[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Juana MARTINEZ, as Representative and Legal Guardian for Santiago Martinez *v.* Megan WRIGHT

CA 05-730 223 S.W.3d 71

Court of Appeals of Arkansas
Opinion delivered January 18, 2006

Ken Swindle, for appellant.

Benson & Wood, P.L.C., by: *Brian Wood*, for appellee.

JOSEPHINE LINKER HART, Judge. In this personal-injury case, appellant Juana Martinez, as representative and legal guardian of her son, Santiago Martinez, appeals from a judgment in favor of appellee Megan Wright following a jury trial. Martinez raises two issues on appeal: first, that the trial court erred in excluding evidence that Wright "made no claim for damages and filed no counterclaim," and second, that the trial court erred in not allowing Martinez to use a police report to cross-examine the investigating police officer concerning statements made by another witness who testified at trial. Finding no error, we affirm.

On May 21, 2004, Martinez, her husband Jose Martinez, and Santiago were riding in a vehicle being driven by Jose when it collided with Wright's vehicle. Martinez filed suit seeking damages for Santiago's injuries. Wright answered and denied the material allegations of the complaint.

The direction of the green light at the time of the collision was the major contested issue. Jose Martinez testified that he was turning left on a green light when the collision occurred. Melody Mira-Valles testified that she was behind Jose Martinez's vehicle, waiting to turn left on a green arrow. She stated that she looked up, and the arrow was yellow. When she looked up again, the collision had occurred. Mira-Valles stated that she was sure that Jose did not enter the intersection on a red light but was unsure whether Jose entered the intersection on a green light or a yellow light. Mira-Valles stated that this was the statement she gave to the investigating officer.

Megan Wright testified that she went through the intersection while the light was yellow. She also stated her belief that Jose Martinez was totally at fault for the accident. On cross-examination, Martinez attempted to ask Wright whether she had filed a counterclaim seeking damages, asserting that the issue went to Wright's credibility. The trial court sustained an objection, ruling the question "immaterial."

Corporal Russ Allen of the Rogers Police Department testified that he investigated the accident. He stated that he recalled speaking with Melody Mira-Valles but denied that she told him that Jose Martinez had a yellow arrow. On cross-examination, Martinez attempted to question Allen from the police report that Allen had prepared following the accident. The trial court sustained Wright's objection and refused to allow Martinez to question Allen about the report as a business record.

Both of Martinez's points for reversal concern evidentiary issues, and this court reviews evidentiary errors under an abuse-of-discretion standard. *See Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003). The circuit court has broad discretion in its evidentiary rulings; hence, the circuit court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *See id.*

For her first point, Martinez contends that the trial court erred in not allowing her to cross-examine Wright concerning the fact that Wright did not file a counterclaim for damages after testifying that she believed that Jose Martinez was at fault for causing the accident. Martinez argues that the question was relevant because it went to Wright's credibility. According to Martinez, the trial court's decision to exclude the evidence "too severely restricted the plaintiff's questioning of the defendant." We disagree.

We are mindful that our courts have allowed a party's pleading to be used as impeachment evidence against that party and the statements made in a pleading are admissions for impeachment purposes. *See Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003); *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *accord Jernigan v. State*, 38 Ark. App. 102, 828 S.W.2d 864 (1992) (allowing the use of a defendant's complaint filed in an earlier civil suit to impeach her at her criminal trial). In *Dodson*, the trial court had refused to allow Dodson, as plaintiff, to use as evidence withdrawn allegations in the defendants' counterclaim where they asserted that Dodson was performing illegal and fraudulent acts in providing physical-therapy treatment. The supreme court reversed and held that Dodson was entitled to use withdrawn allegations of his wrongdoing for impeachment purposes against defendant Allstate Insurance's stance at trial that it never asserted Dodson had done anything wrong.

However, we believe that the more relevant case is our decision in *Belz-Burrows, L.P. v. Cameron Construction Co.*, 78 Ark. App. 84, 78 S.W.3d 126 (2002). In that case, the owner of a development sued its general contractor for constructing the project in an unworkmanlike manner. The general contractor, in turn, sued the owner's tenant for misuse of the premises but then nonsuited its cause of action against the tenant. At trial, the owner sought to introduce proof of the nonsuit to show that, if the contractor believed the tenant was to blame, it would not have

nonsuited its cause of action. We drew a distinction between a withdrawn pleading such as in *Dodson* and filing a nonsuit:

> [T]here is a significant difference between the admissibility of a withdrawn pleading and the admissibility of the fact that a nonsuit was taken. The admissibility of a withdrawn pleading rests on the fact that it is considered an admission and is inconsistent with the present position of the party who filed it. When a party states a fact in a pleading, he is averring that it is true; therefore, if at trial he takes a position contrary to the one taken in the pleading, a clear inconsistency is revealed. The same reasoning does not necessarily apply to the taking of a nonsuit. Unlike a pleading, a nonsuit is not defined by its content; it does not necessarily express a statement or assert a position. A pleader who takes a nonsuit does not necessarily admit that his suit has no basis; rather, a nonsuit is often taken for other reasons, such as settlement or trial strategy. In light of that fact, we are reluctant to accord a nonsuit the same impeachment value as a withdrawn pleading. We cannot say, therefore, that the trial court abused its discretion in excluding the nonsuit from evidence.

Belz-Burrows, 78 Ark. App. at 91-92, 78 S.W.3d at 131. Here, Wright filed an answer that generally denied the allegations of Martinez's complaint, including that she was negligent in her operation of her vehicle. The fact that she did not file a counterclaim was not an assertion of fact, and therefore, she could not be impeached on this point.

There are many possible reasons why Wright may have chosen not to file a counterclaim for damages, *i.e.*, her vehicle may not have been severely damaged; she may have believed that it would prolong the time necessary to resolve the case; it may have been a matter of trial strategy by her attorney. In short, why Wright did not file a counterclaim was not relevant to the issues. *Belz-Burrows, L.P., supra.* Therefore, we affirm on this point.

For her second point, Martinez argues that the trial court erred in not allowing her to cross-examine the investigating officer, using the police report. As noted above, Corporal Allen testified that neither Melody Mira-Valles nor anyone else told him that Jose Martinez had a yellow arrow at the time of the collision. We are unable to address this argument.

[redacted] This point on appeal is procedurally barred because Martinez made no proffer of the evidence that she sought to introduce through cross-examination of Allen. To challenge a

ruling of the trial court excluding evidence, the appellant must proffer the excluded evidence so that the appellate court can review the trial court's decision, unless the substance of the evidence is apparent from the context. Ark. R. Evid. 103(a)(2); *Halford v. State*, 342 Ark. 80, 27 S.W.3d 346 (2000); *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999). The failure to proffer evidence so this court can determine if prejudice resulted from its exclusion precludes review of the evidence on appeal. *Leaks, supra.*

Affirmed.

GLOVER and BAKER, JJ., agree.

Mario CLARK *v.* STATE of Arkansas

CA CR 02-975 223 S.W.3d 66

Court of Appeals of Arkansas
Opinion delivered January 18, 2006

Ables, Howe & Standridge, P.L.L.C., by: *J. Brent Standridge*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. On June 3, 2002, Mario Clark was tried before a jury in the Jefferson County Circuit Court for aggravated robbery, battery in the first degree, and criminal attempt to commit capital murder. The jury returned guilty verdicts on all charges and recommended prison sentences of one hundred and twenty months for the robbery, sixty months for the battery, and seventy-two months for the attempted murder, the sentences to be served concurrently. At a sentencing hearing on June 5, 2002, the trial court imposed the terms that the jury had recommended on each conviction, but the court ordered that the terms run consecutively for a cumulative sentence of two hundred and fifty-two months. Clark contends on appeal that he is entitled to a new trial because the trial court erred in two ways: (1) answering questions from the jury without summoning it into open court as required by Ark. Code Ann. § 16-89-125(e) (1987); (2) violating Clark's right to be present at a critical stage of, or a substantial step in, the proceedings, by formulating and delivering written answers to the jury's questions in his absence. We agree with the State that no reversible error occurred.

Arkansas Code Annotated section 16-89-125(e) provides as follows:

> After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be

> informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties.

Noncompliance with this statutory provision gives rise to a presumption of prejudice, and the State has the burden of rebutting that presumption. *Atkinson v. State*, 347 Ark. 336, 351, 64 S.W.3d 259, 269 (2002). The failure of a defendant and his counsel to be present when a substantial step occurs in his case, such as the judge's answering questions in the jury room, results in a violation of the defendant's fundamental right to be present at any stage of the criminal proceeding that is critical to the outcome. *Id.* (citing *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997)).

The record before us consists of two volumes: the original record and a reconstruction of the record. In the original record there are two notes indexed as *Notes from Jury*. The first note contains the handwritten question, "Who's footprint was in the blood of Mr. Gridder, that was on the floor"[sic]. Beneath the question, in different handwriting and ink, is the answer, "You may consider the evidence that was given and only that evidence." The second handwritten question, "How do you give a Concurrent Plea?" was answered, again in a different handwriting and ink, "You may make a recommendation as to concurrent or consecutive sentences, but it is the Court's decision ultimately." Each answer bears the signature of the circuit judge who presided over the trial.

Clark's appellate attorney moved this court to remand the case to the trial court for settlement of the record to determine how the communication had transpired between the jury and the trial court regarding these notes. We granted the motion, and a hearing to settle the record was conducted on June 24, 2005.

Shana Simmering, one of the deputy prosecutors who had tried the case, testified at the hearing to settle the record that she recalled the jury's having an evidentiary question during its deliberations of the guilt phase of the trial and another question at the sentencing phase. Simmering recalled going to the judge's chambers after someone from the judge's office called or came to the prosecutor's office. She recalled that defense counsel and the other deputy prosecutor were present in chambers, but she could not recall whether Clark himself was there. Referring to the notes that were in the record, she further testified:

> When we got in there, I believe Judge Davis, in both instances, read the question to us and gave what he felt was an appropriate response to that question and gave both parties an opportunity to object and there were no objections made by either side and he would then submit through the bailiff, I believe, the answer to that question.
>
> . . . .
>
> [T]he first question asked about some evidence and they had a question about evidence which, obviously, the judge's answer to the question is, "You can only consider the evidence that you have." And we all agreed that we felt that was an appropriate answer and that was submitted to them.
>
> And then the second question dealt with an issue that really, I think, may have already been dealt with in the jury instructions, . . . and, again, I think he just restated the law, which is they can make a recommendation but it is not binding on the court, and we agreed, again — both parties agreed that that was an appropriate response to the question and those answers were then submitted to the jury.
>
> My memory was that this was not one of those situations where the jury was actually brought into the courtroom and the judge asked them the question and gave the answer and it was all on the record. I'm not sure the court reporter was in chambers. . . .
>
> From what I recall, the bailiff would have taken the actual note back to the jury. Probably given it back to the foreman, who was, again, assuming was the person that gave it to him to begin with.

Testimony was also given by appellant Mario Clark. He stated that he never was made aware that the jury had any questions about the evidence or sentencing, nor was he aware of any communication that they made to the court. He testified that he was not in the judge's chambers when the correspondence came in, nor was he there when the attorneys or the judge issued an answer. Responding to questions by his attorney, he stated:

> I was just in the courtroom when the trial went down, but I was never in the chambers. I don't know nothing about that.
>
> I was — I was in the county jail at the time of the trial. I was escorted by a deputy in here. I was first made aware of this that the jury had a question to the Court when I got a letter from you.

We now address Clark's contention that the trial court committed reversible error. First, he asserts that he is entitled to a new trial on the basis that the court answered questions from the jury without summoning it into open court as required by Ark. Code Ann. § 16-89-125(e) (1987).

Failure to Summon the Jury into Open Court

In *Goff*, *supra*, the judge, with agreement of counsel, went into the jury room alone and answered three written questions that the jury submitted during its deliberations in the sentencing phase of the trial. Although the agreed answers were brief and could have been recited in a minute or less, the judge remained in the jury room for eight minutes. No record was made of what the judge told the jury, nor did he later disclose to the attorneys what he discussed with the jurors. The *Goff* court held that the defendant had been deprived of a substantial right because both she and her counsel were absent during the judge's encounter with the jury; further holding that the State had not overcome the presumption of prejudice arising from the trial court's failure to comply with Ark. Code Ann. § 16-89-125(e), the supreme court reversed and remanded for new sentencing.

A violation of Ark. Code Ann. § 16-89-125 occurred during sentencing-phase deliberations in *Anderson v. State*, 353 Ark. 384, 394, 108 S.W.3d 592, 598 (2003), when the trial court responded in writing to a written question from the jury with an answer that both the State and appellant agreed was the correct response. The supreme court held, however, that the State rebutted the presumption of prejudice because the substance of the circuit court's communication with the jury was reflected in the record, appellant never objected to that substance, and the court never had any contact with the jury during deliberations. Similarly, a presumption of prejudice was overcome in *Atkinson v. State*, 347 Ark. 336, 351–53, 64 S.W.3d 259, 269–70 (2002), where defendant did not object to the trial court's finding that its communication with the jury was limited to answering the jury's questions via a note, using language agreed upon by the parties; the substance of the court's communication with the jury was clearly reflected in the record; the court answered the jury's questions in the manner agreed upon by the parties in open court; the court never had any contact with the jury during deliberations, and appellant fully agreed with the court and State regarding the answer written on the same note where the jury had written its questions.

Here, a violation of Ark. Code Ann. § 16-89-125(e) (1987) occurred when the trial court answered questions from the jury without summoning it into open court as required. For the following reasons, however, we hold that the State has overcome the presumption that prejudice occurred when the trial court violated this statutory subsection.

The proposed answers to the jury's questions were reduced to writing with agreement of Clark's counsel, and Clark does not contend on appeal that there was anything improper about their substance. Those questions and answers were made part of the record. Further, the judge did not enter the jury room when the written answers were delivered to the jurors, nor was he alone with them at any time. There was no direct communication between the judge and the jury; thus, there was nothing further to put in the record. We conclude that, under these facts, the State has overcome the presumption that Clark suffered any prejudice from the judge's written communication with the jury outside of open court.

Clark also argues that the presumption of prejudice has not been overcome because it is unknown what communication occurred once the written note was delivered to the jury room and unknown whether there was communication about the note between the bailiff and jurors. However, neither the original record nor the settled record reflects testimony by the bailiff or other witnesses with knowledge of any possible communication when the note was delivered. We agree with the State that, although it has the burden of rebutting the presumption of prejudice arising from a violation of Ark. Code Ann. § 16-89-125(e), this burden does not require rebutting a speculative scenario with no basis in the record. *See Wilson v. State*, 272 Ark. 361, 363, 614 S.W.2d 663, 664 (1981) (rejecting the defendant's claim for a new trial, for reasons including his failure to prove to the trial court that the bailiff had counseled the jury on a point of law or had acted to prejudice the defendant's rights).

The Defendant's Right to be Present

As his second basis for a new trial, Clark asserts that the trial court's formulating and delivering written answers to the jury's questions in his absence was a violation of his right to be present at a critical stage of, or substantial step in, the proceedings. However, there was no objection by Clark or his counsel, who was present in

the judge's chambers and approved the judge's written answers to the jury, that Clark was absent for this part of these proceedings.

An attorney's authority to waive his client's right to be present at every step of his trial is presumed, in the absence of a showing to the contrary, when the question is not raised until after his trial has been concluded and he has been convicted. *Martin v. State*, 254 Ark. 1065, 1071, 497 S.W.2d 268, 272 (1973). An objection must be made by counsel in order to preserve for appellate review a claim that a defendant was absent during a critical stage of the proceedings. *E.g.*, *Clayton v. State*, 321 Ark. 602, 608–09, 906 S.W.2d 290, 294–95 (1995); *see also Durham v. State*, 179 Ark. 507, 509–10, 16 S.W.2d 991, 991–92 (1929) (refusing to reverse in absence of objection by counsel, who was present, when jury was instructed without defendant's presence).

We will not address Clark's second basis for reversal because it is not preserved for our review. Were we to entertain his argument, however, we would agree with the State that Clark has demonstrated no prejudice or loss of an advantage as a result of his absence. *See Bell v. State*, 296 Ark. 458, 465, 757 S.W.2d 937, 940 (1988) (holding that reversal is required when a significant step in a case is taken in an accused's absence if it appears that he has lost an advantage or has been prejudiced).

We hold that Clark is not entitled to a new trial on either basis he presents on appeal; therefore, the conviction is affirmed.

Affirmed.

GLADWIN and VAUGHT, JJ., agree.

Wael ABDIN *v.* Delores ABDIN

CA 05-169 223 S.W.3d 60

Court of Appeals of Arkansas
Opinion delivered January 18, 2006

Hatfield & Lassiter, by: *Richard F. Hatfield*, for appellant.

Bond & Chamberlin, by: *Will Bond* and *Neil Chamberlin*, for appellee.

DAVID M. GLOVER, Judge. Appellant Wael Abdin appeals from the denial of his petition to probate a lost will. We affirm.

Muhammad Abdeen, later known as Mike Abdin, immigrated to the United States from Israel in 1960. He married

Delores Robertson in 1961, and they had two daughters. He found financial success as the owner of a jewelry store in Jacksonville, Arkansas, and through real-estate investments. Two of Mike's brothers, Wael and Ziad, also moved to the United States in the late 1960s or early 1970s.[1] Mike's mother and several other brothers and sisters remained in Israel. Mike regularly provided financial assistance to his Israeli relatives, in particular his sisters and his late mother.

Beginning in the 1970s, Mike traveled to Israel every year or two. On some occasions, he left blank checks for his family members to use as needed. His last trip occurred in January 2000, shortly before his death. At that point, he was suffering from heart disease and diabetes, which affected his eyesight and his ability to walk. Nevertheless, he made the trip and stayed for approximately one month. While there, he was a guest at the home of his brother Hatem. Hatem and another brother, Hani, would later testify that Mike executed a will during this trip. They stated that, upon Mike's request, they accompanied him into Jerusalem to see a "court clerk" named Khaled Alkam. Alkam worked in a street-side booth "prepar[ing] legal documents," even though he had only a ninth-grade education. According to Alkam, who said that he identified Mike by his passport picture, Mike dictated the terms of his will in Arabic, and Alkam wrote out the terms by hand. Mike then read the handwritten will (using a magnifier) and signed it in Arabic, as did Hatem and Hani, who signed as witnesses. Next, Mike asked that the will be typewritten. Alkam took the handwritten version to a typist, and when he returned with the typewritten will, Mike read it (using a magnifier) and signed it in Arabic, as did Hatem and Hani, who signed as witnesses. Alkam then gave the handwritten will and the typed will to Mike. Thereafter, according to Hani, Mike threw the handwritten will away and retained the typewritten will. The typewritten version would later be offered as a lost will.

An English translation of the typed will shows it to be rather unusual by Western standards. It is made "In The Name of Allah Most Gracious Most Merciful," and it makes no precise bequest of money or property to any person. Instead, it provides for "the amount of money and property I have specified for my three sisters (and a Share for my family) according to the Islamic law of Allah

[1] Because the decedent and many of the his family members bear the surname "Abdin," we will use first names in this opinion to prevent confusion.

and His Messenger," with the "biggest share" going to "my sister Hala." It also contains several provisions stating that the testator "would like" for the following to occur: 1) Wael to invest Hala's share for her; 2) Wael to buy a house and "make it an Islamic trust," to be leased, with the proceeds going to his other sisters; 3) "you to build a Mosque" in Jerusalem named after Mike; 4) Wael to send someone to perform the Hajj obligation on behalf of Mike and his mother; 5) his brothers and sisters to buy a new store for his younger brother, Muhannad. Finally, the will states that the testator had:

> left some signed checks with my brother Hani, so you may make use of them after I pass away. But you should wait until you talk with my wife Dolaris [sic] or Kathi [apparently Cathy Miller, the manager of the Arkansas jewelry store] to sell some of the property and deposit the money in the account. Or if you want to transfer the ownership from my name to your name and then you sell it; Kathi knows all the brokers that I deal with in real estate and she is good and helpful lady.
>
> From the family share, I would like you to build a DeWan (Hall or a Family Center) and to name it after my father's name. . . .

The will leaves nothing to Mike's wife and daughters and mentions them by saying, "I would like that all of you have [sic] good relationship with my wife and with my daughter[s]."

Mike returned to Arkansas after his trip to Israel, and his health began to decline further. He was hospitalized and eventually died on March 15, 2000, leaving a substantial estate valued in the millions of dollars. On April 3, 2000, his wife Delores petitioned the Pulaski County Circuit Court to probate a will that Mike had executed in 1984. The will named Delores as Executrix and, except for a specific piece of property that was left to the daughter of Mike's business associate, Cathy Miller, bequeathed all of Mike's property to Delores. The will further provided that, should Delores predecease him, his estate should be left in trust to his two daughters. The circuit judge admitted the will to probate.

The purported lost will, in its typewritten form, was allegedly located in Israel forty days after Mike's death. According to Hani and Hatem, they entered the room where Mike had stayed at Hatem's home and discovered an envelope containing several of Mike's signed blank checks and the original typewritten will that

Mike had executed in January 2000. Copies of the will were made and sent to the United States, although to whom is not clear. Hani later visited an Israeli attorney, Nabil Gheith, and asked Gheith to send the original of the will to Wael's Arkansas attorney, Richard Hatfield. However, according to Gheith, the original was lost in the mail.

