra. It is clear that the time that is critical is the time during which the criminal activity was observed. *Id.* Because most of the dates provided in the affidavit only reference the date the officer received a report and not when the activity was observed, these references are insufficient to establish a time frame during which the activities occurred. For a search warrant to issue, evidence, either direct or circumstantial, must be provided to show that the contraband or evidence sought is likely in the place to be searched. *Yancey v. State, supra.* Standing alone, circumstantial evidence that the suspect may be a drug dealer is not circumstantial evidence that anything is in his home. *Id.* Therefore, paragraphs five and six of the affidavit do not state that any criminal activity or contraband items were seen at Heaslet's house and we cannot find that a link exists to support a search of his home.

When an affidavit for a search warrant is based, in whole or in part, on hearsay, the affiant must set forth particular facts bearing on the informant's reliability, and shall disclose, as far as practicable, the means by which the information was obtained. Ark. Rule Crim. P. 13.1(b). A search warrant is flawed if there are no indicia of the reliability of the confidential informant. *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001). Furthermore, the conclusory statement, "reliable informant," is not sufficient to satisfy the indicia requirement. *Id.* There is no fixed formula for determining an informant's reliability. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). Factors to be considered in making such a determination include whether the informant's statements are (1) incriminating; (2) based on personal observations of recent criminal activity; and (3) corroborated by other information. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996). Additionally, facts showing that the informant has provided reliable information to law enforcement in the past may be considered in determining the informant's reliability in the present case. *See Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998); *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988). Failure to establish the veracity and bases of knowledge of the informant, however, is not a fatal defect if the affidavit viewed as a whole "provides a substantial basis for a finding of reasonable cause to

believe that things subject to seizure will be found in a particular place." Ark. R. Crim. P. 13.1(b).

The affidavit in issue here makes no mention of the informant's reliability. Because there are other factors that make the affidavit deficient, the affidavit viewed as a whole does not provide a substantial basis for a finding of reasonable cause to support a search warrant.

For the foregoing reasons, we hold that the circuit court erred in denying Heaslet's motions to suppress. Accordingly, we reverse and remand with directions that all the evidence seized from Heaslet's arrest be suppressed and that he be allowed to withdraw his guilty plea pursuant to Ark. R. Crim. P. 24.3(b).

Reversed and remanded.

HART and NEAL, JJ., agree.

CONGO STOVE, FIREPLACE & PATIO, INC., and California Compensation Insurance Company *v.* Edward RICKENBACKER

CA 01-1390 74 S.W.3d 238

Court of Appeals of Arkansas
Division III
Opinion delivered May 15, 2002
[Petition for rehearing denied June 19, 2002]

Hart & Wren, L.L.P., by: *Neal L. Hart*, for appellant.

Dale Grady, for appellee.

WENDELL L. GRIFFEN, Judge. Appellants, Congo Stove, Fireplace & Patio, Inc., and California Compensation Insurance Co., challenge a decision by the Workers' Compensa-

tion Commission that found appellee Edward Rickenbacker was entitled to benefits pursuant to Arkansas Code Annotated section 11-9-505(a) (Repl. 2002). Appellants contend that the decision is contrary to existing statutory and case law and that it is not supported by substantial evidence. We hold that substantial evidence supports the Commission's decision that appellee proved entitlement to compensation benefits. Thus, we affirm.

Factual and Procedural History

While working in the employ of appellants, appellee sustained an admittedly compensable injury to his left shoulder on February 5, 2000. Appellee was subsequently diagnosed with left shoulder strain. The parties stipulated that the injury was compensable, and that appellants paid appellee temporary total disability benefits and medical benefits through April 13, 2000, except for two days that appellee tried to work in February.