Due to the loss of the original document, Wael filed a petition in the Pulaski County on November 13, 2000, seeking to probate the Israeli will as a lost will. A photocopy of the purported will and an English translation of it were attached to the petition. On July 20 and 21, 2004, Judge Alice Gray held a hearing on the matter. Thereafter, she denied admission of the Israeli will to probate, ruling that Wael failed to prove that Mike had signed the will and further that, even if Mike's execution of the will had been proven, Mike had the opportunity to destroy the will in his lifetime. Wael now appeals and argues that the trial court clearly erred in ruling 1) that Mike did not sign the Israeli will, and 2) that Mike had the opportunity to destroy the will in his lifetime.

Probate cases are reviewed de novo, but we will not reverse the probate judge's findings of fact unless they are clearly erroneous. *Remington v. Roberson*, 81 Ark. App. 36, 98 S.W.3d 44 (2003). A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed. *Id.* Due deference will be given to the superior position of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.*

The admission of lost wills to probate is governed by Ark. Code Ann. § 28-40-302 (Repl. 2004), which reads as follows:

> No will of any testator shall be allowed to be proved as a lost or destroyed will unless:
>
> (1) The provisions are clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness; and
>
> (2) The will is:
>
> (A) Proved to have been in existence at the time of the death of the testator; or
>
> (B) Shown to have been fraudulently destroyed in the lifetime of the testator.

Under this statute, the proponent of a lost will must prove two things. First, he must prove the will's execution and its contents by strong, cogent, and convincing evidence. *Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988); *Matheny v. Heirs of Oldfield*, 72 Ark. App. 46, 32 S.W.3d 491 (2000). Second, he must prove that the will was still in existence at the time of the testator's death (*i.e.*, had not been revoked by the testator) or that it was fraudulently destroyed during the testator's lifetime. Proof of this second element is necessary because the law presumes that an original will that cannot be found after a testator's death has been revoked. *See Tucker v. Stacy*, 272 Ark. 475, 616 S.W.2d 473 (1981); *see also Remington, supra*; *Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994). It is the failure to produce the original will that gives rise to the presumption. *See Remington, supra.* This presumption may be overcome, however, if the proponent of the lost will proves, by a preponderance of the evidence, that the will was not revoked during the testator's lifetime. *See Remington, supra; Gilbert, supra.*

We first address Wael's argument that the trial court clearly erred in ruling that he did not prove that Mike had executed the lost will.He cites several factors that he contends should lead us to conclude that Mike signed the will, including: 1) that the only direct testimony regarding the signature came from Khaled Alkam (the clerk), Hani, and Hatem, all of whom said that they saw Mike sign the will; 2) that Wael and Ziad, who were very familiar with the Arabic language and Mike's signature, identified his signature on the will; 3) that the estate's expert document examiner, Linda Taylor, who testified that she could not identify the signature as Mike's, did not consider the effect that Mike's age and illness might have had on his signature, nor did she have any experience analyzing Arabic signatures; 4) that the evidence is undisputed that Mike had a history of sending money to his family; 5) that the Koran allows a Muslim to dispose of one-third of his estate in any way he chooses, which the Israeli will would comply with, once Mike's jointly-held property and Delores's dower interest were deducted from his estate.

Despite the above listed factors, our review of the record, as abstracted, shows that there was conflicting evidence on the issue of whether Mike signed the Israeli will. Wael testified that, while Mike was in Jerusalem, Mike called him and told him that he "took care of the will." Ziad testified that, after Mike returned from Jerusalem, he told Ziad that he "did all of the

paperwork to take care of my sisters and her kids [sic] and my younger brother." Both men also identified the Arabic signature on the Israeli will as Mike's. Further, they testified that Mike regularly sent money to his Israeli relatives and often left blank checks in Jerusalem. Ziad said that, just before Mike went to Jerusalem, Mike told him that:

> I did leave some checks in Jerusalem. If ever something happened to me, I got some checks, and there could be — these checks will be distributed to some of my sisters and my brother from real estate he had here in the states, and he said I don't have the money in the bank, but I have the real estate. You can use some of this money to help, you know, my sisters and my brother, my younger brother, and [Mike] wanted to do something for building like some kind of mosque or like a hall for the family, and [Mike] said that's — [Mike] left some of these checks in Jerusalem to be used after [Mike's] death.

Mike's brothers Hani and Hatem also testified that Mike had signed the will. The clerk who drafted the Israeli will, Khaled Alkam, stated that he identified Mike by his passport and drafted the will as Mike requested. Additionally, Wael's document examiner, Curtis Baggett, testified that the Arabic signature on the Israeli will was Mike's. Imam Islam Musad of the Islamic Center in Little Rock explained that there is an obligation under the Koran for males to take care of females; that the Koran provides for fixed shares for certain relatives; and that a person has the flexibility to dispose of one-third of his assets as he wishes.

However, the proof presented by the estate contradicted much of the above evidence. Delores and Cathy Miller, who had managed Mike's jewelry store for twenty-six years, testified unequivocally that the signature on the will was not Mike's. Despite Wael's claims that these women were not familiar with the Arabic language, Delores said that she had seen Mike's Arabic signature fifteen to twenty times, and Miller said that she had seen it "possibly a dozen times." Furthermore, each witness, in testifying that the signature on the will was not Mike's, offered an explanation that did not depend on a knowledge of the Arabic language. Delores said that the signature on the will was small and neat, whereas Mike "couldn't write like that. He would write real big and you could hardly read it." Miller said that Mike "couldn't see to write in a space that small for one thing. It is so level on the line.

It's just not possible that he could write on a straight line. It's a hundred percent not possible." Both women additionally testified that it would be unlike Mike not to make a provision for his daughters, who Delores testified were "his life." Moreover, according to Delores, Mike had never mentioned drafting a will while he was in Israel.

Delores and Cathy Miller also offered testimony tending to discredit Wael and Ziad. Delores said that Mike did not trust Wael because of Wael's gambling. Miller stated that, while Mike was dying in the hospital, Wael mentioned several times that he needed money, possibly $30,000, and implored Mike, on his deathbed, "Mike, tell Cathy to give me the money for the mosque." There was also evidence that Wael or Ziad may have countenanced the misuse of some of the signed blank checks that Mike left in Israel for his family's caretaking. After Mike's death, his siblings in Israel filled out seven of the checks in the amount of $200,000 each and one check in the amount of $300,000, and named themselves as payees. Later, in a petition filed by Ziad, they made a claim against the estate based on the checks. The claim was later withdrawn in 2004 when it was determined that the checks "were not valid" under Arkansas law. Wael and Ziad explained that the checks were written after their efforts to resolve the situation with Delores proved unsuccessful.

The estate also called Linda Taylor, a certified document examiner, who testified that she could not identify Mike as the signer of the will. Finally, there was testimony from Mike's long-time friend, business associate, and attorney, Mike Wilson, who said that he prepared Mike's 1984 will and that he and Mike had discussed the tax implications of his estate many times since. He said that he did not believe that Mike would make a new will without his knowledge.

Given the above evidence, we cannot say that the trial court clearly erred in ruling that Wael failed to prove that Mike executed the Israeli will. Wael's arguments are, for the most part, attacks on the credibility of the estate's witnesses. He claims that his witnesses, who said that they actually saw Mike signing the purported lost will, were more believable than the estate's witnesses. However, it was within the trial judge's purview to believe Delores Abdin and Cathy Miller, who had known Mike for many years and who testified unequivocally that the signature on the will was not his. *See generally Hanna v. Magee*, 189 Ark. 330, 72 S.W.2d 237 (1934) (holding that circumstantial evidence that a will was never

executed may outweigh testimony of witnesses who allegedly witnessed the will). Moreover, even though, as Wael claims, Delores Abdin and Cathy Miller had an interest in the outcome of the case, many of Wael's witnesses were interested as well, in that their family would benefit from the probate of the Israeli will. Where the decision turns on the credibility of interested witnesses, we defer to the superior position of the trial court to judge their credibility. *See Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002).

Wael's attack on the testimony of the estate's expert, Linda Taylor, is likewise a credibility matter. He claims that she failed to take Mike's age and illness into consideration in analyzing the signature on the will. However, Taylor testified that, even considering those factors, she would expect to see "different characteristics than what I was seeing in the questioned signature" and that she did "not believe it was possible" that the person who signed the known signature samples also signed the will. Wael also claims that Taylor had no background in analyzing Arabic signatures. However, Taylor's qualifications as a document examiner were formidable. She had worked for the FBI and the Arkansas Crime Lab, where she was the chief examiner of questioned documents; was board-certified since 1990; had a certificate from the Arkansas Commission on Law Enforcement Training; and had published articles in peer-review journals. By contrast, Wael's expert, Baggett, admitted that he was not board-certified. He testified that he had studied under Dr. Ray Walker, who was a doctor of divinity. He also said that he taught document examination through Handwriting University, a mail-order school, and that his son owned HandwritingUniversity.com, the "largest handwriting analysis school in the world." He admitted that he had taken no continuing education classes, had never published in any trade journals, and that he had once been convicted of felony theft. Thus, it is ultimately the credibility of the expert witnesses that is at issue, and, on such questions, we defer to the trial judge. *See Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001) (holding that a trial judge's determination that one expert's testimony was entitled to more weight and credibility than the other expert's was within the scope of the judge's discretion).

Finally, while Wael argues that the Israeli will was consistent with Islamic law, even if such a consistency exists, there was evidence that the will was inconsistent with Mike's great affection for his daughters, who were not provided for at all in the Israeli

will. Moreover, both Delores and Cathy Miller testified that the Israeli will did not "sound like" Mike.

It was Wael's burden to prove by strong, cogent, and convincing evidence that Mike executed the Israeli will. *See Matheny, supra.* Considering the evidence in this case as a whole, we cannot say that the trial judge clearly erred in ruling that Wael did not meet his burden. We therefore find no error on this point.

In light of our holding that Wael failed to prove the execution of the Israeli will, it is not necessary for us to resolve the issue of whether the trial court erred in ruling that Mike had the opportunity to destroy the will during his lifetime. However, we note that there is no evidence that Mike had actual possession of the will or access to it after he returned to the United States. No one saw the will in his possession, and he never mentioned having custody of it. There is, in fact, considerable evidence that the purported will remained in Jerusalem. Nevertheless, Wael's prevailing on this point is inconsequential, given our ruling regarding the execution of the will. *See Thomas v. Thomas*, 30 Ark. App. 152, 784 S.W.2d 173 (1990); *Wharton v. Moss*, 267 Ark. 723, 594 S.W.2d 856 (Ark. App. 1979) (holding that the proponent of a lost will must prove *both* the execution of the will the lack of revocation or fraudulent destruction).

We conclude by mentioning an evidentiary argument that Wael makes for the first time in his reply brief. During the testimony of expert witness Linda Taylor, she stated that her opinion had been reviewed by another document examiner, Mr. Bear Chandler. Wael objected on the ground of hearsay, but the trial court overruled the objection. Wael argues that the trial judge erred in permitting the testimony.

It is well established that we will not consider an argument made for the first time in a reply brief. *See Maddox v. City of Fort Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001). However, there is an unusual circumstance in this case. Prior to his reply brief's being filed, Wael filed a motion asking for permission to "supplement the record." He claimed that his objections to Taylor's testimony did not "appear in the abstract," and he submitted two pages of supplemental abstract containing that material. We granted the motion to supplement. However, Wael's motion did not make it clear that he would be raising an argument regarding this testimony for the first time in his reply brief. He did not seek permission to raise a new argument but only to supplement his

abstract. Under these circumstances, he remains bound by the general rule that we do not consider arguments raised for the first time in a reply brief.

Affirmed.

HART and BAKER, JJ., agree.

Robert C. TAYLOR *v.* STATE of Arkansas

CA CR 04-1262 223 S.W.3d 80

Court of Appeals of Arkansas
Opinion delivered January 18, 2006

Dover Dixon Horne P.L.L.C., by: *Nona M. Morris*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Appellant Robert C. Taylor was convicted of five counts of first-degree forgery and one count of first-degree continuing criminal enterprise in connection with the possession and uttering of counterfeit money. He was sentenced to 600 months in the Arkansas Department of Correction. On appeal, appellant argues that: (1) the trial court erred in denying his motions for directed verdict; (2) the trial court erred in denying his objection based upon ineffective assistance of counsel; (3) the trial court erred in denying his motion for mistrial. We affirm in part and reverse and dismiss in part.

The facts of this case are as follows. On January 14, 2004, the State filed a felony information charging appellant with six counts of first-degree forgery. The State filed an amended information on March 16, 2004, charging appellant with six counts of first-degree forgery and one count of first-degree continuing criminal enterprise. At some point, count two, one of the first-degree forgery charges, was nolle prossed. On May 13 – 14, 2004, a jury trial was held in the Drew County Circuit Court.

During the trial Sherry Price testified that, on January 3, 2004, she worked as a cashier at the Save-A-Lot Store. Around 8:00, a man came in and attempted to pay for two dollars' worth of

merchandise with a one-hundred-dollar bill. Ms. Price described the bill as waxy, slimy, and burned around the edges. The man informed Ms. Price that the reason the bill looked so bad was because his house had recently burned. Ms. Price told the man that she could not break a one-hundred-dollar bill and called her manager. The manager marked the bill with a "counterfeit pen" and the edges of the bill changed color. When the manager refused to take the bill, the man left the store. Ms. Price said that State's Exhibit One looked like the bill appellant tried to pass. She remembered the burned hole on the bill. From the stand, Ms. Price identified appellant as the person who tried to pass the bill.

Mark Hodnett, general manager at the Save-A-Lot Store, remembered being called to the front by a cashier to look at an "unusual" one-hundred-dollar bill. He said that, when he examined the bill, he could not determine if it was good, so he suggested that appellant take the bill to the bank to have it verified. When shown State's Exhibit One, Mr. Hodnett said that it appeared to be the same bill. He described it as being covered in tape and having a burned hole. Mr. Hodnett identified State's Exhibit Four as the photo line up that he was later shown. He recalled picking number five as the person who came into the store. He identified appellant as number five.

Stanley Pryor, a clerk at the Pine Hill Liquor Store, testified that during the first week of January 2004, he took a one-hundred-dollar bill from appellant. After appellant left, Mr. Pryor became suspicious, so he asked his manager to check the bill. When his manager marked the edges of the bill, it indicated the bill was counterfeit. Mr. Pryor identified State's Exhibit Two as looking like the bill he took. Mr. Pryor said that, a few days later, appellant returned and attempted to make a purchase using a ten-dollar bill. When he told appellant the money was counterfeit, appellant protested, so he called his manager. Mr. Pryor identified State's Exhibit Three as the ten-dollar bill. He said he recognized the mark he made on it.

Darrell Snuffer, also an employee of the Pine Hill Liquor Store, testified that, on January 3, 2004, appellant came into the store and passed a counterfeit one-hundred-dollar bill. He said that appellant returned to the store on January 6 and, when asked his name, appellant identified himself. He said that, on this occasion, appellant tried to pass a ten-dollar bill. Mr. Snuffer identified State's Exhibit Two as the one-hundred-dollar bill. He identified State's Exhibit Three as the ten-dollar bill. He recalled that the

sides of the ten-dollar bill tested "bad." Mr. Snuffer said that, when questioned about the one-hundred-dollar bill, appellant denied passing it. He said that appellant insisted that the ten-dollar bill was good; however, Mr. Snuffer believed the bill was suspect and asked appellant to remain in the store until the sheriff came. Appellant refused and left the store. Mr. Snuffer followed appellant outside the store and wrote down appellant's license-plate number and traveling directions.

John Dement of the Monticello Police Department testified that he investigated the passing of the counterfeit bills at the Pine Hill Liquor Store. He said that the liquor store had video surveillance, and he managed to obtain the videotapes for the evenings of January 3 and January 6. Officer Dement identified State's Exhibits Six and Seven as the original videotapes. From a review of the videotapes, Officer Dement recognized appellant. During Officer Dement's testimony, the videotapes were played and Officer Dement provided narration. He identified appellant on the videotapes. He said that he had known appellant several years and said "[I am] familiar with the way he carries himself, how he looks, the way he walks. I can identify him from those features, and when I watch the film, I see [appellant] entering Pine Hill Liquor."

At the conclusion of Officer Dement's testimony, appellant moved for mistrial. He argued that based on Officer Dement's testimony concerning his personal contact with appellant, the jury would assume the contact arose out of some type of criminal activity. The trial court denied appellant's motion but offered a cautionary instruction. Appellant declined the offered instruction.

David Anderson, the mayor of Monticello, testified that appellant's mother rented an apartment from him, and that appellant lived with his mother. Mayor Anderson identified State's Exhibit Nine as a Wal-Mart sack with money in it that he found while raking pine straw in the back of his apartment complex. He said that he found the bag against the wall next to appellant's mother's apartment. Mayor Anderson testified that he turned the bag over to the police chief.

Jessica Green, the mother of appellant's child, testified that on January 6, she and appellant went to the Cracker Box Food Store. She said that appellant asked her to take a one-hundred-dollar bill in and have it checked. Before taking the bill, she asked if the bill was fake, and appellant replied that it was real. She said that State's Exhibit One looked like the bill appellant gave her. She

said it had the same texture and the same hole. When she took the bill inside the store, she was told that the bill was counterfeit and that the store was keeping the bill. Ms. Green said that, afterwards they went to the Pine Hill Liquor Store. Appellant then went inside the liquor store and, after about fifteen minutes, appellant came back outside. The manager followed appellant outside. When the manager told appellant he had a fake bill, appellant and the manager started arguing. Eventually, appellant and Ms. Green left and went back to appellant's apartment. Shortly thereafter, they were arrested. During her testimony, Ms. Green recalled that, in the past, appellant had mentioned he wanted to counterfeit some money.

Kevin Brooks, appellant's friend, recalled being at appellant's home one day and seeing some money lying on appellant's bed. When shown State's Exhibit One, Mr. Brooks said that he saw a one-hundred-dollar bill similar to the one in the exhibit amongst the money on the bed. Mr. Brooks testified that appellant offered to give him a one-hundred-dollar bill in exchange for twenty dollars. He also said that, while there, appellant had him retrieve a can of hair spray from a closet.

Betty White testified that her daughter, Amanda Lewis, was an acquaintance of appellant. She said that while appellant was in jail, she learned that Amanda and appellant were exchanging letters. Immediately following this statement, appellant moved for mistrial. He argued that Ms. White's statement suggested that appellant was previously involved in criminal activity. The trial court denied the motion, and appellant informed the trial court that he did not want a curative instruction.

Amanda Lewis identified State's Exhibit Twelve as a letter appellant sent to her while he was in jail. She read the letter aloud for the jury. The letter provided:

> What's up? Me, well you know, is Keith still missing? What this about Big Ed we know? [sic] so what pass you to write me? O, [sic] I get it, you want some of that counterfeit money I got, Huh? The Secret service came down to investigate, but needless to say, as usual, I was one, or maybe two steps ahead. All they got off of me was a $10.00 bill at Pine Hill, but they say I spent much more around town. I say if I did, I did not know. Because you cannot mark it with one of those pens and it would show to be real.

Following Ms. Lewis's testimony, the following transpired:

> APPELLANT'S COUNSEL: Your Honor, Defendant has some problems with Counsel.
>
> TRIAL COURT: Tell him to come on up.
>
> APPELLANT'S COUNSEL: Your Honor, the Defendant has advised Counsel that he is displeased about certain motions and objections and other things about the proceedings, that he is dissatisfied with Counsel. Counsel advised Defendant that at the end of the trial he might want to go ahead and file a Rule 37 alleging ineffective assistance of Counsel. The Defendant has advised Counsel he wants to make that complaint at this time, and so I asked if the Court would want to hear him. Now, under these circumstances, I have serious problems with continuing as counsel for the Defendant.
>
> TRIAL COURT: It's not timely. A decision has not been reached in this case. You hadn't put your defense on at this point. So we're in the midst of the trial and [appellant's counsel] is very experienced.
>
> APPELLANT: Yes, I understand, but also I'd like for the Court to know that, according to this, what I received, is, I never knew until yesterday that I was to be here for a forgery case. I was under — According to this that I received from her, I was to here for breaking and entering, and it's Docket Number CR-20030158-4-B, set of [sic] jury trial May 11 through 14.
>
> APPELLANT'S COUNSEL: Your Honor, I want to say for the record that certainly it puts me in what is an uncomfortable position at this point of the trial. I want to assure the defendant and the Court that I will certainly do my utmost to continue to represent him, but it certainly puts a strain on our position.
>
> TRIAL COURT: Well, that's just a part of the practice of law in this country.

Next, appellant's counsel again moved for mistrial. He informed the trial court that appellant had just informed him that the alternate juror may have seen appellant in handcuffs. Appel-

lant's counsel argued that it prejudiced appellant's chances for a fair trial. The trial court denied the motion; however, this time appellant accepted the trial court's offer to admonish the alternate.

Scott Woodward, Special Agent with the Arkansas State Police, testified that on December 29, 2003, he was contacted by Secret Service concerning appellant. Afterwards, he began conducting surveillance of appellant. He said that on January 3, 2004, he learned that a white male had passed a counterfeit one-hundred-dollar bill at the Pine Hill Liquor Store. The following Monday, local authorities sent Special Agent Woodward the bill and the surveillance tape from the liquor store. Special Agent Woodward identified State's Exhibit One as the bill he received. He said that from viewing the surveillance tape, he identified appellant and developed probable cause for a search warrant. On the morning of January 6, a search warrant was issued for appellant's residence. On the way to execute the search warrant, appellant was seen walking toward the Save-A-Lot Store. Special Agent Woodward said appellant was wearing the same clothes that he had on in the January 3 surveillance tape. He observed appellant enter the store, and a few minutes later, he observed appellant walk out of the store and head toward his mother's apartment.

Special Agent Woodward then drove over to the Save-A-Lot Store and asked the manager if a white male wearing a tan ball cap, tan shirt, and blue jeans had been in the store earlier. The manager replied yes and said that appellant had attempted to pass a counterfeit one-hundred-dollar bill. When shown a photo lineup, the manager identified appellant as that man. When asked if there was anything unique about the Save-A-Lot bill, Special Agent Woodward replied that he was told it was a one-hundred-dollar bill that had been burned on the corner. Special Agent Woodward testified that, later that evening, the same bill showed up at the Cracker Box Food Store. However, this time, a white female had passed the bill. Special Agent Woodward said that same evening a man fitting appellant's description tried to purchase alcohol from the Pine Hill Liquor Store with a counterfeit ten-dollar bill.

Special Agent Woodward testified that on January 12, he received a Wal-Mart bag containing $161 that had been received by the chief of the Monticello Police Department. The bag contained ten-dollar bills that were exactly the same as the ten-dollar bill appellant tried to pass at the Pine Hill Liquor Store. Special Agent Woodward also testified that hair spray is associated with counterfeit money production.

At the conclusion of the State's case, appellant moved for a directed verdict as to each of the remaining counts in the information. The trial court denied appellant's motions. Appellant then rested without putting on any evidence. At the conclusion of his case, appellant renewed his motions for directed verdict. The trial court denied appellant's renewed motions.

The jury returned a verdict of guilty on the remaining five counts of first-degree forgery and the one count of first-degree continuing criminal enterprise. Appellant was sentenced to twenty years on each of the first-degree-forgery counts and fifty years on the first-degree continuing-criminal-enterprise count. The trial court ordered that the sentences for each count run concurrently with each other. This appeal followed.

Appellant first argues that the trial court erred when it denied his motions for directed verdict. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005). In our review of the evidence, we seek to determine whether the verdict is supported by substantial evidence. *Id.* In determining whether there is substantial evidence to support the verdict, we review the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Saul v. State*, 92 Ark. App. 49, 211 S.W.3d 1 (2005). Substantial evidence is that evidence which is of sufficient force and character to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Furthermore, we do not weigh the credibility of the witnesses on appeal; such matters are left to the factfinder. *Turbyfill v. State, supra.*

First-Degree-Continuing-Criminal-Enterprise

Appellant first challenges the sufficiency of the evidence to support his first-degree-continuing-criminal-enterprise conviction. A person commits the offense of engaging in a continuing criminal enterprise in the first degree if he:

> (A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and
>
> (B) That offense is part of a continuing series of two (2) or more predicate criminal offenses which are undertaken by that person *in concert with two (2) or more other persons* with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management.

Ark. Code Ann. § 5-74-104(a)(1) (Repl. 1997) (emphasis added). Appellant specifically argues that: (1) the incidents were two separate events and not a continuous series of events; (2) there was no evidence that he acted "in concert" with anyone; (3) there was no evidence establishing that appellant acted as the supervisor or organizer; (4) there was no evidence corroborating the testimony of his two so-called accomplices.

1. Whether there was a continuing series of events.

We begin by first addressing appellant's contention that there was no evidence establishing a continuing series of events. Appellant failed to make this argument below. It is well settled that this court will not address arguments raised for the first time on appeal. *Davidson v. State*, 358 Ark. 452, 193 S.W.3d 254 (2004). Accordingly, this argument is not preserved for appellate review.

2. Whether appellant acted in concert with anyone.

Appellant next argues that there was no evidence establishing that he acted "in concert" with anyone. The phrase "in concert" has been defined as acting in mutual agreement in a common plan or enterprise. *See Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998). The State alleges that appellant acted in concert with Ms. Green and Mr. Brooks. The evidence established that appellant had Ms. Green pass a counterfeit one-hundred-dollar bill at the Cracker Box Food Store. Ms. Green testified that appellant had assured her that the bill was real. As to Mr. Brooks, the evidence established that, while Mr. Brooks was visiting appellant, appellant offered him a one-hundred-dollar bill in exchange for twenty dollars, and that Mr. Brooks refused this offer. Mr. Brooks also testified that, while there, appellant had him retrieve a can of hair spray. Even when we view this evidence in a light most favorable to the State, there was no evidence establishing that appellant and Mr. Brooks were engaged in a mutual agreement. Thus, there was no evidence establishing that appellant acted in concert with two or more other persons.

We, therefore, reverse and dismiss his first-degree continuing-criminal-enterprise conviction. Because we are reversing and dismissing appellant's conviction, we do not address

his remaining arguments challenging the sufficiency of the evidence to support his first-degree-continuing-criminal-enterprise conviction.

First-Degree Forgery

Appellant also challenges the sufficiency of the evidence to support his first-degree forgery convictions. Arkansas Code Annotated section 5-37-201 (Repl. 1997) provides:

> (a) A person forges a written instrument if with purpose to defraud he draws, makes, completes, alters, counterfeits, possesses, or utters any written instrument that purports to be or is calculated to become or to represent if completed the act of a person who did not authorize that act.
>
> (b) A person commits forgery in the first degree if he forges a written instrument that is:
>
> (1) Money, a security, a postage or revenue stamp, or other instrument issued by a government;

"Utter" as used in section 5-37-201 "means to transfer, pass, or deliver or cause to be transferred, passed, or delivered to another person any written instrument, or to attempt to do so." Ark. Code Ann. § 5-37-101(7) (Supp. 2005); *see also Ruffin v. State*, 83 Ark. App. 44, 115 S.W.3d 814 (2003). Appellant specifically argues that there is no evidence that he acted with intent. A criminal defendant's intent or state of mind can rarely be proven by direct evidence and must usually be inferred from the circumstances of the crime. *Simmons v. State*, 89 Ark. App. 34, 199 S.W.3d 711 (2004).

When we view the evidence in a light most favorable to the State, there is substantial evidence establishing that appellant acted with intent. Appellant repeatedly tried to pass counterfeit bills at local businesses. Furthermore, he offered Mr. Brooks one of his bills in exchange for twenty dollars. Based on appellant's conduct, a jury could find that he acted with intent.

Ineffective Assistance of Counsel

Appellant next argues that the trial court erred when it denied his ineffective-assistance-of-counsel objection. It is well settled that this court will not consider ineffective assistance as a

point on direct appeal unless that issue has been considered by the trial court. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). Additionally, the facts surrounding the claim must be fully developed, either during the trial or during hearings conducted by the trial court. *Id.* The reason for this rule is that an evidentiary hearing and finding as to the competency of appellant's counsel by the trial court better equips the appellate court on review to examine in detail the sufficiency of the representation. *Id.* The trial court is in a better position to assess the quality of legal representation than we are on appeal. *Id.*

As set out above, in the middle of trial, appellant made the trial court aware that he was unsatisfied with his counsel's representation. The trial court informed appellant that his objection was untimely, *i.e.*, too early. Therefore, appellant's objection was not considered by the trial court, and we cannot address his claim of ineffective assistance of counsel.

It is worth noting that appellant also filed a Rule 37 petition. However, his petition was filed after the filing of the notice of appeal with this court. Arkansas Rule of Criminal Procedure Rule 37.2(a) provides that "[i]f the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court while the appeal is pending." Accordingly, we do not have jurisdiction to address appellant's Rule 37 petition.

Motion for Mistrial

In his last argument on appeal appellant asserts that the trial court erred when it denied his motion for mistrial following the testimony of Officer Dement that introduced appellant's prior bad acts. A mistrial is a drastic remedy, which should only be used when the error is so prejudicial that justice cannot be served by admonition. *Ashlock v. State*, 64 Ark. App. 253, 983 S.W.2d 448 (1998).

Here, appellant waited until the conclusion of Officer Dement's testimony to make his mistrial motion. Motions for mistrial must be made at the first opportunity. *Flowers v. State*, 92 Ark. App. 29, 210 S.W.3d 907 (2005). The policy reason behind this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Id.* Furthermore, appellant fails to cite authority in support

of his argument. It has been held that a failure to cite authority is also a reason to affirm. *Ashley v. State*, 358 Ark. 414, 191 S.W.3d 520 (2004).

In conclusion, we affirm appellant's first-degree-forgery convictions and hold that his arguments alleging ineffective assistance of counsel and that the trial court erred in denying his motion for mistrial lack merit. However, we hold that appellant's first-degree continuing-criminal-enterprise conviction was not supported by substantial evidence and thereby, reverse and dismiss that conviction.

Affirmed in part, reversed and dismissed in part.

ROBBINS and ROAF, JJ., agree.

William GEE *v.* Julia HARRIS

CA 05-712 223 S.W.3d 88

Court of Appeals of Arkansas
Opinion delivered January 18, 2006

Tripcony Law Firm, P.A., by: *John D. Young*, for appellant.

Terry Askew, for appellee.

LARRY D. VAUGHT, Judge. This case arises from an order of protection entered against appellant William Gee by the

Garland County Circuit Court. Gee filed a motion to dismiss the protective order, arguing that the circuit court improperly exercised personal jurisdiction over him. The trial court denied Gee's motion. On appeal Gee argues that the circuit court erred in asserting personal jurisdiction over a non-resident and that the court erred in entering and extending the order because there was insufficient evidence presented by appellee Julia Harris that Gee posed an immediate threat of harm. We dismiss the appeal as moot.

Gee and Harris lived in Vancouver, Washington, until February 2005. After a serious altercation — Gee pleaded guilty to criminal charges after beating Harris — she fled to Hot Springs, Arkansas, to live with her mother. Based on Harris's accusation that Gee had called her mother's home several times and threatened to commit further acts of violence against her, Harris swore out a petition for an order of protection. An ex parte order based on this petition was issued on February 23, 2005. The order was extended on March 28, 2005, but it expired on September 27, 2005.

Here, the issue of mootness has not been raised by the parties; rather, it is a jurisdictional issue that we raise on our own motion. *Black's Law Dictionary* 1024 (7th ed. 1999), defines "moot" as "[h]aving no practical significance." A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings, including the appeal. As a general rule, the appellate courts of this state will not review issues that are moot. *Allison v. Lee County Election Comm'n*, 359 Ark. 388, 198 S.W.3d 113 (2004). To do so would be to render advisory opinions, which we will not do. *Id.* Generally, a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Id.* Our courts have recognized two exceptions to the mootness doctrine. *Id.* The first exception involves issues that are capable of repetition, yet evade review, and the second exception concerns issues that raise considerations of substantial public interest, which if addressed would prevent future litigation. *Id.*

[redacted] As far as the underlying order of protection that is being appealed, neither exception is applicable. The order has expired and thus there is no remedy for Gee — even if we held that the trial court erred — because the damage, if there was any, has already been done and cannot be undone. Because any judgment

rendered would have no practical legal effect upon an existing legal controversy, we dismiss Gee's appeal as moot.

Dismissed.

GLADWIN and BIRD, JJ., agree.

Charnaley MARSHALL *v.* STATE of Arkansas

CA CR 04-1146 223 S.W.3d 74

Court of Appeals of Arkansas
Opinion delivered January 18, 2006

[Rehearing denied February 22, 2006.]

The Rogers Law Firm, P.A., by: *Edmundo G. Rogers*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. A Clark County jury convicted appellant Charnaley Marshall of rape. He was sentenced to ten years in prison. On appeal, Marshall argues that the trial court erred when it denied his directed-verdict motion, because the evidence was insufficient to prove the occurrence of sexual intercourse involving penetration and insufficient to prove that the sixteen-year-old victim, S.B., was mentally incapacitated or physically helpless. We affirm.

Taiwan Dickerson testified that on January 31, 2004, he was at Marshall's mother's apartment drinking with Marshall and other friends. Around midnight, Dickerson drove Marshall to pick up S.B. and another girl, Victoria, and they all returned to the apartment. S.B. and Victoria were drinking shots of alcohol. Victoria left the party with a girl named Carreshia at approximately 2:00 a.m., leaving S.B. alone and intoxicated with Marshall, his brother Chris Marshall, and several other men. Dickerson saw Marshall trying to put S.B. on his lap, and he witnessed Marshall and Moody take off S.B.'s clothes and panties. Marshall then took S.B. into his room and shut the door. According to Dickerson, S.B. "was out of it, she didn't know what was going on." When Blake opened Marshall's door, Dickerson saw Marshall pulling his pants up and saw S.B. on the floor "with her legs up a little and spread. . . ." Marshall then took S.B. to his bed and began fondling her in her vaginal area. S.B. began vomiting, and Dickerson decided to leave, but he remembered helping to take S.B. to the bathroom before he left.

Blake Moody testified that he first saw S.B. at the apartment around midnight. According to Moody, Marshall made S.B. a drink, and then S.B. and Victoria began to have a drinking contest. Moody estimated that each girl had about twelve shots over a twenty-minute time period. Moody opined that S.B. was drunk and passed out after Victoria left the party. According to Moody, he and Dickerson helped take off S.B.'s clothes in Marshall's bedroom. Moody at one point witnessed Marshall rubbing S.B. in her vaginal area. Moody testified that Marshall laid her on his bed, reached into a drawer and pulled out a condom, and told Dicker-

son and Moody to leave. When Moody went back to the bedroom a few minutes later, Marshall "jumped off of [S.B.]." Marshall was "on top of [S.B.] between her legs" when Moody walked in, and Moody observed that Marshall's pants were around his knees. S.B. then began to vomit, Moody helped take her to the bathroom, and Marshall entered the bathroom and shut the door. According to Moody, S.B. was passed out and naked at the time. After about five minutes, Chris opened the bathroom door with a knife and told Marshall to get off of S.B. Moody saw Marshall on top of S.B., and he testified that both Marshall and S.B. were naked and that Marshall had an erection.

According to Moody, at this point, Dickerson, James Giles, and Carreshia, who had just returned to the apartment, put S.B.'s clothes back on, and Marshall carried her to the car. Moody testified that S.B. was passed out at this time. Carreshia, Marshall, and Moody took S.B. to a friend's house and put her on the couch. S.B. was passed out the whole time that she was being transported to her friend's house.

James Giles testified that he was at Marshall's mother's apartment on January 31, 2004, and that he saw S.B. "with her pants halfway down and she was propped up on her knees on the floor." According to Giles, she was naked and not in a condition to stand. Giles saw Marshall take S.B. to his room and close the door when he got S.B. into his bedroom. When Chris got the bedroom door unlocked, Giles noticed that Marshall was on top of S.B. between her legs and that his pants were around his knees. He could see Marshall's pelvis but not his penis. S.B. began to vomit. Giles saw Marshall take S.B. to the bathroom, and then he and Dickerson left the apartment.

S.B. testified that she was staying at a friend's house when Marshall and Dickerson came to pick her up around midnight. After she arrived at the apartment, Chris and Marshall made her a drink. S.B. testified that she remembered asking Carreshia to take her home when she took Victoria home. The next thing S.B. remembered was waking up at her friend's house the next day. S.B. testified that, after she woke up, she went to the bathroom and noticed that her vaginal area and abdomen was hurting and that she had a scratch on her head. She tried to take a bath, but it was too painful. Her "private parts, legs and thighs were hurting," so she went to the hospital.

The State rested its case, and Marshall moved for a directed verdict, arguing that there was insufficient evidence of penetration

and insufficient evidence to show that S.B. was physically helpless or mentally incapacitated. The trial court denied the motion.

Chris Marshall, Marshall's brother, testified in Marshall's defense. He stated that Marshall and Dickerson picked up S.B. and brought her to the apartment and that she and Victoria had a drinking contest. Carreshia took Victoria home, and S.B. was left sitting on the couch. According to Chris, S.B. asked if she could lie down, and Chris showed her the bedroom. Marshall then went back to check on her. Chris testified that she had her clothes on when she went to the bedroom and that Marshall was alone with her in the bedroom with the door closed. Chris went to the bedroom and noticed that S.B. was vomiting and that she was naked. He saw S.B. leaning against the door in the bathroom. He testified that someone put her clothes back on, and Marshall took her to the car.

Marshall testified in his own defense. According to Marshall, Chris took S.B. into the bedroom. Marshall went to check on S.B., and when he came out of the bedroom, Moody and Chris went into the bedroom. S.B. then starting vomiting and taking off her clothes. Marshall just "sat and watched her." S.B. rolled off the bed, and Marshall took her to the bathroom. He shut the bathroom door so that he could put her clothes back on her and then took her to the car. He testified that he did not have sexual intercourse with S.B. and that he was never alone with her in the bedroom. Marshall's parents, his former basketball coach, and a pastor also testified as character witnesses. After he rested his case, Marshall renewed his motion for directed verdict, and the trial court denied the motion. Marshall was convicted of rape.

For his first point on appeal, Marshall argues that the evidence against him was insufficient to prove that sexual intercourse took place. Specifically, he argues there was insufficient evidence of penetration. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). Evidence, direct or circumstantial, is sufficient if it is substantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.* This court will only consider evidence that supports the verdict. *Id.*

Circumstantial evidence can support a finding of guilt in a criminal case if it excludes every other reasonable hypothesis

consistent with innocence. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). In a rape case, "penetration can be shown by circumstantial evidence, and if that evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced for it would leave little room for doubt, that is sufficient." *Clem v. State*, 351 Ark. 112, 117-18, 90 S.W.3d 428, 430 (2002) (citing *Tinsley v. State*, 338 Ark. 342, 993 S.W.2d 898 (1999)). The question of whether the evidence excludes every other reasonable hypothesis consistent with innocence is for the jury to determine. *Ross, supra*. The uncorroborated testimony of a rape victim alone is sufficient to sustain a conviction, *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004), and one eyewitness's testimony is sufficient to sustain a conviction. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

A person commits the offense of rape if he or she engages in sexual intercourse or deviate sexual activity with a person "who is incapable of consent because he or she is physically helpless, mentally defective, or mentally incapacitated." Ark. Code Ann. § 5-14-103(a)(1)(B) (Supp. 2003). Sexual intercourse is the "penetration, however slight, of the labia majora by a penis." Ark. Code Ann. § 5-14-101(10) (Supp. 2003). Deviate sexual activity is "any act of sexual gratification involving . . . the penetration, however slight, of the labia majora . . . of one person by any body member or foreign instrument manipulated by another person." Ark. Code Ann. § 5-14-101(1)(B). A person is "physically helpless" when he or she is either unconscious, physically unable to communicate lack of consent, or rendered unaware that the sexual act is occurring." *Id.* § 5-14-101(6).

The State contends that Marshall does not argue on appeal that the evidence was insufficient to prove that he engaged in deviate sexual activity with S.B., and also argues that he has abandoned this argument on appeal. Marshall argues on appeal that the evidence is insufficient to prove that sexual intercourse occurred. However, the jury was instructed that either sexual intercourse or deviate sexual activity would support the rape conviction. The general verdict form did not specify upon which ground the jury found Marshall guilty of rape. Nevertheless, the substance of Marshall's argument is that there was a lack of evidence of penetration, which is an element of both grounds of the rape offense. Indeed, he argues on appeal that "the alleged victim did not testify as to any penetration," and "no one saw any penetration or sexual intercourse" and that the State's witnesses "did not see

[Marshall] penetrate the alleged victim or rub between her vaginal lips." These arguments encompass both bases for the rape conviction. Accordingly, we address the merits of Marshall's argument.

Here, the evidence is sufficient to prove that Marshall had sexual intercourse with or engaged in deviate sexual activity with S.B. Dickerson testified that he saw Marshall pulling up his pants and getting up from between the legs of S.B., who was naked lying on her back with her legs bent and spread. Dickerson and Moody also testified that they saw Marshall fondling S.B in her vaginal area. According to Moody, Marshall undressed S.B., took her to a bedroom, pulled a condom out of a drawer, and told the others to leave the room. Moody saw Marshall jump off of S.B. when the bedroom door was opened, saw that his pants were around his knees, and saw that he was on top of S.B. with his mid-section over her vagina. Moody testified that Marshall stayed in the bathroom alone with S.B. for about five minutes and that, when the bathroom door was opened, he saw that Marshall had an erect penis and was getting off of a naked S.B. Giles testified that he saw Marshall carrying S.B. to a bedroom and confirmed that, when the bedroom door was opened a few minutes later, Marshall had his pants down and Giles could see Marshall's pelvis but not his penis.

S.B. testified that she remembered having a drink at the apartment and asking another girl to take her home. She had no memory of anything after that until she woke up the next day at her friend's house. She testified that her private parts, legs, and thighs were sore and that she was hurting in her vaginal and abdominal area. S.B.'s testimony about her physical symptoms, when coupled with the testimony of the other witnesses, provides circumstantial evidence of penetration, which is an element of both rape by sexual intercourse and by deviate sexual activity.

Although Marshall asserts that there was no evidence that his pants were down or that he had an erection, this assertion is inconsistent with the testimony as Moody, Dickerson, and Giles all testified that they saw Marshall with his pants down, and Giles testified that Marshall had an erection. Marshall also contends that there "are a myriad of reasonable possibilities of what [Marshall] could have been doing between [S.B.'s] legs inconsistent with sexual intercourse." Marshall does not tell us what any of these possibilities might be, and this argument is not at all convincing given the testimony presented at trial. Here, the evidence gave rise

to more than a mere suspicion that either sexual intercourse or deviate sexual activity took place.