On February 15, 2000, appellee's physician released him to work with restrictions of no heavy lifting or heavy use of the upper extremity. Appellee reported to work on that date and was assigned to feather-dust furniture and sweep the floor. He testified that sweeping the floor aggravated his shoulder and that he could not physically continue to perform the work after February 16, 2000. Appellee explained that sweeping the floor involved pushing a broom, which required him to use his left shoulder. He testified that his job duties also required him to move barbecue grills, which also hurt his shoulder. On cross-examination, appellee acknowledged that when he made his employer aware of the difficulties he was experiencing, his employer told him to just sweep around everything. Following the second day of his return to work appellee contacted his employer and stated that he was still in pain and needed to go back to the doctor. Appellee did not return to work and appellants continued to pay temporary total disability benefits.

On March 9, 2000, appellee was seen by Dr. Charles Pearce, an orthopedic surgeon, who diagnosed appellee with left trapezius strain with trigger point and a possible partial tear of the left deltoid. Dr. Pearce ordered an MRI, and indicated in a medical

note that appellee was unable to work. An MRI was performed on March 16, 2000, which revealed a mild hypertrophic change of appellee's acromioclavicular joint. Following an evaluation conducted on that same date, Dr. Pearce increased appellee's medication and told appellee that he was still unable to return to work. Appellee returned to Dr. Pearce on April 13, 2000, and was given a release to return to work with restrictions of no lifting, pushing, or pulling in excess of twenty-five pounds. The record indicates that appellants received appellee's return to work authorizations, release from work authorizations, and restricted work authorizations. In addition, appellants contracted the services of an independent registered nurse to manage appellee's case.

Appellants continued to pay temporary total disability benefits to appellee until April 13, 2000, when Dr. Pearce authorized appellee to return to work with restrictions. On April 14, 2000, appellee attempted to return to work. However, he was told that he no longer had a job because he failed to maintain contact with his employer. The next day, appellee went to the Employment Security Division to seek employment benefits. He later moved to Missouri, and worked at a machine shop from May 9, 2000, until July 31, 2000, when he voluntarily quit and returned to Arkansas. On September 6, 2000, appellee found a job as a truck driver.

Appellee subsequently filed a claim for workers' compensation contending that he was entitled to additional temporary total benefits from April 14, 2000, through May 8, 2000; that he was entitled to temporary partial disability benefits from May 9, 2000, through July 31, 2000; that he was entitled to relief under Arkansas Code Annotated section 11-9-505(a); and that he was entitled to a change of physician or an independent medical evaluation.

Following a hearing, an administrative law judge (ALJ) found 1) that appellee failed to prove entitlement to any additional benefits after April 13, 2000; 2) that appellee was not entitled to any benefits pursuant to section 11-9-505(a); and 3) that appellee was not entitled to a physician or an independent medical evaluation. Appellee appealed only that portion of the ALJ's decision that found that he was not entitled to benefits for temporary total disa-

bility pursuant to section 11-9-505(a). Following its *de novo* review, the Commission found that appellee was not entitled to benefits for temporary total disability subsequent to April 13, 2000. However, the Commission determined that appellee was entitled to an award of benefits pursuant to section 11-9-505(a). This appeal followed.

Standard of Review

When reviewing decisions from the Commission, we view all evidence in the light most favorable to the results reached by the Commission. *See Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). The critical factor is not whether we would have reached a different result than the Commission or whether the evidence supports a contrary finding. *See id.* Rather, the findings of the Commission are affirmed when we determine that the findings are supported by substantial evidence, *i.e.*, evidence upon which reasonable minds could have reached the same conclusion as the Commission. *See id.*

Entitlement to Additional Benefits

Our workers' compensation laws serve to provide disability benefits to legitimately injured workers, to pay reasonable and necessary medical expenses, and to return the worker to the workplace. *See Torrey v. City of Forth Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

Arkansas Code Annotated section 11-9-505 reads as follows:

> (a)(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

We reviewed section 505(a)(1) in *Torrey, supra,* and held that before section 505(a)(1) applies, the following criteria must be satisfied. First, the employee must prove that he sustained a compensable injury. Second, he must demonstrate that there is suitable employment within his physical and mental limitations with his employer. Next, he must prove that the employer has refused to return him to work. Last, he must demonstrate that the employer's refusal is without reasonable cause. *See Torrey, supra.*