For his second point on appeal, Marshall argues that there was insufficient proof that S.B. was mentally incapacitated or physically helpless. Marshall's brief argument states that, although there were witnesses who testified that S.B. was passed out, there were also other witnesses who stated that she was responsive. "Physically helpless" means that a person is unconscious, physically unable to communicate lack of consent, or rendered unaware that the sexual act is occurring. Ark. Code Ann. § 5-14-101(6). Here, there was ample testimony that S.B. was at times unconscious, inebriated, "out of it," unable to stand, unable to walk, and unable to sit on the couch without falling off. There was also testimony that S.B. had consumed approximately twelve shots of alcohol in a twenty-minute period. Thus, given that this court only considers evidence that supports the verdict and that the determination of a witness's credibility is for the jury, *see Clem*, *supra*, the evidence is sufficient to prove that the sexual activity occurred between Marshall and S.B. while she was rendered physically helpless.

Affirmed.

ROBBINS and NEAL, JJ., agree.

Christina Heinley INMON *v.* Brad HEINLEY

CA 05-799 224 S.W.3d 572

Court of Appeals of Arkansas
Opinion delivered January 25, 2006

David P. Cann, for appellant.

JOHN MAUZY PITTMAN, Chief Judge. The parties in this child custody case are the parents of Kaleb, a seven-year-old boy. The parties were divorced by a decree entered January 9, 2001. The decree granted custody of Kaleb to his father, the appellee herein, and required appellant to pay child support in the amount of twenty-five dollars per week. It further provided that appellant would receive "reasonable visitation to be exercised in an appropriate fashion and under proper conditions." Appellant filed a petition for change of custody in July 2004, alleging that there had been a material change of circumstances and that it would be in Kaleb's best interest for custody to be vested in appellant. Appellee denied this allegation and filed a counterclaim praying that the court impose standard visitation provisions. After a hearing, the trial judge found that appellant had failed to prove a material change in circumstances by credible evidence, and

denied her petition to change custody. In addition, the trial court granted appellee's counterclaim for the establishment of a definite visitation schedule and, *sua sponte*, increased appellant's child support obligation to $63.00 per week based on an imputed net income of $272.00 per week. On appeal, appellant argues that the trial court erred in failing to find a material change of circumstances warranting a change of custody, and in increasing her child support obligation. We agree, and we reverse.

In *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999), the Arkansas Supreme Court set forth the standard of review applicable in change-of-custody cases:

> In reviewing chancery cases, we consider the evidence de novo, but will not reverse a chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). We give due deference to the superior position of the chancellor to view and judge the credibility of the witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). This deference to the chancellor is even greater in cases involving child custody, as a heavier burden is placed on the chancellor to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). Where the chancellor fails to make findings of fact about a change in circumstances, this court, under its de novo review, may nonetheless conclude that there was sufficient evidence from which the chancellor could have found a change in circumstances. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988).
>
> Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the chancellor or were not known by the chancellor at the time the original custody order was entered. *Jones*, 326 Ark. 481, 931

> S.W.2d 767. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

337 Ark. at 465-66, 989 S.W.2d at 523. Here, appellant presented evidence that appellee unreasonably withheld visitation from appellant, threatened that he would never allow appellant to see the child again, verbally abused and humiliated the child at a baseball game, and physically abused the child by routinely punishing him by spanking him with a belt so as to leave marks on the child's skin. This evidence, if believed, would clearly constitute a material change in circumstances that could warrant a change of custody. *See, e.g., Carver v. May,* 81 Ark. App. 292, 101 S.W.3d 256 (2003); *Hollinger v. Hollinger,* 65 Ark. App. 110, 986 S.W.2d 105 (1999). However, these matters were sharply contested at trial, and the trial judge expressly found the evidence adduced by appellant to be lacking in credibility. Given the conflict in the trial testimony, and the degree of deference that we accord to a trial judge's superior position to assess the demeanor and credibility of the witnesses in child custody cases, we cannot say that the trial judge erred in finding that appellant failed to establish a material change of circumstances on these grounds. *See Hamilton v. Barrett, supra.*

Of greater concern to us is behavior admitted to by appellee. He stated that, since the divorce, he had been arrested for passing hot checks on more than one occasion and for driving on a suspended driver's license. He also admitted that he subsequently was arrested for failing to pay fines previously imposed by the court in those criminal matters, and the record shows that appellee was also found in contempt of court in the present case for failing to pay attorney's fees pursuant to the decree of divorce.

This evidence of repeated lawbreaking, together with the confrontational and disrespectful character of several remarks made by appellee as he testified at trial, leads us reluctantly to the conclusion that appellee has lost the willingness and ability to act as a proper role model for his seven-year-old son, and to teach him the need to afford due respect to the law and to others. Appellee stated that his many arrests were attributable to his own stupidity, but he did not express regret. Appellee also admitted that the $4,000 spent on fines could have been better spent elsewhere. We have always recognized a distinction between human weakness leading to isolated acts of indiscretion, which do not necessarily

adversely affect the interest of a child, and moral breakdown leading to depravity which renders one unfit to have custody of a minor. *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). The repeated nature of appellee's transgressions and his demeanor at trial cause us to be greatly concerned that appellee will, by his example, teach his son a confrontational approach to life that is certain to be self-destructive. On our de novo review of the record, we must conclude that these were not isolated instances for which appellee has atoned and which will not be repeated, and we hold that the trial court erred in finding that appellant failed to prove a material change in circumstances.

Furthermore, our de novo review of the record leads us to the firm conviction that a change of custody to the appellant would be in the child's best interest. Appellant has shown her devotion to the child by paying double the amount of child support ordered by the trial court in the decree of divorce, and by regularly making voluntary payments to ensure that the child obtains school lunches, snacks at the Boys Club, and school supplies. Her testimony demonstrates that she understands that parents must, despite their mutual animosities, cooperate in a spirit of good will to alleviate the trauma suffered by children of divorce. She has remarried to a local businessman since the divorce, and the record indicates that her new husband is supportive of her desire to gain custody of her child and that their marriage is loving and stable. Appellee, too, has remarried since the divorce from appellant, but has experienced ongoing marital difficulties for the past year that have not been resolved, and a suit for divorce brought by his present wife is still unresolved. Having found that there has been a material change in circumstances and that a change of custody to appellant would be in the child's best interest, we reverse and remand for the trial judge to enter an order awarding custody of Kaleb to appellant, establishing a visitation schedule, and setting the amount of child support that appellee will be obligated to pay.

Reversed and remanded with instructions.

GRIFFEN and CRABTREE, JJ., agree.

Bedri BEQIRI *v.* STATE of Arkansas

CA CR 04-307 224 S.W.3d 575

Court of Appeals of Arkansas
Opinion delivered January 25, 2006

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

Mike Beebe, Ark. Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. Bedri Beqiri was convicted in a Pulaski County bench trial of passing a hot check in an amount greater than $2,500, and he was sentenced to sixty months' probation and ordered to make restitution. Beqiri's appellate counsel had previously submitted a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals. However, in an unpublished opinion, handed down on June 29, 2005, we denied Beqiri's appellate counsel's motion to withdraw and ordered that he submit a merit brief addressing the trial court's order of restitution. We were specifically concerned with whether the trial court complied with Arkansas Code Annotated section 5-4-205(a)(3)(A) (Supp. 2003). Beqiri now argues on appeal that the trial judge erred in failing

to require the State to prove in a restitution hearing the amount of restitution that he owed. We agree, and we reverse and remand for the trial court to hold a restitution hearing.

In charging Beqiri with a single count of violating the Arkansas Hot Check Law, the State alleged that on February 28, 2003, he did "make, draw or utter checks in an amount in excess of $2,500." A food distributor, Quality Foods, was identified as the victim. At Bequiri's November 3, 2003, bench trial, Jane Elder, Assistant Credit Manager of Quality Foods, testified that, on February 28, 2002, Beqiri issued a worthless check for $6,336.48 worth of food that had been delivered to his restaurant. According to Elder, the check was twice returned by Quality Foods's bank, Bank of America. Tommie Abrams, Vice President of Operations at Beqiri's bank, The First State Bank in Conway, testified that, on the date that he wrote the check, Beqiri did not have sufficient funds to cover it. Testifying on his own behalf, Beqiri asserted that he had reimbursed Quality Foods for the dishonored checks through payments that he made to Quality Foods salesman Ralph Burley. Nonetheless, the trial court found Beqiri guilty.

At the December 1, 2003, sentencing hearing, when the trial judge took up the issue of restitution, Beqiri's trial counsel informed the court that Beqiri denied that he owed restitution and requested a restitution hearing. The trial court brushed aside the request and asked the prosecutor for the amount of restitution. The State replied, "six thousand four hundred and thirty-six dollars and forty-eight cents," and confirmed that the restitution was only owed to Quality Foods. The trial court subsequently entered an order of restitution in the amount that was recited by the prosecutor.

On appeal, Beqiri argues that the circuit judge erred in failing to require the State to prove the amount of restitution that he owed at a hearing held during the sentencing phase of the trial. He contends that the plain wording of Arkansas Code Annotated section 5-4-205(a)(3)(A) requires the State to put on proof as to the amount of restitution, and the "State put on no proof whatsoever," because the statement by the prosecutor was not evidence. Further, he notes, the amount asserted by the prosecutor was $100 more than the amount of the check that was returned for insufficient funds. He finally argues that, because the State failed to put on any evidence, this case should be reversed and dismissed.

We agree the trial court erred in refusing to hold a restitution hearing, but rather than dismissing this case, we reverse and remand.

Arkansas Code Annotated section 5-4-205(a)(3)(A) requires that the amount of restitution be determined "by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of the trial." The record is clear that no such evidence was presented; instead, the record shows only the incorrect recitation by the prosecutor of the amount of a dishonored check. It is axiomatic that a statement by counsel is not evidence. *See, e.g., Wright v. State*, 67 Ark. App. 365, 1 S.W.3d 41 (1999).

Regarding the final disposition of this case, we have held that the remedy for irregularities in the calculation of restitution lies in remand for a new hearing. *Tumlison v. State,* 93 Ark. App. 91, 216 S.W.3d 620 (2005). Accordingly, we reverse and remand with instructions for the trial court to hold a restitution hearing.

Reversed and remanded.

BAKER and GLOVER, JJ., agree.

Charles Franklin ROGERS *v.* STATE of Arkansas

CA CR 05-491 224 S.W.3d 564

Court of Appeals of Arkansas
Opinion delivered January 25, 2006

Bramhall Law Firm, by: *Thomas M. Bramhall*, and *Greenhaw & Greenhaw*, by: *John F. Greenhaw*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Charles Rogers appeals his conviction for driving while intoxicated as entered by the Washington County Circuit Court after a bench trial. Appellant contends on appeal that the conviction is not supported by sufficient evidence that he was in actual physical control of the vehicle under Arkansas law. We agree, mandating that we reverse the conviction.

The facts are not in material dispute. Appellant agrees he was intoxicated when two Fayetteville police officers found him asleep or passed out in his vehicle, a Cadillac Escalade, in the driver's seat. The vehicle was parked outside an Elk's lodge at about 2:00 a.m. on January 7, 2004, in Fayetteville, Arkansas. The vehicle's engine was running with exhaust visible from the tailpipe; the headlights and taillights were on. It was a very cold night, well below freezing. Officers tapped on the window, and with some persistence eventually aroused appellant from sleep. Appellant's foot appeared to the officers to be on the brake pedal. Appellant turned the vehicle off and exited to speak to the officers. The officers testified that the vehicle keys were recovered from the front passenger area of the vehicle, although the officers could not recall where. The officers denied knowing anything about how remote-start worked.

Appellant testified that he had been driven back to his vehicle by a friend and had started the engine of his vehicle by pressing a remote-start button. He stated that after his vehicle had warmed for a few minutes, he promised his friend that he would enter his Escalade and sleep until he was safe to drive. Appellant testified that once he entered his Escalade, the keys were never in the ignition but rather were on the floorboard.

Appellant had the electronics technician who installed the remote-start testify on his behalf. The technician stated that the only way to turn off the engine after being remotely started is by pushing the remote button again or pressing the brake pedal. He said that remote-start turns on the head and tail lights, and any accessories are available to use, such as the radio, the heat and air conditioning, and the like.

The technician reviewed the videotape of the police encounter taken by the patrol car's mounted camera.[1] The technician stated that the tape showed that the brake lights were not on because, if they were, a third brake light would be activated in the back window. Instead, only the head and tail lights were on. Furthermore, had the brake pedal been depressed, the vehicle's engine and accessories would have stopped. The technician stated that the tape showed that when appellant was encountered by the police officers, appellant reached down to the floorboard at appellant's left foot to grab the key ring and then pushed the button on the key fob to turn off remote-start. The technician explained that when in remote-start, one cannot drive the vehicle because the steering is locked and the gear shift is locked. The only way to actually move it is to put the keys into the ignition and turn the ignition to the run position, then brake and shift into gear.

Appellant's friend testified that he took appellant as a guest inside the Elk's lodge, where they listened to music and drank a bit. Later on that night, the friend drove appellant to Bobbisox lounge where appellant drank too much. The friend drove appellant back to the lodge, where appellant remote-started the Escalade so it would get warm. His friend said appellant promised he would not drive but would only sleep in his Escalade until he was capable of driving safely.

Appellant moved for directed verdict or dismissal at the appropriate times, arguing that pursuant to Arkansas appellate case law interpreting the DWI statute, there lacked proof that he was in "actual physical control" of the vehicle. Those motions were denied. This argument was amplified by defense counsel in closing argument, explaining that the cases required proof that the keys were in the ignition. The State argued that even if the keys were not in the ignition, the engine was running, which was a sufficient showing of control.

At the conclusion of the evidence, the trial court announced its decision. The trial court found as facts that appellant had been out with his friend drinking that night; that he started his Escalade using the remote-start button while sitting in the friend's vehicle; that some minutes later appellant entered his vehicle and sat in the driver's seat with the engine running; that when officers encountered him, appellant's foot was on the brake pedal, though not

[1] The videotape, in loop format, was entered into evidence without objection. The tape was provided in DVD format for our court in the addendum for appellate review.

necessarily critical to the outcome of the case; and that appellant turned off the engine by use of the remote-start button. The trial court acknowledged that prior case law had held that if the keys to a vehicle were not in the ignition, then there was not sufficient evidence of actual physical control over the vehicle for purposes of DWI. Nonetheless, the trial court stated that this set of facts was distinguishable, without explaining how, and that appellant was guilty of DWI. This appeal followed.

Pursuant to Arkansas Code Annotated section 5-65-103(a) (Supp. 2005), "[i]t is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle." The State pursued conviction under the "actual physical control" aspect of the statute. The test for determining the sufficiency of the evidence is whether there is substantial evidence to support a verdict. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997); *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997). Substantial evidence is direct or circumstantial evidence that is forceful enough to compel a conclusion one way or another and which goes beyond mere speculation or conjecture. *Williams, supra*; *Ladwig, supra*. In making this determination, we review the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Williams, supra*; *Ladwig, supra*.

Viewing the evidence in the light most favorable to the State, there is no evidence that the keys were in the ignition, nor did the trial court find such to be the case. The Omnibus DWI Act of 1983, from which the DWI statute came, was enacted because the legislature declared "that the act of driving a motor vehicle while under the influence...constitutes a serious and immediate threat to the safety of all citizens of this State[.]" The Emergency Clause to Act 549 of 1983. The purpose of Arkansas laws against driving while intoxicated is to prevent accidents and protect persons from injury. *See, e.g.*, *Benson v. State*, 212 Ark. 905, 208 S.W.2d 767 (1948). The case law developed in this area makes clear that if a person does not place the keys in the ignition, then this scenario falls short of the proof necessary to establish actual physical control of the vehicle for purposes of DWI.[2] Whether this

[2] This case does not analyze the law as it applies to the portion of the statute that concerns "operation" of a motor vehicle.

demarcation line is reasonable or effective in attaining the purpose of ensuring public safety is not for our court to decide. It is, however, the law in Arkansas. The case law argued by both sides in this case are considered herein.

In *Stephenson v. City of Fort Smith*, 71 Ark. App. 190, 36 S.W.3d 754 (2000), Stephenson was found by police asleep in the parked vehicle, the motor was not running, and the keys were on the dashboard. We held that this was not "actual physical control" of the vehicle for purposes of DWI statute, citing to *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984). In *Dowell,* our supreme court held that the appellant was not in actual physical control where he was found asleep in his automobile, which was parked with motor not running, in a driveway of a business near the highway, with keys in the seat of the vehicle by his side. In *Wiyott v. State*, 284 Ark. 399, 683 S.W.2d 220 (1985), Wiyott was found asleep behind the wheel of his car with the keys in the ignition, and when awakened by the police, Wiyott tried to start his car. Our supreme court held that this was sufficient evidence of actual physical control. The *Wiyott* case explained that the control contemplated meant more than the ability to stop an automobile, but meant the ability to keep from starting, to hold in subjection, to exercise directing influence over, and the authority to manage. As interpreted thus far by our supreme court and applied by our court, the issue of actual physical control has not turned on whether the defendant is awake when observed, whether the defendant is behind the wheel, or whether the engine is running. The supreme court in *Dowell* set out a bright-line rule that actual physical control begins when the keys are located in the ignition.

In the present appeal, the State did not prove that the keys were in the ignition. The trial court did not find that the keys were in the ignition, nor did any evidence show that the keys were in the ignition. Rather, the trial court accepted appellant's version of events as true. The State did not counter appellant's evidence that the car was not moveable unless and until the keys were placed in the ignition, nor do the dissenting judges disagree with that assertion. Criminal statutes are to be construed strictly in favor of the accused, and we are powerless to declare an act to come within the criminal laws by implication. *Dowell v. State, supra.* In this instance, the State failed to present sufficient evidence that appellant was a menace to public safety, as the statutory language "actual

physical control" has been interpreted by our appellate courts.[3] Therefore, the conviction is not supported by sufficient evidence of an essential element and must be reversed.

Reversed.

CRABTREE, BAKER, and ROAF, JJ., agree.

BIRD and GRIFFEN, JJ., dissent.

SAM BIRD, Judge, dissenting. I respectfully disagree with the majority's conclusion that the evidence was not sufficient to show that appellant, Charles Rogers, was in actual physical control of his vehicle within the meaning of our DWI statute. I believe that the evidence was sufficient, and I would affirm Rogers's conviction for fourth-offense DWI.

The majority relies on *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984), in which our supreme court held that where the intoxicated occupant of an automobile was found to be asleep or passed out behind the steering wheel of an automobile without the key in the automobile's ignition and with the motor not running, there was insufficient evidence to support the trial court's finding that he was in the actual physical control of the automobile within the DWI statute. The majority also cites *Stephenson v. City of Fort Smith*, 71 Ark. App. 190, 36 S.W.3d 754 (2000), which contains a similar holding by this court. However, in neither *Dowell, supra*, nor *Stephenson, supra*, was there evidence that the automobiles involved were susceptible of being started except by inserting and turning a traditional key in the automobile's ignition switches.

I do not disagree with the holdings of the *Dowell* and *Stephenson* cases. I simply question their applicability in the case at bar, where the evidence is undisputed that: (1) at the time of his arrest, Rogers's automobile was equipped with an "auto-start" device that eliminated the need for a traditional key to start or stop the engine, or to operate the accessories of his automobile; (2) Rogers admittedly started the engine of his automobile with the

[3] We can envision a multitude of scenarios that would subject a person criminally liable under the DWI statute pursuant to the dissenting judges' interpretations that expand the definition of actual physical control beyond its stated purpose. We instead adhere to "actual physical control" as defined by our supreme court so as to avoid an interpretation that leads to absurd results.

use of the auto-start device; (3) the engine of the automobile was running and the headlights, taillights, and heater were on as the police officers approached his automobile; (4) Rogers was sitting intoxicated in the driver's seat of his automobile; and (5) when Rogers was awakened by an officer, he used the auto-start device to turn off the motor of his automobile.

Our case law clearly recognizes that evidence that an intoxicated person is asleep or passed out in the front seat of a vehicle with the lights on and the motor running is sufficient to show that the person is in control of a vehicle. *See Diehl v. State*, 63 Ark. App. 190, 975 S.W.2d 878 (1998) (affirming DWI conviction where appellant was slumped over on the driver's side with the key in the ignition and the engine running); *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989) (affirming DWI conviction where appellant was lying on the front seat with the key in the ignition and the motor running); *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988) (affirming DWI conviction where appellant was asleep in the front seat with the key in the ignition and the motor running). Although I agree that there was evidence in these cases that the keys to the automobiles were in the ignitions at the time of the arrests, the location of the keys was merely incidental to the fact that the cars were running. There was no evidence that any of the automobiles was equipped with an auto-start device that eliminated the need for a traditional key to start the automobile's engine. In other words, unlike the case at bar, for the engines to have been running in *Diehl*, *supra*, *Hodge*, *supra*, and *Blakemore*, *supra*, the keys *had* to have been in the ignitions. Thus, the import of those cases is not that the keys were in the ignitions, but that the engines of the automobiles were running.

In *Wiyott v. State*, 284 Ark. 399, 402, 683 S.W.2d 220, 222 (1985), our supreme court, in discussing the degree of "control" necessary to bring an automobile's occupant within the gamut of the DWI statute, quoted with approval from the Oklahoma case of *Hughes v. State*, 535 P.2d 1023 (Okla. Crim. App. 1975), wherein the Oklahoma court said, "[T]he control contemplated meant more than the 'ability to stop an automobile,' but meant the 'ability to keep from starting,' 'to hold in subjection,' 'to exercise directing influence over,' and 'the authority to manage.' " In *Wiyott* our supreme court then went on to say, "[T]he evidence would support the finding that the appellant was exercising direct influence over his vehicle and had the authority to manage it. At any moment he could have awakened and started his vehicle." 284

Ark. at 402, 683 S.W.2d at 222. Thus, the *Wiyott* decision did not turn on whether the key was in the automobile's ignition but, rather, whether Wiyott had the authority to exercise directing influence over the management of his automobile. Likewise, in *Hodge, supra*, this court said that "[t]he object of [DWI] legislation is to prevent intoxicated persons from not only driving on the highways, but also from having such control over a motor vehicle that they may become a menace to the public at any moment by driving it." 27 Ark. App. at 96, 766 S.W.2d at 620.

The technician who installed the auto-start device in Rogers's car testified that when started with auto-start, the automobile's radio and heater become "active" and, thus, susceptible to the normal control of the driver. He also testified that when the automobile's engine is ignited with auto-start, the car could be driven away by turning the key to the "on" position, pressing the brake, and putting the transmission in gear. Rogers himself testified that his purpose in using the auto-start was to warm up his automobile so he could sit in it until he was sober enough to drive home. In my opinion, a person who has the power to start and stop his automobile's engine by the pushing of a remote button, and the power to operate his automobile's heater, radio, and other accessories is a person who is exercising direct influence over the operation and management of his vehicle. As the supreme court said in *Wiyott, supra*, "control" within the meaning of our DWI law means more than simply the ability to stop and start one's automobile.

The majority concludes that in *Dowell*, "the supreme court has set out a bright-line rule that actual physical control begins when the keys are located in the ignition."[1] This might have been true in 1982 when Dowell was arrested, because in 1982 an automobile was started by placing the key in its ignition at the "off" position, twisting the key past the "on" position to the "start" position, and holding the key in the "start" position long enough for the automobile's engine to ignite. The 1982 driver could then press the brake pedal, place the automobile in gear, and drive away. However, in 2004, when Rogers was arrested, the engine in his Cadillac Escalade could have been ignited with the

[1] One logical extension of the majority's analysis would be that if a drunken person lost his car keys and "hot-wired" his automobile's ignition so as to enable him to drive the car, he would not be guilty of DWI because there was no key in the ignition. Of course, the same could be said of a drunken thief who hot-wired a stolen car because he had no key.

simple press of a remotely-located button. At that point, Rogers could have inserted his key in the ignition at its "off" position, turned the key to the "on" position, pressed the brake pedal, put the automobile in gear, and driven away. Having already started his engine with auto-start, Rogers could have skipped the twisting of the key to the "start" position because the automobile's engine was already running.

Comparing these two automobile-starting techniques, it is clear to me that it would be just as easy, if not easier, for a drunken person to wake up and drive off in an automobile that is already running as it would be to wake up and start a non-running automobile that has its key in the ignition. This is especially true if the drunken person with auto-start knows where his automobile key is located, as was the evidence in this case[2].

I do not believe that it is the public policy of Arkansas, expressed through Ark. Code Ann. § 5-65-103(a) (Repl. 1997), to simply discourage intoxicated persons from placing their keys in the ignition switches of their automobiles. Rather, I believe that it is the public policy of Arkansas to discourage intoxicated persons from placing themselves behind the steering wheels of automobiles under circumstances that permit them to exercise directing influence and management authority over their automobiles. *See Wiyott*, *supra*, and *Hodge*, *supra*. In this regard, I see no distinction between the degree of control over the operation of an automobile that is exercised by a drunken person who merely inserts his traditional key in a non-running automobile's ignition switch and the degree of control exercised by a drunken person who has in his pocket, or otherwise readily accessible to him, a device that allows him to start or stop his automobile's engine without a key in its ignition switch. The only difference is that the traditional key must be manually inserted in the ignition, whereas with auto-start, the "key" is "inserted" electronically with the push of a remote button. Either way, the automobile, with a drunk driver at the wheel, becomes a potentially lethal weapon with the twist of a key.

I do not mean to suggest by this dissenting opinion that potentially drunk drivers should be discouraged from getting into their automobiles and "sleeping it off," rather than attempting to drive after they have been drinking. Under *Dowell*, *supra*, they are

[2] The auto-start technician testified that Rogers's automobile key was attached to his auto-start "fob" by a chain.

still free to do this, remaining immune from prosecution for DWI, by simply leaving the engine off and the key out of the ignition, even if their automobile is equipped with auto-start.

I respectfully dissent, and I am authorized to state that Judge GRIFFEN joins in this dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I join Judge Bird's dissent because I agree that appellant exercised actual physical control over his vehicle. I also agree that the cases cited by the majority, *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984), and *Stephenson v. City of Fort Smith*, 71 Ark. App. 190, 36 S.W.3d 754 (2000), do not compel reversal because whether appellant exercised actual physical control over his vehicle is not determined by merely finding that his keys were not in the ignition of his running vehicle.

I write separately to further emphasize that appellant's conduct represented precisely the type of public menace that the DWI statute is designed to prevent; that he posed just as strong a menace to the public as any drunk person passed out behind the wheel of his running vehicle with the keys in the ignition; and that the auto-start technology he had installed into his vehicle did not lessen the threat that he posed.

The purpose of the DWI statute is not only to prevent intoxicated persons from driving on the highways, but to also prevent intoxicated persons from having such control over motor vehicles that they may become a menace to the public at any moment by driving the vehicle. *Hodge v. State,* 27 Ark. App. 93, 766 S.W.2d 619 (1989). If a stone-cold drunk driver with a blood-alcohol content of nearly twice the legal limit who has his foot on the brake with the engine running while he is sitting behind the wheel of his vehicle does not pose the kind of menace that the DWI statute was enacted to prevent, I suspect that comes as a big surprise to the members of the Arkansas General Assembly who enacted the "actual physical control" aspect of the statute. I also suspect that most of the driving public believes that someone in that state who is sitting behind the wheel of a running vehicle with his foot on the brake may become a menace at any moment.

The majority opinion purports to respect the purpose of the DWI statute, yet ignores critical testimony from Officer Knotts and appellant plainly proving that appellant posed precisely the type of "public menace" the DWI statute is designed to prevent.

Appellant used his key fob to engage auto-start. He then remained in the front seat, behind the steering wheel with the engine running. Appellant kept the keys within his immediate reach, as proven by the fact that he used the key fob to turn off the vehicle when Knotts aroused him. Appellant told Knotts that he was waiting for someone to pick him up. At trial, however, appellant offered two contradictory explanations for being in his vehicle that also contradicted what he told Knotts at the scene: that he "was just going to go to sleep until the morning" and that he "just planned to sleep there until I felt like I was all right to be able to drive."

The latter intent, especially, presents the precise danger that the DWI statute was designed to prevent: that an intoxicated person, whose judgment, coordination, and reflexes are severely compromised will, to the detriment of the public, arouse from his drunken stupor and decide that he is capable of driving safely. This threat seems especially pronounced in the instant case because appellant was parked on private property, which would at some point, *require* him to move his vehicle. The threat posed by appellant, although ignored by the majority opinion, was expressly recognized by the trial judge, who noted that the DWI statute was designed to deter those who are intoxicated from "getting themselves in a situation that Mr. Rogers has put himself in intentionally."

Appellant argues as if the number of steps required to take the vehicle out of auto-start so that it can be driven normally are so insurmountable as to preclude a finding that he could easily make the vehicle operable again, and thereby precludes the danger of him becoming a public menace. This simply is not so. The person who installed the auto-start device on appellant's car testified that even if the vehicle is started using auto-start, the vehicle can be driven normally by putting the key in the ignition, then braking and shifting the car into gear. However, these are the *same steps* that would be required of *any* driver, whether that driver possessed an auto-start device or not. The only "additional" step required to operate the vehicle normally once it is in auto-start is to simply place the key in the ignition.

Auto-start technology allows a person to start a vehicle, which is a prerequisite to driving it. Drunk drivers are, by definition, drunk starters, whether they start their vehicles by auto-start or by conventional means. A driver who chooses to enjoy the benefits of auto-start remote technology has no right to

expect an exemption from prosecution for DWI when he chooses to become legally intoxicated, start his engine, and get behind the wheel of his vehicle. While we do not declare an act to come within the criminal laws by implication, affirming appellant's conviction here would no more violate that rule than affirming in any other case in which control has been found where the defendant was not actually driving the vehicle.[1]

This case clearly demonstrates that auto-start technology does not lessen the control that a driver may exercise over a vehicle. Instead, auto-start technology provides an alternative method by which a driver may exercise actual physical control over his vehicle. The evidence in this case overwhelmingly demonstrates that appellant exercised actual physical control over his vehicle and posed a threat to the public although the keys were not in his ignition. Hopefully, our supreme court will correct the misjudgment reflected by the majority opinion and, in doing so, will vindicate the public condemnation against drunk driving that the Arkansas General Assembly recognized when it enacted the "actual physical control" element of the DWI statute. In the meantime, I respectfully dissent.

I am authorized to state that Judge BIRD joins in this dissent.

Dennis CAMERON *v.* STATE of Arkansas

CA CR 05-483 224 S.W.3d 559

Court of Appeals of Arkansas
Opinion delivered January 25, 2006

[1] The fact that appellant's vehicle could not be driven while in auto-start mode does not preclude a finding that he was in actual physical control of his vehicle. *See Walker v. State*, 241 Ark. 396, 408 S.W.2d 474 (1966) (holding the defendant exercised actual physical control over the vehicle under the DWI statute where the defendant was steering the vehicle while someone else pushed it).

James Law Firm, by: *William O. James Jr.*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Dennis Cameron appeals from his two convictions for theft of property in excess of $2500. He argues that the trial court erred in denying his motion to dismiss the charges because the charges were barred by the statute of limitations. Because we disagree, we affirm each of appellant's convictions.

Because appellant does not challenge the sufficiency of the evidence supporting his convictions, it is only necessary to recite

those facts relating to his argument that the statute of limitations barred his prosecution for theft of property. Appellant is an attorney who was charged with theft of property in excess of $2500 from the estates of Thomas and Tonya Zander between April 6, 1998 and January 18, 2001, and from United Healthcare of Arkansas between November 20, 1998, and January 31, 2002.

Both charges in this case stem from an automobile accident that occurred on June 30, 1997. Count I relates to money stolen from the estates of Thomas Zander and his minor daughter, Tonya, who were killed in the accident, and who each died intestate. Appellant referred the Zander family to another firm to handle Thomas's estate.[1] Although Tracy Zander, Thomas's son, testified that he never discussed hiring appellant to open an estate for Tonya, appellant filed a petition in probate court requesting that Tracy be appointed as administrator of Tonya's estate. The appointment was subsequently made. No request to make expenditures or disbursements from Tonya's estate was filed with the probate court; thus, the court filed no orders authorizing any expenditures or disbursements from the estate.

On December 15, 1997, appellant opened a bank account in the name of Tonya's estate at the Malvern National Bank; the authorized signatories were appellant and Tracy Zander. Appellant subsequently negotiated a $50,000 settlement on Tonya's behalf with State Farm Insurance Company agent Steve Medlock. Mr. Medlock issued the settlement check, dated April 3, 1998, and payable to Tonya's estate; he sent the check and a release form to appellant. The release form was returned to Medlock purportedly signed by Tracy and witnessed by appellant. The check was negotiated, but bore only appellant's name as "attorney for the estate of Tonya Zander." Tracy testified that the release appeared to bear his signature, but that he did not remember signing the release, and that he never saw the $50,000 check.

The bank records regarding Tonya's account showed several deposits, including an initial deposit of $958.31; a deposit for $50,000 credited on April 6, 1998; and a deposit for $795 credited on July 1, 1998. Appellant does not dispute that he made three withdrawals from this account by check and that each check was

[1] The other firm pursued a wrongful-death suit in Thomas's name but the litigation was ultimately dismissed; neither the other firm nor the representative of Thomas's estate received any money on behalf of the estate.

signed by him and made payable to him. The first withdrawal was made on April 6, 1998, in the amount of $20,516.41. The second withdrawal was made on February 23, 2000, for $30,000. The final withdrawal was made on January 18, 2001, for $700.

Count II relates to settlement proceeds that appellant stole from United Healthcare of Arkansas. United Healthcare is a medical services provider who was to benefit from a settlement that appellant negotiated for Megan Ungerer, a minor who was injured in the same accident that killed the Zanders. Megan's mother, Charann Cooley, retained appellant to represent them in a personal-injury action. Appellant ultimately negotiated a settlement, again with Mr. Medlock, on Megan's behalf for $300,000. Megan was to receive $198,000, less medical expenses; appellant was to receive $99,000 as his fee. The trial court approved the settlement and ordered that the money was to be placed in a locked account so that no withdrawals, expenditures, or disbursements could be made without permission of the court. However, appellant disobeyed the trial court's order by placing the settlement proceeds into his client trust (IOLTA) account instead of a locked account. The bank records for appellant's IOLTA account show that between November 1998 and May 2002, appellant wrote a number of checks on this account ranging in amount from $5000 to $50,000. Again, appellant does not dispute that he wrote these checks and obtained the money from this account as alleged by the State. Despite requests made on her behalf, Megan has not received any of the money from the settlement, nor has United Healthcare been paid for the medical services it provided to Megan.

In response to these charges, appellant filed a motion to dismiss, arguing that the conduct was not a continuing course of conduct and that charges were barred by the statute of limitations. The trial court denied the motion with regard to each charge on the basis that the issues of whether and when the thefts occurred were issues of fact. A jury subsequently found appellant guilty of two counts of theft in excess of $2500, each Class B felonies. He was sentenced to serve a total of twenty years in prison (ten years for each conviction). This appeal followed.

I. Motion to Dismiss — Estate of Tonya Zander

Count I of the amended information, filed on October 28, 2002, charged appellant with taking monies in excess of $2500 from the estate of Tonya and Thomas Zander between April 6,

1998, and January 18, 2001.[2] Appellant maintains that the offense was not a continuing offense and that the amended information, filed on October 28, 2002, was not filed within the three-year statute of limitations for a Class B felony because the statute of limitations for any alleged theft against the Tonya Zander estate began on April 3, 1998.

A person commits theft of property if he or she 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. Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2005). Theft of property is a Class B felony if the value of the property is $2500 or more. Ark. Code Ann. § 5-36-103(b)(1)(A). Prosecution for a Class B felony must commence within three years after its commission. Ark. Code Ann. § 5-1-109(b)(2) (Supp. 2005).[3] An offense is committed either when every element occurs or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time the course of conduct or the defendant's complicity therein is terminated. Ark. Code Ann. § 5-1-109(e)(1). A continuing offense is a continuous unlawful act or series of acts set on foot by single impulse and operated by unintermittent force, however long a time it may occupy; an offense which continues day by day, a breach of criminal law that is not terminated by single act or fact, but subsisting for definite period and intended to cover or apply to successive similar obligations or occurrences. *Britt v. State*, 261 Ark. 488, 549 S.W.2d 84 (1977).

■ It is within the trial court's discretion to grant a motion to dismiss the prosecution of a charge. *Biggers v. State,* 317 Ark.

---

[2] It appears that the only evidence offered to support that appellant stole money from the estate of Thomas Zander was Exhibit 11, a copy of a check in the amount of $960.31 payable to Tracy Zander and appellant, which was endorsed by appellant as purported reimbursement for Thomas's cremation and urn.

[3] Nonetheless, if the limitations period under § 5-1-109(b)(2) has expired, prosecution may be brought within one year after the offense is discovered or should have reasonably been discovered if the offense involved either fraud or breach of a fiduciary obligation. Ark. Code Ann. § 5-1-109(c)(1). The trial court in this case found that a fiduciary relationship existed between appellant and his victims. Appellant argues alternatively that § 5-1-109(c)(1) does not save the charges because the thefts should have been discovered more than one year before the charges were filed. However, because we hold that the charges in this case were not barred by the three-year statute of limitations under § 5-1-109(b)(2), we do not address this argument.

414, 878 S.W.2d 717 (1994). We hold that the trial court did not abuse its discretion in denying appellant's motion to dismiss with regard to the money taken from Tonya's estate. Appellant asserts that the statute of limitations began to run on April 3, 1998, the date he endorsed the $50,000 settlement check. However, appellant's argument inexplicably ignores the fact that he deposited the settlement proceeds *after* that date and made three withdrawals from those proceeds *after* that date in the respective amounts of: $20,516.41 (April 6, 1998); $30,000 (February 23, 2000); and $700 (January 18, 2001). According to appellant's theory, these unauthorized withdrawals from this account after April 3, 1998, have no legal effect whatsoever — they are neither part of a continuing course of conduct nor does each act, individually, support a theft charge. His argument is tenuous, if not disingenuous, and is not supported by any argument or authority.

Our courts have determined that theft by receiving and theft of public benefits are continuing offenses. *See State v. Reeves*, 264 Ark. 622, 574 S.W.2d 647 (1978) (regarding theft by receiving); *Scott v. State*, 69 Ark. App. 121, 10 S.W.3d 476 (2000) (regarding theft of public benefits). However, our research revealed no case law supporting that theft of property pursuant to § 5-36-103 is a continuing offense. Nonetheless, we need not determine whether theft of property under § 5-36-103 is a continuing offense in order to affirm appellant's convictions.

With regard to Count I, as the State argues, the theft was committed either by a continuing course of conduct that began on April 6, 1998, (when appellant deposited the settlement proceeds into the account) and terminated on January 18, 2001, (when he made the last withdrawal from the account) or was committed by the single $30,000 withdrawal made on February 23, 2000. Under either set of facts, it is undisputed that appellant took at least $2500 from Tonya's estate within the three-year period prior to October 28, 2002. Accordingly, the trial court did not err in denying appellant's motion to dismiss the charge under Count I because it was brought within the requisite time period.

II. Motion to Dismiss — United Healthcare

Count II of the amended information alleged that between November 20, 1998, and January 31, 2002, appellant stole money in excess of $2500 from United Healthcare. While appellant argued under Count I that the theft occurred when he signed the

settlement check, he inconsistently, and without explanation, argues that the theft occurred under Count II when he placed the money into his IOLTA account, on November 19, 1998, rather than when he signed Megan's settlement check. Pursuant to his theory, the three-year statute of limitations would have expired in November 2001, nearly one year before the amended information was filed in this case.

Appellant's argument is absurd on its face. Appellant is simply wrong in arguing that the date the settlement proceeds were deposited triggered the statute of limitations and he, again, disingenuously ignores the legal effects of the subsequent transactions.[4] The trial court directed appellant to deposit the settlement into a locked account from which no disbursements were to be made without court approval. No such court approval for the disbursement of funds was ever granted. Aside from directly disobeying the court's order by depositing the settlement proceeds in his IOLTA account instead of a locked account, appellant undisputedly made numerous unauthorized withdrawals for funds attributable to the settlement after November 19, 1998, and each such withdrawal exceeded the $2500 minimum necessary to support the theft charge. The amended information, filed on October 28, 2002, was filed within three years of even the earliest such unauthorized withdrawal ($15,000 on November 29, 1999); therefore, the charge under Count II was timely filed.[5]

Affirmed.

CRABTREE, J., agrees.

PITTMAN, C.J., concurs.

---

[4] The State notes that, even allowing for appellant's $99,000 fee and the $37,575.17 that was in appellant's IOLTA account prior to the settlement deposit, $4,424.83 of the settlement proceeds were unlawfully transferred as of the end of 1999.

[5] In fact, it appears that appellant's counsel conceded this point during the pre-trial hearing on appellant's motion to dismiss. When asked by the trial court whether he thought the statute-of-limitations argument would be "valid" if the thefts continued through January 2002, he responded, "Your Honor; no, I don't."

Aletha ROLLINS and James Lee Silliman, Co-executors of the Carrie Lee Sillman Estate *v.* V. Benton ROLLINS

CA 05-693 224 S.W.3d 554

Court of Appeals of Arkansas
Opinion delivered January 25, 2006

Robert S. Laney, P.A., by: *Robert S. Laney*, for appellants.

V. Benton Rollins, *pro se*.

ANDREE LAYTON ROAF, Judge. Aletha Rollins and James Lee Silliman appeal the trial court's award of $24,000 in attorney's fees to their brother, appellee V. Benton Rollins, who served with them as co-executors of their mother's estate and also as attorney for the estate. On appeal, Aletha and James assert that the $24,000 attorney's fee award was excessive. We affirm.

V. Benton Rollins filed a petition to admit the Last Will and Testament of his mother, Carrie L. Silliman. The will was admitted to probate on October 2, 1997, and Benton along with his siblings, Aletha and James, were appointed co-executors of the estate. Benton, an attorney, also provided some legal services for the estate, including the following: preparing and filing the cus-

tomary petitions, notices, and orders for the probate clerk; hiring and consulting with the CPA who prepared the estate tax and the estate income tax returns; selling land, stocks, and bonds to pay the estate tax liability; corresponding with oil and gas companies about leasing his mother's royalty interest; and distributing the assets of the estate to the devisees. Aletha, James, and Benton hired Charles Kriehn, a CPA, to prepare the estate tax return. On June 9, 1998, Kriehn filed a tax return on behalf of the estate. The return indicated that the estate owed taxes in the amount of $268,295, and the portion of the return listing the incurred expenses for administering the property showed executors' fees of $27,116, which were authorized by court order in July 1998 and shared equally by the three co-executors, and accountant's fees of $5,000. There was no listing of any attorney's fees — estimated, agreed upon, or paid. Some stocks and bonds were sold in order to pay the estate taxes.