In *Davis v. Dillmeier Enterprises, Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997), our supreme court analyzed subsection 505(a)(1) in the context of an Arkansas Civil Rights Act claim regarding disability. The claimant, Davis, had returned to work while she was receiving medical treatment and was terminated only after she had entered into a joint petition that ended her claim for workers' compensation. In considering whether Davis had a workers' compensation claim or a discrimination claim based on a violation of the Arkansas Civil Rights Act, the *Davis* court held as follows:

> [W]e conclude that there is no remedy under the Workers' Compensation Act for an employee who is terminated from his or her job on the basis of a disability. Thus, the exclusive-remedy provision of the Act does not preclude Appellant from bringing an action under the Arkansas Civil Rights Act based upon Appellee's alleged discrimination in terminating her on the bases of her permanent restrictions and impairments.

Davis, 330 Ark. at 556, 956 S.W.2d at 160-61.

In the present case, the Commission specifically found that appellee was not entitled to benefits for temporary total disability after April 13, 2000. It based its finding on appellee's own testimony that he had the capacity to work as of April 13, 2000, when he was released to light duty work by Dr. Pearce. However, the Commission found that appellee was entitled to an award of benefits pursuant to section 505(a)(1) based on its determination that appellee established each element outlined in *Torrey, supra.*

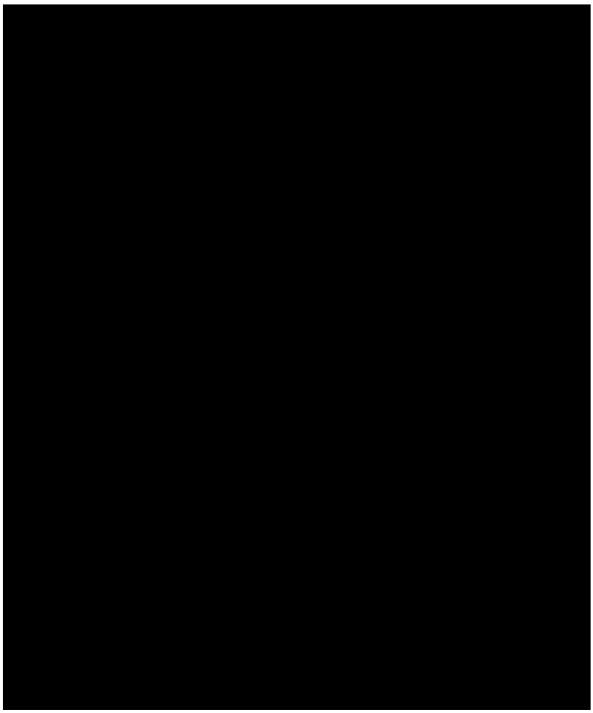
Appellants invite us to apply the reasoning espoused in *Davis, supra,* and to hold that the Commission's decision is inconsistent with case law. We decline to do so and hold that substantial evi-

dence supports the Commission's finding that appellee proved entitlement to benefits based on the factors outlined in *Torrey*.

We begin by noting that the facts in the present case are distinguishable from those presented in *Davis, supra*. *Davis* involves the applicability of subsection 505(a)(1) as it relates to the Arkansas Civil Rights Act. Because appellee was not pursuing a discrimination case, the Commission properly analyzed the case at bar using *Torrey, supra*.

We agree with the Commission that appellee met the *Torrey* factors. Appellee sustained a shoulder injury, which was accepted as compensable. The employer does not deny that it had suitable employment within appellee's physical and mental limitations available for appellee. Nor does the employer deny that it refused to return appellee to work. After finding that appellee received benefits throughout the pertinent period of time, that appellee's physician had taken appellee off work until April 13, and that an independent nurse who was hired by appellants was aware of theses facts, the Commission concluded that the employer terminated appellee without reasonable cause. Because a reasonable person could agree with the Commission's conclusion, substantial evidence supports the Commission's finding that appellee met the *Torrey* requirements. We affirm.

VAUGHT and BAKER, JJ., agree.



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