On February 4, 1999, Benton filed a petition for approval of final distribution and discharge of the personal representatives; nothing else was filed with the probate court until November 2004 when Benton filed for allowance of attorney's fees. The petition requested the statutory maximum of $34,500 but also claimed that he had informed Aletha and James that he would accept a reduced fee of $24,000 if paid within twenty days of the petition's filing. Aletha and James filed objections to the allowance of attorney's fees, claiming that the fee request was excessive and not commensurate with the value of Benton's legal services.

Benton did not prepare a sworn fee petition listing such things as his hours, hourly rate, and the time and effort he put into performing work for the estate. Instead, at the hearing, the trial court allowed Benton to testify under oath regarding his services for the estate. The trial judge also indicated that she was in possession of the court file, which reflected some of the work that he did.

Benton testified that the bulk of his work was done in the first year of the probate proceedings but that he had performed work over several years. He claimed that the court's file was self-explanatory but that it did not provide an accurate representation of all the work that had been done and that he was in possession of a file of all the work that he did after the first year.

Benton testified that he had been in practice for thirty years and that he was experienced in the area of estate law and had handled 200 to 250 estates. He stated that it had generally not been

his practice to keep time records in these cases but that he had used the statutory fee as his maximum and his guideline.

Benton estimated that he had performed "somewhere in the neighborhood" of 140 to 160 hours of work, and that his hourly rate at the time was $160 an hour. He stated that his hourly rate was reasonable due to his thirty years of experience. In providing a summary of the work he performed for the estate, Benton claimed that it took him approximately two hours to prepare the petition and open the estate, one hour to prepare the order admitting the will to probate and appointing him and his siblings as co-executors, one half hour or less to prepare the acceptances of appointment, five hours to file a petition for allowance and payment of fees as a personal representative because it involved consultation with the CPA, no more than an hour to prepare an order awarding fees to the executors, one hour to prepare a petition for approval of final distribution and discharge of the personal representatives, one half hour to prepare the receipt of the distributee, and a little less time to file similar documents from the First Baptist Church and the Ouachita County Library, for a total of approximately seventeen hours. In addition, Benton claimed that he did other work including discussing with his siblings which assets to sell, meeting the requirements for companies to sell some of the estate stocks and bonds, negotiating to sell some land, and corresponding with oil and gas companies about leasing some oil and gas royalties.

Benton claimed that he did not consider the estate to be closed after February 1999 because the family had not dealt with the continuing oil royalties but admitted that Aletha had handled all of the oil royalties since 1999. He also stated that he considered all of the work he did to be that of an attorney as opposed to an executor, although all three co-executors received an equal share of the executor's fee. In addition, he stated that there were no unusual or extraordinary things involved in managing the estate. Benton also testified that he believed it was reasonable to submit a fee for the maximum amount although he believed that amount was a little high but claimed that he tried to compromise by offering to accept a reduced fee. He claimed that the lower fee would be too low if Aletha and James had not been family.

Benton also stated that the estate had a tax liability of $268,295 and testified that an attorney's fee was not included on the tax return because they had not agreed upon a fee. He agreed that some figure should have been included on the return because

it would have resulted in a deduction to the estate taxes and that he was probably at fault for not including a fee. However, he asserted that although most of the work had been performed within the first year, he knew there was still work to be done, mainly involving the oil royalties. Benton concluded his testimony by admitting that he never discussed attorney's fees with Aletha and James because he knew that when he asked for fees "there was going to be problems because they didn't feel like they would owe me an attorney's fee since it was family."

Mr. Kriehn, the accountant, testified that he did not recall discussing attorney's fees with anyone but that any amount would have resulted in a reduction in the estate tax owed. He also testified that he did not know of any way to amend the estate tax return after three years. He stated that he was still filing income tax returns for the estate on annual oil royalty income of approximately two to three thousand dollars and that it would be possible to deduct attorney's fees on these tax returns.

James testified that he, Aletha, and Benton never discussed attorney's fees. He stated that he believed that there would be no attorney's fees when the estate tax return was filed in 1999 and that the return did not include an amount for attorney's fees although most of the legal work had been done at that point. He objected to the amount Benton requested for fees based upon the amount of work he performed as an attorney for the estate. While James agreed that Benton prepared and filed court documents, wrote some letters, and prepared some deeds, he was unaware of anything else that Benton did as an attorney for the estate.

In announcing her decision, the trial court declared that, unfortunately, many people do not believe that attorneys are entitled to payment for the work they do as attorneys. She stated that she had no evidence to dispute that a fee of $160 an hour was a reasonable and customary fee, and awarded Benton $24,000 for 150 hours, based upon his estimate of having performed between 140 to 160 hours of work on the estate. She accepted Benton's testimony that it was a reasonable and customary fee for probate work done in Ouachita County.

On appeal, Aletha and James argue that the attorney-fee award was excessive pursuant to the factors set out in *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). They contend that Rollins could not have spent more than fifty hours on the estate, that he could only come up with seventeen and one-half

hours of work in his testimony, and that the trial court completely ignored these facts and accepted Rollins's guess of 160 hours spent on the case. They contend that Rollins's failure to include any amount for attorney's fees on the estate tax return reflected a lack of experience and ability, or a plan to trick his siblings at their expense. They contend that the estate would have saved over $10,000 in taxes had an attorney fee of $24,000 been listed on the return.

Probate cases are tried de novo on appeal, and this court does not reverse the findings of the trial court in probate matters unless they are clearly erroneous, giving due deference to its superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. The value of services rendered to an estate is primarily a factual determination to be made by the probate judge, and the appellate court will not reverse his decision where it is not clearly erroneous. *Adams v. West*, 293 Ark. 192, 736 S.W.2d 4 (1987). Further, a fee award for services rendered to an estate is primarily a matter within the discretion of the probate judge, and this court will not reverse such an award without finding an abuse of discretion. *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 878 (1991), *see also Bailey v. Rahe*, 355 Ark. 560, 142 S.W.3d 634 (2004). Unless otherwise contracted with the personal representative, heirs or beneficiaries of an estate, compensation for an attorney who performs legal services for the estate is governed by Ark. Code Ann. § 28-48-108(d)(2) (Repl. 2004) based on the total market value of the real and personal property reportable. However, under Ark. Code Ann. § 28-48-108(d)(3), the court can determine that the schedule of fees can be either excessive or insufficient under the circumstances and allow the attorney a fee commensurate with the value of the legal services provided.

While there is no fixed formula in determining the excessiveness or insufficiency of attorney's fees, courts should be guided by certain recognized factors including the following: the experience and ability of the attorney; the time and labor required to properly perform the legal services; the amount involved in the case and the results obtained; the novelty and difficulty of the issues; the customary fees for similar legal services in the locality; whether the fee is fixed or contingent; the time limitations imposed by the client; and the likelihood, if apparent to the client, that the employment will preclude other employment by the lawyer. *Chrisco, supra.* The reviewing court will usually defer to the

superior perspective of the trial judge in assessing the applicable factors. *Id.* In *Bailey*, *supra*, the supreme court reversed and remanded a reduced attorney fee award where the trial court did not provide sufficient reasons for reducing the award.

In *Scott v. Estate of Prendergast*, 90 Ark. App. 66, 204 S.W.3d 110 (2005), this court considered an award of attorney's fees for probating a decedent's estate. The attorney in *Scott* appealed an award of only $4,166.25 after he had petitioned for a fee of $32,623.90. In reliance upon *Chrisco*, *supra*, and *Bailey*, *supra*, this court, because it was unable to discern on what basis the fee award was made, reversed and remanded to the trial court for it to analyze the award in accordance with the *Chrisco* factors and to make findings sufficient for a review of the award. This court also reversed and remanded the trial court's award of $7500 in attorney's fees for guardianship work and probate of an estate where the trial court failed to differentiate between the guardianship and probate matters or to consider the factors set forth in *Bailey*, *supra*, and where it was impossible to discern how the trial court arrived at the estate fee or what it considered to be assets of the estate. *See Monk v. Griffin*, 92 Ark. App. 320, 213 S.W.3d 651 (2005).

With these precedents in mind, we consider the argument made by Aletha and James. They contend that the fee award was excessive based upon their assessment of the time that Rollins could have spent in handling the estate, and the facts that he failed to list an attorney's fee on the estate tax return and waited five years later to petition for a fee. They do not assert that the trial court failed to consider the proper factors in making the award but instead question Rollins's conduct and the credibility of his testimony presented in support of the fee petition.

In considering the award, the trial court specifically referred to *Bailey*, *supra*, and advised Rollins that he had the burden of proving the reasonableness of his fee request. The trial court stated that although it was a guardianship case, *Bailey* had been applied by this court in a probate case. The trial court went on to outline the factors to be considered in determining the reasonableness of Rollins's fee. In the fee-award order, the trial court stated in pertinent part:

> Petitioner is an experienced attorney in handling the probate of estates having done some 150 in his 30 years of practicing law. It is not his practice to keep detailed time records of his work in

> probating estates rather using the statutory fees set forth in A.C.A. sect. 28-48-108 as a guideline in determining his fee. However, in reviewing his file in preparation for this hearing he estimated that he had performed 140 to 160 hours of work from September of 1997, to the present [including the additional time to be incurred in closing the estate]. His hourly rate during most of this period was $160 per hour which was in line with what other attorneys in the area charged for this type of work.
>
> Based on the size of the estate, the experience of petitioner, the number of hours spent working on the estate, and the customary charges of other attorneys in the area for similar work, the Court is of the opinion that a fee of $24,000 is quite reasonable.

Under *Bailey,* the trial court is required to consider the *Chrisco* factors and make findings with sufficient clarity that the reasoning for the award of an attorney fee is discernible by the reviewing court. This court recently applied the principles set forth in *Bailey* and *Chrisco* in a case involving inadequate findings to support an award of fees for probating an estate, *see Scott, supra.* However, in the case before us the trial court was well aware of the factors to be considered, recited the factors in open court, and advised Rollins that he had the burden of proving that the fees he requested were reasonable. The order entered recites the factors that the trial court took into consideration in making the award, which was approximately one-third less than the amount authorized by Ark. Code Ann. § 28-48-108(d)(2). Here, the trial court made primarily factual and credibility determinations, and we do not reverse such a decision where it is not clearly erroneous. In these circumstances, and in light of the fact that Benton himself will bear one-third of the fee, we also perceive no abuse of discretion in the award of $24,000 in fees.

Affirmed.

ROBBINS and NEAL, JJ., agree.

COTTAGE CAFÉ, INC., and Farmers Insurance Group *v.* Patricia COLLETTE

CA 05-734 226 S.W.3d 27

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

Huckabay, Munson, Rowlett & Moore, P.A., by: *Carol Lockard Worley* and *Jarrod S. Parrish*, for appellants.

Walker, Shock, Cox & Harp, P.L.L.C., by: *J. Randolph Shock*, for appellee Patricia Collette.

Roberts Law Firm, P.A., by: *Michael L. Roberts*, *Andrew M. Ivey*, and *Caroline L. Curry*, for appellee Southern Guaranty Insurance Company.

JOHN MAUZY PITTMAN, Chief Judge. Appellee, the claimant in this workers' compensation case, had been employed by appellant Cottage Café, Inc., as a grill cook for approximately nine years when the owner of that establishment sold the business to Mr. Leonard Cernak on September 12, 2003. The previous owner had workers' compensation insurance coverage with Southern Guaranty Insurance. Mr. Cernak obtained workers' compensation insurance coverage from Farmers Insurance Group. Farmers' coverage became effective on September 23, 2003. On September 29, 2003, appellee dropped a spatula from her hand and, unable to continue work, sought medical treatment resulting in a diagnosis of carpal-tunnel syndrome and cubital-tunnel syndrome. Neither of the insurers involved accepted the injury as compensable or accepted liability for the claim. After a hearing, the Commission found that the injury was compensable and that Farmers Insurance was liable for the compensation and benefits awarded. On appeal, appellants Farmers Insurance and Cottage Café argue that the Commission erred in finding that the claimant's injury was compensable and in concluding that Farmers Insurance was liable for payment of benefits. We affirm in part and reverse in part.

We first address the question of the sufficiency of the evidence to support the Commission's finding that the claimant's injury was compensable. In reviewing decisions from 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 affirm if they are supported by substantial evidence, *i.e.*, evidence that a reasonable person might accept as adequate to support a conclusion. *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002). Questions of weight and credibility are within the sole province of the Workers' Compensation Commission, which is not required to believe the

testimony of the claimant or of any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Strickland v. Primex Technologies*, 82 Ark. App. 570, 120 S.W.3d 166 (2003). Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Id.*

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). A claimant seeking workers' compensation benefits for a gradual-onset injury must prove by a preponderance of the evidence that (1) the injury arose out of and in the course of his or her 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. Ark. Code Ann. § 11-9-102(4)(A)(ii) and (E)(ii) (Repl. 2002). Because carpal-tunnel syndrome is by definition a gradual-onset injury, it is not necessary that the claimant prove that this injury was caused by rapid repetitive motion. *See Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). However, because cubital-tunnel syndrome is not recognized as a per se rapid repetitive injury, the claimant was required to additionally prove by a preponderance of the evidence that this gradual-onset injury to her right elbow was caused by rapid repetitive motion. *See Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

Here, the Commission's finding of compensability was based on the claimant's extensive testimony concerning her duties as a grill cook which required her to prepare eggs, omelets, hash browns, ham, sausage, and bacon, and to flip these foods with a spatula as they cooked. The Commission also relied upon testimony from several co-workers that the claimant was "good help" and a hard worker, and testimony from the mother of the café's previous owner that she had worked with the claimant and, from her observations, had no doubt that the claimant's medical problems with her right arm resulted from her job duties. Co-workers also testified concerning the increasing difficulty that the claimant experienced in performing her job duties during the gradual onset of her injuries. Furthermore, the Commission relied on the opinion of one of the claimant's treating physicians, Dr. Kelly, that the claimant's carpal-tunnel and cubital-tunnel injuries were obviously related to claimant's repetitive use on her job, as well as the

fact that there was no probative evidence before the Commission, medical or otherwise, to suggest that claimant's injuries resulted from any other cause or activity. The record supports these findings, and we cannot say that the Commission erred in finding that the claimant's carpal-tunnel and cubital-tunnel injuries were compensable.

However, we conclude that the Commission did err in finding that appellant Farmers Insurance was liable for the payment of benefits. The Commission, believing the question to be one of first impression, opted for what it called a "manifestation" approach to determining which carrier was liable, pursuant to which liability attaches when the injury "manifests" and the claimant begins to lose time from work, requires medical attention, and is no longer able to perform his job. Finding that "the true extent of the claimant's injury to her right wrist and elbow did not manifest itself until" appellant Farmers had become the carrier, it held that Farmers was liable for the claim.

The Commission cites neither authority nor public policy considerations supporting its adoption of this rule. Furthermore, it disregards prior opinions of the Arkansas appellate courts that bear on the question under consideration, *i.e.*, when does a scheduled gradual-onset injury legally commence? This court recently addressed this question in the context of the statute of limitations as follows:

> Our singular task on appeal is to determine the point in time that Pina sustained a compensable injury. It has long been held that the statute of limitations does not commence to run until the true extent of the injury manifests and causes an incapacity to earn wages sufficient to give rise to a claim for disability benefits. *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992); *Donaldson v. Calvert-McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950); *Shepard v. Easterling Constr. Co.*, 7 Ark. App. 192, 646 S.W.2d 37 (1983). Act 796 of 1993 provides that for purposes of statute of limitations, "the date of compensable injury shall be defined as the date an injury is caused by an accident as set forth in § 11-9-102(5)." However, this amendment did not address the injury date with regard to gradual-onset injuries-the type presented in Pina's claim. In *Minnesota Mining & Manufacturing v. Baker*, 337 Ark. 94, 982 S.W.2d 11 (1999), our supreme court addressed when a scheduled injury claim becomes compensable for statute of limitations

> purposes. In *Baker*, the court reasoned that loss of earnings are conclusively presumed in scheduled-injury cases; therefore, the statute of limitations begins to run when the scheduled injury became apparent to the claimant. Here, because Pina's injuries are scheduled under the Workers' Compensation Act, the statute of limitations began to run when the injury became apparent to her. The Full Commission determined, based on her testimony, that Pina's injury became apparent at least by the date she reported her symptoms of pain and numbness to her supervisor in October 1999 and she was provided accommodations by her employer.
>
> However, the Full Commission acknowledged that "it may be argued that the dicta in *Minnesota Mining & Mfg. v. Baker, supra*, in which the court stated that statute of limitations began to run in that claim in February of 1978 because that claimant's hearing loss had not ceased to deteriorate until then, stands for the proposition that the statute of limitations does not begin to run until the claimant becomes aware of his injury and the injury has stabilized." This is precisely the argument that Pina makes on appeal. Pina argues that *Baker* requires both the awareness of an injury and the stabilization of the injury prior to the commencement of the running of the statute of limitation.
>
> The initial claim in *Baker* was for permanent disability benefits. Therefore, in order to be entitled to permanent disability benefits, the hearing loss had to reach a point of stability. Accordingly, it is our view that the requirement that the injury stabilize is limited to hearing-loss claims, and the *Baker* dicta supports only a narrow view of the stabilization requirement. Further, in hearing-loss claims the annual hearing tests quantify the amount of loss experienced by the claimant. Such annual testing objectively demonstrates the amount of loss and the time period in which the loss occurred, removing all elements of subjectivity as to time and amount of loss from the fact finding.

Pina v. Wal-Mart Stores, Inc., 91 Ark. App. 77, 84, 208 S.W.3d 236, 240 (2005). Although *Pina* deals with the statute of limitations, the question is the same: when does a scheduled gradual-onset injury legally commence? We think that the Commission erred by ignoring precedent in favor of its "manifestation" test, and we reverse and remand for the Commission to determine the respective liability of the insurers based on a finding as to when the claimant became aware

of the injury pursuant to the standard enunciated in *Pina v. Wal-Mart Stores, Inc., supra.*

Affirmed in part, reversed in part, and remanded.

GRIFFEN and CRABTREE, JJ., agree.

Frank SCHILLER *v.* STATE of Arkansas

CA CR 05-471 226 S.W.3d 11

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

Witt Law Firm, by: *Ernie Witt*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Frank Schiller entered a conditional guilty plea to possession of cocaine with intent to deliver pursuant to Ark. R. Crim. P. 24.3(b), reserving in writing the right to appeal from the denial of his pretrial motion to suppress evidence. On appeal, Mr. Schiller argues that the cocaine seized by the police should have been suppressed because it was the result of an illegal stop of his vehicle as well as an unlawful detention of his person. We affirm.

Arkansas State Police Officer Chris Goodman was the only witness to testify at the suppression hearing. He stated that he was patrolling Interstate 40 at 2:00 p.m. on April 30, 2004, and was on

the side of the road monitoring eastbound traffic. Officer Goodman testified that he observed a car being driven by Mr. Schiller pass by, and that Mr. Schiller was the sole occupant. According to Officer Goodman, when Mr. Schiller passed he quickly turned his head to look away from the patrol car, and Officer Goodman thought this looked suspicious.

Officer Goodman pulled out behind Mr. Schiller's car and followed him for a few miles. Officer Goodman stated that Mr. Schiller was traveling at a speed of sixty to sixty-five miles per hour, which was a legal speed, but he observed that Mr. Schiller was twenty to thirty feet behind the rear of a tractor trailer. Officer Goodman indicated that at that rate of speed a reasonable distance would be six car lengths, and that because Mr. Schiller was only a car length or two behind the tractor trailer he decided to make a traffic stop.

Officer Goodman approached Mr. Schiller's car and made contact with him from the passenger's side. He noticed that Mr. Schiller was extremely nervous and was shoveling sunflower seeds into his mouth during their conversation. Mr. Schiller advised that he was headed toward Memphis to visit his brother because his brother's wife was sick and in the hospital. Officer Goodman asked Mr. Schiller if he had ever been arrested, and Mr. Schiller replied that he had not.

Officer Goodman returned to his patrol unit with Mr. Schiller's Oregon driver's license, and a computer check confirmed that the license was valid. However, Officer Goodman also confirmed that Mr. Schiller had numerous prior felony drug arrests.

Officer Goodman returned to Mr. Schiller's car and asked him to step out of the vehicle. At that time, Officer Goodman returned the paperwork and gave Mr. Schiller a verbal warning. Officer Goodman subsequently asked whether a phone call to Mr. Schiller's brother would confirm his travel plans, and Mr. Schiller responded in the affirmative. Officer Goodman then asked if there was any reason for a person to give a description of Mr. Schiller's car as one that would be transporting drugs, and Mr. Schiller answered "no." After that, Officer Goodman asked for consent to search the car, and Mr. Schiller gave his consent.

During a search of the car, Officer Goodman found a plastic baggie containing a white powder residue in the backseat under a bag. Officer Goodman also found residue in the front seat as well

as a rolled-up twenty-dollar bill, indicating that drugs were being snorted. Officer Goodman *Mirandized* Mr. Schiller, and then instructed Mr. Schiller to follow his patrol car to a body shop. Mr. Schiller complied, and at the shop Officer Goodman inspected the car and found almost three kilograms of cocaine in a hidden compartment.

Mr. Schiller argues on appeal that the cocaine should have been suppressed because it was illegally obtained. He contends that the stop of his vehicle was illegal, and alternatively that he was detained an excessive amount of time in violation of his constitutional rights.

In order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). In the present case, Mr. Schiller contends that Officer Goodman lacked the probable cause necessary to stop his vehicle. He notes that he was traveling at a legal rate of speed, and submits that quickly turning his head does not constitute any violation. While Officer Goodman testified that Mr. Schiller was following another vehicle too closely, Mr. Schiller notes that this was not reflected in the videotape introduced at the hearing, as the tape did not begin to run until he was pulling off the highway at the officer's direction. Mr. Schiller asserts that he was not stopped for any traffic violation, but rather because Officer Goodman perceived a suspicious situation.

Mr. Schiller further argues that, even if the stop was legal, the cocaine should have been suppressed due to his unlawful detention. He cites *Sims v. State*, 356 Ark. 507, 514, 157 S.W.3d 530, 535 (2004), where our supreme court announced:

> It is true that, as part of a valid traffic stop, a police officer may detain a traffic offender while the officer completes certain routine tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning. *See Laime*, 347 Ark. at 157-58 (citing *United States v. Carrazco*, 91 F.3d 65 (8th Cir. 1996)). During this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered. *Id.* at 158. However, after those routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of

> the driver can become unreasonable. *See United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998) (citing *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995)); *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999). In *Mesa, supra*, the Sixth Circuit stated that "[o]nce the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *Mesa*, 62 F.3d at 162. Similarly, the Tenth Circuit has held that, in the absence of a reasonable, articulable suspicion of some drug-related criminal activity, once the purpose of the traffic stop is completed, the operator of the vehicle should be allowed to proceed on his way, without being subject to further delay by police for additional questioning. *United States v. Wood*, 106 F.3d 942, 945 (10th Cir. 1997).

Mr. Schiller contends that after Officer Goodman issued a warning, the purpose of the traffic stop was completed and there was no reasonable suspicion to justify any further detention. Because his consent to search was given after he should have been allowed to proceed on his way, Mr. Schiller argues that the cocaine found by Officer Goodman was fruit of the poisonous tree and should have been suppressed.

We conclude that the arguments for suppression raised in this appeal are not preserved for review because they were not raised before the trial court. The entirety of Mr. Schiller's written motion to suppress states:

> Comes Defendant, by Counsel, and, as to all of the State's evidence, objects to the use of any such evidence, on the grounds that it was illegally obtained in violation of the Arkansas and U.S. Constitutions and the Arkansas Rules of Criminal Procedure.
>
> WHEREFORE, Defendant prays that all testimony and exhibits concerning such evidence be suppressed pursuant to Ark. R. Crim. P. 16.2.

The appellant made no argument in support of his motion at the suppression hearing.

It is well settled that an appellant must raise and make an argument at trial in order to preserve it on appeal. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003). This is true even when the

issue raised is constitutional in nature. *Id.* If a particular theory was not presented at trial, the theory will not be reached on appeal. *Id.*

In the case at bar, Mr. Schiller moved to suppress the evidence on the general ground that it was illegally obtained, but did not apprise the trial court of his particular contentions that the traffic stop was illegal or his detention was excessive. Because Mr. Schiller's arguments on appeal were not specifically made at trial, we need not address them. *See Hollis v. State*, 346 Ark. 175, 55 S.W.3d 756 (2001); *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001); *Willet v. State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986).

Affirmed.

GLADWIN and CRABTREE, JJ., agree.

INDUSTRIAL ELECTRONIC SUPPLY, INC. *v.*
LYTLE MANUFACTURING, L.L.C.

CA 04-1351 226 S.W.3d 1

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

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

Gary J. Mitchusson and *Jennifer Hicky Collins*, for appellee.

JOHN B. ROBBINS, Judge. This is an appeal arising under the Uniform Commercial Code. The trial court, following a bench trial, awarded appellant Industrial Electronic Supply, Inc. (IES), a net judgment of $430.90 on its complaint on open account after granting appellee Lytle Manufacturing, LLC, a setoff on its counterclaim for breach of warranties. In its two points on appeal, IES argues that the trial court erred when it held that Lytle was entitled to a setoff and that the trial court erred in assessing its damages at $24,487.10. We affirm as modified.

Lytle manufactures duck decoys with motorized wings; IES supplied wiring and other electrical parts necessary to operate the decoys. IES also supplied adapters/chargers for recharging the decoy batteries overnight. These supplies were provided sporadically between April and November 2000. A dispute arose when Lytle discovered that some of the chargers/adapters were less than the 500-milliamp chargers that it had ordered. Lytle found other suppliers and refused to pay IES.

On February 8, 2001, IES filed suit on open account against Lytle, seeking to collect $36,856.30 for unpaid merchandise. Lytle answered, denying the material allegations of the complaint. Lytle also counterclaimed for damages, alleging that IES breached its warranties and was negligent because it had shipped the wrong product (100, 200, or 300 milliamps instead of 500 milliamps). The counterclaim, based on breach of warranties, sought a setoff against the sum due IES. The counterclaim did not allege that Lytle

notified IES that the chargers were defective in that they were not 500-milliamp chargers. In a late-filed response to the counterclaim, IES denied the material allegations of the counterclaim. Further, the response did not address Lytle's failure to allege notice.

In opening statements at trial, IES asked the trial court to dismiss Lytle's counterclaim because Lytle knew that it had repeatedly received the wrong sized chargers and because it failed to give notice of the problem within a reasonable time of discovering the mistake, as required by Ark. Code Ann. § 4-2-607(3). In its opening statement, Lytle did not address the issue.

Mark Sober, an outside sales representative for IES and responsible for Lytle's account, testified that Lytle owed $36,856.30 for unpaid goods. He explained that IES started by supplying Lytle with chargers but ultimately supplied other goods as well. He denied that he gave Lytle any advice on manufacturing its decoys. He stated that Lytle asked him to locate some 500-milliamp chargers and that he did so. Sober stated that he obtained some samples of various sized chargers for Lytle to evaluate prior to any orders being placed. He also admitted that IES supplied Lytle with chargers smaller than 500 milliamps because that was what Lytle ordered. He stated that most of his dealings were with Thereasa May at Lytle. He further testified that all shipments had a shipping document known as a "picking ticket" describing the contents of the shipment. He identified several picking tickets showing shipment of chargers of various sizes other than 500 milliamps. Sober admitted on cross-examination that IES could not have supplied Lytle with all of its 500-milliamp chargers in the hasty manner in which Lytle was ordering them. He also asserted that all of the chargers would have charged the same. He also testified that the first time he learned that there was a problem with the chargers not being 500 milliamps was in November 2000. Finally, Sober identified a credit memo for $12,369.20 credited to Lytle's account. However, he could not say whether this credit was reflected in the total due IES from Lytle.

Bill Lytle, the sole owner of Lytle, testified that, as he was developing his prototype, he and Mark Sober discussed whether IES could meet his supply requirements. He stated that Sober told him that IES could meet all of his supply needs. He also stated that Sober knew that he needed 500-milliamp chargers. Lytle explained that the 500-milliamp chargers were necessary for the decoy's battery to be fully recharged overnight. He stated that

Sober told him to use the 500-milliamp chargers. He also stated that there was no reason to test chargers smaller than 500 milliamps because he was under the impression that they would not work.

Lytle admitted that he signed shipping documents showing shipments of chargers of less than 500 milliamps. He also admitted that, if he had read the shipping documents closely, he could have detected as early as April 2000 that he was not receiving the proper chargers. According to Lytle, he would not have knowingly accepted chargers of less than 500 milliamps. He also denied telling Sober to ship whatever size chargers were available. Lytle testified that it never occurred to him that he was receiving chargers other than 500 milliamps.

Lytle stated that he started receiving complaints in late October 2000 from customers that the chargers were not completely recharging the decoys overnight. After learning that the problem resulted from using chargers smaller than 500 milliamps, Lytle stated he called Sober around the first week of November to inform him of the problem. He testified that Sober said that he would investigate the matter but that, ultimately, Sober and IES refused to correct the problem. Lytle stated that he found another supplier and detailed his efforts to remedy the problems with his customers. Lytle admitted that he had not paid for some of the supplies from IES. He also identified a credit memo for a shipment that Lytle had returned to IES. However, he was not sure whether Lytle was given the credit or not.

Thereasa May testified that she was Lytle's former office manager and oversaw the buying and selling of the decoys in 1999 and 2000. She stated that she was involved in the negotiations with IES and that IES started supplying products to Lytle. She admitted that she signed shipping documents for 200-milliamp chargers. However, she stated that she did not realize that they were 200-milliamp chargers, in part because the individual charger boxes were not marked. May denied telling Mark Sober to ship chargers of other sizes if IES did not have enough 500-milliamp chargers. She said that customers started complaining after duck season opened. After Lytle discovered that the problem was with the chargers, May stated that she called Sober in November 2000 about chargers that "were not mine." She stated that Sober told her that he would look into the matter but that he ultimately told her that she had accepted the goods. She also detailed Lytle's replacement of decoys with various retailers. May also denied ever ordering any chargers less than 500 milliamps.

In its letter opinion, the trial court found that Lytle owed IES $36,856.30 for unpaid merchandise but that Lytle was not given a credit of $12,369.20 for returned goods. This resulted in a net amount of $24,487.10 owed to IES. The trial court also found that the chargers that IES sold to Lytle were nonconforming and that Lytle was required to replace the chargers. The trial court further found that Lytle was entitled to recover $24,056.20 in damages for having to replace the decoys with the improper chargers. This resulted in a net judgment in favor of IES in the sum of $430.90. The trial court also ordered each party to be responsible for its own attorney's fees. Judgment was entered accordingly, and this appeal followed.

In bench trials, the standard of review is not whether there is any substantial evidence to support the finding of the court but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a firm conviction that a mistake has been made. *Chavers v. EPSCO, Inc.*, 352 Ark. 65, 98 S.W.3d 520 (2003). However, a trial court's conclusion on a question of law is reviewed *de novo* and is given no deference on appeal. *Murphy v. City of West Memphis*, 352 Ark. 315, 101 S.W.3d 221 (2003).

In its first point, IES argues that the trial court erred when it gave Lytle a setoff because Lytle failed to notify IES of the goods being defective, as required by Ark. Code Ann. § 4-2-607(3)(a) (Repl. 2001), and because Lytle knowingly ordered chargers other than 500 milliamps. We affirm the trial court on this point, holding that this issue was tried by consent of the parties. This result is consistent with cases from other jurisdictions holding that the issue of the seller's failure to properly plead notice is waived unless pled with specificity. *See Faucette v. Lucky Stores, Inc.*, 33 Cal. Rptr. 215 (Cal. App. 1963); *Rich's Rest., Inc. v. McFann Enters., Inc.*, 570 P.2d 1305 (Colo. App. 1977); *Thompson Farms, Inc. v. Corno Feed Prods.*, 366 N.E.2d 3 (Ind. App. 1977). We further hold that the trial court's finding that the chargers were nonconforming is not clearly erroneous.

Arkansas's version of the Uniform Commercial Code provides that a "buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Ark. Code Ann. § 4-2-607(3)(a)

(Repl. 2001).[1] Our courts have held that the giving of reasonable notice is a condition precedent to recovery under the provisions of the commercial code. *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994); *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969); *Adams v. Wacaster Oil Co., Inc.*, 81 Ark. App. 150, 98 S.W.3d 832 (2003). Only when the buyer has given notification as required in section 4-2-607(3)(a) may he recover damages for any loss resulting from his seller's breach. Ark. Code Ann. § 4-2-714(1) (Repl. 2001); *Adams, supra.*

In the present case, Lytle did not specifically allege in its counterclaim that notice was given. Lytle also does not argue on appeal that it pled that notice was given to IES; rather, Lytle argues that notice was given. IES did not address the lack of notice in its response to the counterclaim. Instead, IES first raised the issue of lack of notice in its opening statement. IES did not further address the issue at trial. Mark Sober, the IES sales representative handling Lytle's account, testified that he received a call in November 2000 complaining about the chargers not being 500-milliamp chargers. Thereasa May testified that she called Sober in November 2000 about the chargers not being what Lytle ordered. Bill Lytle testified to the same effect. These telephone calls could be considered notice from Lytle to IES. Notice is sufficient when it informs the seller that the transaction is claimed to involve a breach and thus to open the way for negotiation of a normal settlement. *Cotner v. Int'l Harvester Co.*, 260 Ark. 885, 545 S.W.2d 627 (1977); *Greenfield Seed Co. v. Bland*, 18 Ark. App. 48, 710 S.W.2d 833 (1986). However, written notice is not required. *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 558 S.W.2d 147 (1977). The mere failure to pay for goods is not constructive notice to the seller that the buyer considers the goods defective. *Fleet Maint., Inc. v. Burke Energy Midwest Corp.*, 728 P.2d 408 (Kan. App. 1986). It must, however, be sufficient to let the seller know that the transaction is still troublesome and must be watched. *Cotner, supra; Greenfield Seed Co., supra.* Ordinarily, the sufficiency of notice is a question of fact based upon the circumstances. *Cotner, supra; L.A. Green Seed Co., supra.*

[1] In 2001, the uniform version of Uniform Commercial Code section 2-607(3)(a) was amended. The General Assembly has not adopted this change for Arkansas.

As to the trial court's finding that some of the chargers were nonconforming, we cannot say that it is clearly erroneous. Mark Sober testified that he provided Lytle with samples of various size chargers and that Lytle knowingly ordered chargers other than 500 milliamps. Bill Lytle and Thereasa May both testified that they did not order non-500 milliamp chargers nor tell Sober to "send what he had." It is within the province of the trier of fact to resolve conflicting testimony. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (2002).

Under these facts, we cannot say that the trial court was clearly erroneous in awarding Lytle damages for breach of warranty.

In its second point, IES argues that the trial court erred in calculating its damages at $24,487.10. The argument is that the trial court erred in giving Lytle a credit of $12,369.20 for goods Lytle returned to IES because the credit had, in fact, already been given. We find that this point has merit.

The question of damages, both as to measure and amount, is a question of fact. *Carter v. Quick*, 263 Ark. 202, 563 S.W.2d 461 (1978); *Quality Truck Equip. Co. v. Layman*, 51 Ark. App. 195, 912 S.W.2d 18 (1995). At trial, IES introduced Exhibit 1, a summary showing that the total balance due on all of the invoices shipped to Lytle as $36,856.30. This summary lists each individual invoice and the current balance due under that invoice. Also attached to this exhibit was a credit memo for $12,369.20. IES also introduced the individual invoices. Invoice 553181, dated September 27, 2000, showed an original total due of $20,594.10. However, on Exhibit 1, the current balance listed under invoice 553181 was $8,224.90, a difference of $12,369.20, the exact amount of the credit the trial court found was not given. Therefore, we hold that the trial court was clearly erroneous and reinstate the trial court's finding that the amount owed to IES is $36,856.30. Consequently, the judgment for appellant is modified to reflect the amount of $12,800.10.

Affirmed as modified.

GLADWIN and CRABTREE, JJ., agree.

BYME, INC. *v.* Jackie IVY
and Connie Ivy

CA 05-28 226 S.W.3d 15

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

Wright, Lindsey and Jennings, L.L.P., by: *J. Mark Davis* and *Troy A. Price*, for appellant.

Friday, Eldredge and Clark, L.L.P., by: *Marvin L. Childers* and *Bruce B. Tidwell*, for appellees.

JOHN B. ROBBINS, Judge. This is a suit for damages and specific performance brought by appellees Jackie and Connie Ivy against appellant Byme, Inc., d/b/a RE/MAX (hereafter RE/MAX). RE/MAX has consistently defended against the Ivys' claims by asserting that a particular provision of the parties' contract, paragraph 6(f), relieved it from further performance. Prior to this appeal, the Ivys obtained a summary judgment on the ground that paragraph 6(f) was unenforceably vague. However, we reversed the summary judgment and remanded the case in *Byme, Inc. v. Ivy*, 84

Ark. App. 406, 141 S.W.3d 913 (2004) (*Byme I*). Thereafter, a jury trial was held, and the Ivys were granted specific performance and awarded $158,847.71 in damages. RE/MAX now appeals and, still relying on paragraph 6(f), argues that the trial court erred in failing to grant its motion for a directed verdict and in instructing the jury. We agree that a directed verdict should have been granted, and we therefore reverse and remand.

In 1997, RE/MAX entered into an agreement with Jackie Ivy's employer, Huntco Steel, to provide relocation services to Huntco's employees in exchange for a fee paid by Huntco. As we explained in *Byme I*, RE/MAX's services consist of obtaining an appraisal of the employee's home, sending the employee a contract of sale, along with various other documents, and offering to purchase the home for the appraised value. Once the employee executes the contract of sale and other documents, RE/MAX pays the employee his equity in the home; assumes the employee's mortgage or takes over payments on the employee's home loan; places the home into its "inventory"; and lists the home for sale. It then bills the employer for an initial fee of 7% of the home's appraised value, plus 4.5% of the appraised value for every quarter that the home remains in the inventory.

In July 2001, the Ivys were in the process of relocating when they received a letter from RE/MAX notifying them that Huntco had "contracted with us to provide you with our Home Purchase Program" and that, as soon as an appraisal could be obtained, the Ivys would "receive a verbal offer on your home and a formal written offer package will be sent to you."

On September 10, 2001, the Ivys received a document package from RE/MAX offering to purchase their property for its appraised value of $612,500. The package contained, *inter alia*, a warranty deed naming the Ivys as grantors but containing no grantee or amount of consideration; an owner's affidavit requiring information such as whether a divorce was pending, whether there were any leases on the premises, and whether there were any covenants or outstanding repair bills on the home; and an Irrevocable Limited Power of Attorney and Affidavit of Delivery and Acceptance of Warranty Deed, which acknowledged, among other things, that delivery of the deed to RE/MAX and its acceptance by RE/MAX "shall be sufficient delivery so as to operate as a valid conveyance of the property." The packet also contained a contract of sale naming RE/MAX as the buyer of the home. It provided that the Ivys would vacate the home by October

9, 2001; that within one year they would convey good and marketable title to RE/MAX or its nominee or a purchaser designated by RE/MAX; and that the Ivys' equity would be paid upon receipt of the properly executed documents. Paragraph 6(f) of the contract, which is central to this case, provided as follows:

> 6. EXPRESS CONDITIONS: As express conditions of this Contract, it is specifically understood and agreed that:
>
> . . . .
>
> f. RE/MAX is relying upon the Sellers' employer to make certain payments to it and, therefore, each and every obligation of RE/MAX under this contract is expressly contingent upon the Sellers' employer fulfilling all of its obligations to RE/MAX. Sellers agree that RE/MAX is released from any and all obligations of this Contract should the Sellers' employer fail to perform any of its duties with RE/MAX.

Following the Ivys' execution of the above documents, RE/MAX paid them their equity in the property. RE/MAX also sent a letter to Regions Bank, which had the mortgage on the home, stating that it was a "homebuying corporation under contract with various corporations to purchase their relocated employees' homes" and that it had "acquired" the Ivy property "for resale purposes only." The letter notified Regions that, until the home was sold, loan payments would be made by RE/MAX.

Once the Ivys' home was taken into the RE/MAX inventory, RE/MAX sent Huntco an initial invoice for $42,875 (7% of the home's appraised value), followed by another invoice for $27,562.50 (4.5% of the appraised value). When Huntco failed to pay the invoices and filed bankruptcy in February 2002, RE/MAX sent the Ivys a letter stating that Huntco was indebted to RE/MAX in the amount of $70,437.50 (the total of the two invoices) and that the Ivys' contract of sale was "expressly contingent upon your employer making certain payments to RE/MAX and fulfilling all of its obligations to RE/MAX." RE/MAX then demanded that the Ivys release RE/MAX from further liability under the contract of sale and reimburse RE/MAX for the equity payments RE/MAX had made to the Ivys, plus the mortgage payments RE/MAX had made to Regions and other expenses associated with the house. The Ivys were also advised that future mortgage payments and expenses would be their responsibility.

The Ivys resisted RE/MAX's demands and eventually sued RE/MAX on June 7, 2002, in Craighead County Circuit Court. They alleged that the sale of their home to RE/MAX "was complete"; that paragraph 6(f) was unduly vague and unenforceable; and that their execution and delivery of the warranty deed "completed the transaction and removed the 'condition' set forth in paragraph 6(f)." They sought an order requiring RE/MAX to continue making mortgage payments on the property and any other relief deemed appropriate. RE/MAX defended on the ground that paragraph 6(f) released it from its contractual obligations in light of Huntco's failure to pay. Although the trial court initially ruled that paragraph 6(f) was unenforceable, we reversed that ruling in *Byme I*, and, upon our remand, RE/MAX re-asserted paragraph 6(f) as a defense during the jury trial.

The testimony of two witnesses was presented at the jury trial. Appellee Jackie Ivy testified that, based on the language in the documents that he signed, he did not believe that his contract with RE/MAX was merely a listing contract; rather, he thought that he was selling his home to RE/MAX. He said that he conveyed title to RE/MAX when he executed the power of attorney on September 12, 2001, and that he vacated the house by October 9, 2001, as required by the contract. Ivy also testified that he knew that there was a contract between RE/MAX and Huntco and that he fully understood paragraph 6(f) of his sales contract, but he thought that it applied only "up to the point of closing," *i.e.*, when he was paid his equity. He based this belief on paragraph 7(d) of the contract, which read: "The provisions of this Contract, unless fully performed, shall survive the execution and delivery of the deed and shall not be merged therein."

Ivy also stated that he had been through this type of relocation procedure several times before and that, on those occasions, "once the equity was disbursed, I never heard anything else." As a result, when he received his equity in the present case, he never checked to see whether the mortgage had been paid nor did he take the documents to an attorney for review because he had "never had any trouble" before. After receiving RE/MAX's letter demanding to be released from the contract, Ivy learned that the mortgage at Regions Bank had not been fully paid by RE/MAX, and he began making the mortgage, utility, and upkeep payments on the house in order to preserve his credit rating. Although he acknowledged that nothing in the sales contract required RE/MAX to pay off the Regions loan, he stated that

RE/MAX had offered to pay him $612,500 for the house and therefore should have paid that amount directly to him or should have paid off the Regions note after paying him his equity. He asked the jury to require RE/MAX to "remove the loan at Regions Bank in our name" and "reimburse us for the money we have been forced to spend for the last three years."

RE/MAX employee Paula Bogle testified that the documents in this case were prepared by RE/MAX or someone else at RE/MAX's direction. She characterized RE/MAX as "more of a property management company" trying to "transfer title to an outside buyer." She further stated that, upon Huntco's failure to pay the 7% and 4.5% invoices, RE/MAX was released from further obligations under the contract pursuant to paragraph 6(f). In response to Jackie Ivy's contention that paragraph 6(f) did not survive the "closing," *i.e.*, payment of equity to the Ivys, Bogle said that RE/MAX's obligations extended beyond the time when equity was paid. Additionally, she testified that RE/MAX never informed Regions that RE/MAX would assume complete liability for the home loan. However, she admitted that, with the deed and the power of attorney being executed by the Ivys, "nothing else was required from [the Ivys] to transfer" the house and that the Ivys "didn't have to do anything else to convey title." Finally, she said that the Ivys had fully performed the contract when they vacated the house on October 9, 2001, and she admitted that, in her pre-trial deposition, she stated that RE/MAX had fully performed by October 9.

At the close of all the evidence, RE/MAX moved for a directed verdict on the following basis:

> [T]he Arkansas Court of Appeals [in *Byme I*] specifically determined that paragraph 6f was in the nature of a condition subsequent. Mr. Ivy testified that he understood that provision to refer to the contract between Huntco Steel and RE/MAX. The only fact remaining is whether or not Huntco fulfilled its obligations under that contract, and the testimony unrebutted here is that they did not. On top of that, there is absolutely no provision in the agreement that limits the time period of effectiveness of paragraph 6f of that contract to a closing date or any other time period and by virtue of those reasons, there, RE/MAX is released from all obligations under that contract.

The trial court denied the motion, ruling that the "contract taken as a whole submits issues for the jury." Following deliberations, the jury

determined that the Ivys were entitled to have RE/MAX "purchase their home" and reimburse them for $158,847.71 in mortgage payments and expenses. RE/MAX now appeals, arguing that the trial court erred in denying its motion for a directed verdict and erred in the manner in which it instructed the jury on RE/MAX's liability. The essence of both of these arguments is that paragraph 6(f) unequivocally relieved RE/MAX of further performance under its contract with the Ivys once Huntco failed to pay.

We first address RE/MAX's claim that the trial court erred in denying its motion for a directed verdict. A directed-verdict motion is a challenge to the sufficiency of the evidence. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004). When reviewing the denial of a motion for a directed verdict, we determine whether the jury's verdict is supported by substantial evidence. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without having to resort to speculation or conjecture. *Id.* When determining the sufficiency of the evidence, 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.* A motion for a directed verdict should be denied when there is a conflict in the evidence or when the evidence is such that fair-minded people might reach different conclusions. *Id.* Under those circumstances, a jury question is presented and a directed verdict is inappropriate. *Id.* It is not our province to try issues of fact; we simply examine the record to determine if there is substantial evidence to support the jury's verdict. *Id.*

RE/MAX's argument on this point is two-fold. First, it asserts that a directed verdict was required by virtue of the law-of-the-case doctrine. This assertion is based on our statements in *Byme I* that paragraph 6(f) "clearly" released RE/MAX from its obligations should Huntco fail to perform and that the issue of whether or not Huntco failed to perform was a question of fact. In light of these holdings, RE/MAX contends, the trial court, on remand, should have considered "*only* the factual determination" of whether Huntco performed or failed to perform. Because Huntco undisputedly failed to perform, RE/MAX argues, it was relieved of its obligations and entitled to a directed verdict. In RE/MAX's second argument, it claims that, contrary to the Ivys' assertion, paragraph 6(f) survived the "closing" of the real-estate

sale. Because we agree with RE/MAX's second argument and with its first argument insofar as it advocates the clear meaning of paragraph 6(f), we conclude that a directed verdict should have been granted in RE/MAX's favor.[1]

The facts undisputedly show that the contractual arrangement crafted by RE/MAX required Huntco to essentially finance the relocation services by making payments to RE/MAX, which RE/MAX would then use to cover the mortgage payments and other expenses pending the sale of the home. In apparent recognition of this, RE/MAX included paragraph 6(f) in its contract with the Ivys, stating that its obligations to the Ivys were "expressly contingent" on Huntco's fulfilling its obligations and that "Sellers agree that RE/MAX is *released from any and all obligations of this Contract* should the Sellers' employer fail to perform any of its duties with RE/MAX." (Emphasis added.) As we recognized in *Byme I*, paragraph 6(f) was a clear statement that RE/MAX would be released from its contractual obligations should Huntco fail to perform.

It is undisputed in this case that Huntco did not perform. It therefore follows that what *Byme I* referred to as the "condition subsequent" in paragraph 6(f) was activated, and, at that point, RE/MAX's obligations to the Ivys' ceased.[2] The Ivys do not claim that paragraph 6(f) is ambiguous, and at trial they did not dispute its meaning or import. In fact, Jackie Ivy said that he read paragraph 6(f) and fully understood it. Under these circumstances, the issue of RE/MAX's liability should never have gone to the jury. When contractual language is unambiguous, its construction is a question of law for the court. *Carver v. Allstate Ins. Co.*, 77 Ark. App. 296, 76 S.W.3d 901 (2002). Further, when the language of a contract is clear, it must be given its plain and obvious meaning. *See id.* Under the clear language of paragraph 6(f) and Huntco's unquestioned failure to perform, RE/MAX was released from its obligations to the Ivys.

However, the Ivys have invoked a second provision of the sales contract, paragraph 7(d), in an effort to avoid the application of paragraph 6(f). Paragraph 7(d) provides that "the provisions of

---

[1] In light of our conclusion, we need not directly address RE/MAX's claim regarding the law-of-the-case doctrine.

[2] A condition subsequent is a condition that follows liability on a contract but provides for a contingency, which, if it occurs, will defeat a contract already in effect. *See Byme I, supra.*

this Contract, unless fully performed, shall survive the execution and delivery of the deed. . . ." The Ivys contend that, under this provision, paragraph 6(f) did not survive the "closing," *i.e.*, the "full performance" of their real-estate sales contract with RE/MAX. They first point to evidence that their transaction with RE/MAX was in fact a real-estate sale. We agree that the documents that RE/MAX provided to the Ivys are replete with references to RE/MAX's "purchasing" the Ivys' home and that the transaction between RE/MAX and the Ivys bore many of the traditional indicators of a home sale, such as a contractual offer and acceptance, receipt of equity by the seller, warranties for the purpose of title insurance, and relinquishment of possession by the seller, among other things. However, even if the transaction was, in many respects, indicative of a home sale, that fact alone does not prevent the operation of paragraph 6(f). The condition subsequent in 6(f) exists whether the parties' transaction was a home sale, a listing agreement, or a hybrid of both.

The Ivys further argue that paragraph 6(f) was no longer in effect when Huntco defaulted in 2002 because, by that time, their contract with RE/MAX had been fully performed. As proof that full performance occurred prior to Huntco's default, they point to the fact that all of the documents necessary to transfer title to RE/MAX were executed in September 2001; that they vacated the home in October 2001; that they were paid their equity in November 2001; and that Jackie Ivy testified that his understanding of the contract was that, if Huntco did not meet its obligations "up to the point that we closed on the property," then RE/MAX was released from any further obligation "up until closing." They also note the testimony of RE/MAX's representative, Paula Bogle, who said in a deposition that RE/MAX had fully performed the contract on October 9, 2001, when the Ivys vacated the property. We disagree that these factors constitute substantial evidence that paragraph 6(f), at some point, lost its efficacy.

First, despite the fact that the Ivys executed the sales document, vacated the premises, received their equity in the property, and understood that the contract had been fully performed, the fact remained that RE/MAX had continuing obligations under the contract. For example, according to paragraph 6(c) of the contract, RE/MAX was required to "make payments [on the seller's mortgage] coming due after the date of assumption by RE/MAX or the Possession Date," which, in this case, was October 9, 2001. Moreover, the Ivys' contention that RE/MAX "fully performed"

the contract prior to Huntco's default is belied by the fact that they sued RE/MAX for specific performance of the contract — a contract that they now contend was fully executed and on which no further performance was required. Finally, Paula Bogle's deposition testimony that RE/MAX had fully performed by October 9, 2001, cannot be reconciled with the fact that RE/MAX sent the Ivys the balance of their equity payment and a revised settlement statement in November 2001. If Bogle's testimony was correct, then the Ivys would not have been entitled to the balance of their equity, which cannot be the case.

For the foregoing reasons, we believe that paragraph 6(f) clearly operated to relieve RE/MAX of its obligations under the contract once Huntco failed to perform and that the trial court should have granted a directed verdict in favor of RE/MAX. We therefore reverse and remand without addressing RE/MAX's arguments regarding jury instructions.

Reversed and remanded.

VAUGHT, CRABTREE, and ROAF, JJ., agree.

HART, J., concurs.

GLADWIN, GRIFFEN, GLOVER, and BAKER, JJ., dissent.

JOSEPHINE LINKER HART, Judge, concurring. I concur in the disposition of this case, but write separately because I believe that Jackie Ivy's employer, Huntco, should have been made a party, as required by Rule 19 of the Arkansas Rules of Civil Procedure. Rule 19 provides in pertinent part:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party.

I cannot ignore the fact that no matter whether we affirmed or reversed, the losing party was going to get less than they contracted for

because of Huntco's failure to perform. Accordingly, under the plain language of Rule 19, Huntco must be a necessary party. This is quintessentially the case of "the persons already parties [being] subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest." *Id.*

It is less clear to me, however, whether we are obligated to raise this issue on our own motion. My research has uncovered at least three cases, *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 605 (2005), *Yamauchi v. Sovran Bank/Central South*, 309 Ark. 532, 832 S.W.2d 241 (1992), and *Harrison v. Knott*, 219 Ark. 565, 243 S.W.2d 642 (1951), where our supreme court did just that, and reversed and remanded the case with instructions to join the necessary party. However, I am also aware that the supreme court accepted certification of *McAdams v. McAdams*, 353 Ark. 494, 109 S.W.3d 649 (2003), for the purpose of conclusively stating whether an appellate court must *sua sponte* address whether all necessary parties have been joined in an action and subsequently decided that certification of this issue was improvidently granted. Given the unsettled nature of the law in this area, I am reluctant to seek a different disposition of this case, and therefore, I join the majority.

KAREN R. BAKER, Judge, dissenting. The majority places undue emphasis on the lack of ambiguity of paragraph 6(f), which is hardly in dispute; erroneously makes its own factual finding that the contract was not fully performed; and then compounds this error by not giving paragraph 7(d) of the contract due consideration. I believe that this case was properly submitted to the jury and that the jury's verdict was supported by substantial evidence. I therefore dissent.

Lying within the real-estate sales contract prepared by RE/MAX was a provision not ordinarily found in such documents. This provision, paragraph 6(f), can be likened to a time bomb that began "ticking" upon the parties' execution of the contract and would "blow up" the contract should a certain contingency occur, namely, Huntco's failure to pay. Although it is unnerving to contemplate being a party to such a contract with this type of clause, I make no comment on its propriety; the Ivys freely entered into this contract and admitted at trial that they were aware of the presence of paragraph 6(f). Moreover, I do not question the meaning of paragraph 6(f). I agree with our statement in *Byme I* that the paragraph "clearly states that RE/MAX will be released

from its obligations under the contract of sale should the employer fail to perform its duties." *Byme, Inc. v. Ivy*, 84 Ark. App. 406, 410, 141 S.W.3d at 915. However, the question in this case is not whether 6(f) is ambiguous; the question is, did it stop ticking before Huntco's default? To continue the metaphor, was it "disarmed" by the parties' completion of their contract? I believe that the answer to this question cannot be ascertained as a matter of law and was properly submitted to the jury.

As the trial judge correctly noted in denying RE/MAX's motion for a directed verdict, the "contract as a whole" must be considered in deciding this case. The contract contains not only paragraph 6(f) but paragraph 7(d), which provides that the provisions of the contract, "unless fully performed, shall survive the execution and delivery of the deed and shall not be merged therein." The Ivys contended at trial that, under this clause, paragraph 6(f) did not survive the closing of their real-estate sale. Thus, the fact-finder was presented with three issues to resolve: 1) the nature of the parties' contract; 2) whether the contract was fully performed by both parties; 3) whether paragraph 7(d) can be interpreted to mean that, upon completion of the parties' contract, paragraph 6(f) no longer applied. When the proof is viewed in a light most favorable to the Ivys, as our standard of review requires, there is substantial evidence to support a finding in their favor on each of these matters. *See, e.g., Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992).

First, the Ivys contend that the nature of their transaction with RE/MAX was a real-estate sale. Given the facts of this case, I hardly see how RE/MAX can claim otherwise. While the Ivys were in the process of relocating, they were solicited by RE/MAX and told that they would receive an offer on their home. Thereafter, they received a large packet of documents, all prepared by RE/MAX, in which RE/MAX unequivocally offered to purchase their home for $612,500. They went through all of the normal processes that accompany the selling of a home, such as executing a deed, warranting a lack of encumbrances, transferring possession to the purchaser, and receiving their equity. Further, they executed a power of attorney, which provided that delivery of the deed to RE/MAX operated as a valid conveyance of the property. Under these circumstances, it was perfectly reasonable for the Ivys to conclude that their contract with RE/MAX was a real-estate

sale. Moreover, a jury's determination that RE/MAX bought the house from the Ivys would be supported by substantial, even ample, evidence.

The next question is, when was the sale of the house completed? There is conflicting evidence on this point, but, again, our standard of review requires us to view the evidence in the light most favorable to the Ivys. When doing so, there is proof that, at the latest, the contract was complete when the Ivys received their final equity payment in November 2001. By that point, they had signed the offer and acceptance, transferred possession of the home to RE/MAX, conveyed the property to RE/MAX by virtue of the power-of-attorney, and received all monies that they were due from the sale. RE/MAX, by that point, had acquired possession of the home, had paid the Ivys their equity, and had begun making payments to the mortgagee, Regions Bank. Further, Paula Bogle testified that both parties had fully performed the contract on or about October 9, 2001, when possession was transferred. Any fact-finder with this proof before it would be perfectly justified in concluding that the parties' contract was fully executed by late 2001.[1]

Finally, we turn to what I perceive as the key issue in this case — did paragraph 6(f) survive the full performance of the parties' contract? An interpretation of paragraph 7(d) is crucial to this issue. It states that "the provisions of this Contract, unless fully performed, shall survive the execution and delivery of the deed and shall not be merged therein." The meaning of this clause is ambiguous. And, when the terms of a written contract are ambiguous, the meaning of the contract becomes a question of fact. *Carver v. Allstate Ins. Co.*, 77 Ark. App. 296, 76 S.W.3d 901 (2002).

Thus, it was the jury's job in this case to interpret paragraph 7(d). Certainly, a jury could reasonably construe the clause to say that, once the contract is "fully performed," its provisions do not survive. In other words, when the home sale was completed, the fully performed contract merged with the deed, and the contract, including paragraph 6(f), was no more. The logic of this interpre-

[1] I disagree with the majority's placing any significance on the Ivys' pursuing a claim for specific performance. They were simply seeking an order requiring RE/MAX to do what they thought RE/MAX had already done under the completed contract — make the mortgage payments to Regions Bank. I also note that the Ivys also asserted in their complaint that the sale of their home to RE/MAX was "complete."

tation is apparent when one considers what would have happened if Huntco, instead of defaulting just two months after the sale was complete, had defaulted two years later. Surely the parties' contract would not still be in the executory phase at that point, and surely paragraph 6(f) would not still be ticking, ready to "blow up" a home sale that had occurred two years previously.

This is a case replete with factual questions, and it was the jury's province to look at the contract as a whole and reach a resolution. I simply cannot agree with the majority that the jury's verdict was not supported by substantial evidence. I therefore dissent.

GLADWIN, GRIFFEN and GLOVER, JJ., join.

Vicki McKINNEY *v.* Randall K. McKINNEY

CA 05-381 226 S.W.3d 37

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

[Rehearing denied March 8, 2006.*]

* GRIFFEN and BAKER, JJ., would grant rehearing.

Taylor Law Firm, by: *Scott Smith*, for appellant.

Sexton Law Firm, by: *Jane Watson Sexton*, for appellee.

JOHN B. ROBBINS, Judge. This is an appeal regarding a reduction in child support. Appellant Vicki McKinney and appellee Randall McKinney are the parents of a son who was ten years old when they divorced on October 3, 2003. Per their agreement, which was approved by the Washington County Circuit Court, Vicki retained custody, while Randall was granted visitation and was obligated to pay $1000 per month in child support, one-half of his son's extracurricular expenses incurred through high school, one-half of any medical expenses for the child not covered by insurance, and one-half of his college expenses. Randall had been unemployed since September 2003, but he had been approved to receive $1000 in monthly unemployment benefits until he retained gainful employment, but for no longer than six months. The agreed order read in pertinent part that:

> This [$1000 child support] amount is a deviation from the child support guidelines and is based upon the accustomed standard of living of the child and that husband has assets in addition to his monthly net income which has recently been approximately $4,800.00. It is agreed that this amount shall be paid directly to the wife by the fifth of every month.

In the divorce, the parties approximated an even division of the marital assets, resulting in Vicki retaining the home and furnishings. Randall moved into a one-bedroom apartment in Rogers, Arkansas. Each party retained their own retirement accounts. Vicki was employed as a professor at the University of Arkansas, earning about $90,000 annually.

On November 19, 2003, Randall moved to vacate or modify the agreed order pursuant to Ark. R. Civ. P. 60(a), stating that he agreed to this provision while acting pro se, that he had not

found a job as he had expected to, that he was approved for but had not received the unemployment benefits in a timely manner, and that the October 3 order represented a miscarriage of justice. This petition was heard and denied in December 2003, though the trial court stated that if in the future there was a change in circumstances regarding income, the trial court could take evidence at that time.

On January 16, 2004, Vicki moved for contempt on the basis that Randall had not yet paid child support for the months of December and January. Randall responded and filed a counterclaim in May 2004, petitioning for a reduction in his child support.[1] Randall stated that as of March 12, 2004, he was no longer receiving any unemployment benefits and that despite diligent efforts he had not found employment. Vicki resisted Randall's petition, arguing that there was no material change in circumstances since the time of their divorce.

Both Vicki's request to hold Randall in contempt and Randall's petition to modify child support were heard on October 1, 2004. Vicki testified that since the filing of her petition for contempt, Randall was current on his child support, and he even overpaid her $500 in July 2004. Nonetheless, Vicki complained that the child support was not always paid on or before the fifth of the month. She said that in the previous year, only four months of support was either paid or postmarked by the due date. Vicki testified that she and her son lived in the house she and Randall bought in 2002 in Fayetteville, Arkansas. She estimated her expenses for herself and her son at $6300 per month, though she stated that her take-home income as Assistant Professor of Information Systems was $5300 per month. She also said that she had earned another $4200 in summer 2004 for research that was not listed on her Affidavit of Financial Means. Vicki explained that she had $1537 per month taken out of her paycheck for pension benefits and stock purchase plans. Vicki, a woman in her late forties, presently had about $56,000 in her retirement account. In order to keep their son in the lifestyle to which he had become accustomed, which included several summer camps, sports activities, and music lessons, she said she had taken funds from her

[1] Randall also requested that the trial court order Vicki to cease her refusal to communicate with him regarding visitation. This issue is not pertinent to the present appeal.

savings account but not from her retirement accounts. Vicki agreed that Randall had paid about $800 in extracurricular expenses thus far.

Randall testified that their son was presently eleven years old. He agreed that he wanted to continue to support his son to the best of his ability, and that he was not asking to be excused from responsibility for half of other expenses listed in the agreed order (extracurricular activities, medical expenses over insurance, college). Fifty-seven-year-old Randall held a degree in mathematics, but he suffered from an arthritic back, which prevented him from being able to stand for long periods of time. Randall said that though he was unemployed in September 2003, he knew that unemployment benefits were forthcoming, he expected to use those benefits to pay child support for his son, and he felt sure he would quickly find gainful employment. He sent out approximately 300 letters seeking employment, and he sought professional recruiter services in Fayetteville, Little Rock, and Dallas. He was also working with the Employment Security Department of Arkansas, and he had searched through a temporary agency in Rogers. All of those efforts were unsuccessful to date.

He said that he retained one retirement account valued at approximately $133,500, but he had liquidated his other smaller retirement accounts, stocks, and some of his deceased mother's assets to pay for child support and living expenses. He incurred a ten-percent penalty on each retirement account withdrawal. Including the unemployment checks, his bank account deposits for the last year totaled approximately $45,000. Bank statements and financial documents supported those figures. Randall requested that his child support obligation be reduced to $500 per month, given his current circumstances. Randall said that if he found a job, he should pay $1000 per month child support.

Randall testified that he wanted to support his son, but he did not want to spend all of his retirement to that end. Randall said that he presently drove a 1996 Toyota Camry with 160,000 miles on it. Randall's one-bedroom apartment in Rogers cost $395 per month rent. He expressed a desire to eventually move into a two-bedroom apartment so that their son would not have to sleep on the couch when he visited. He said that his only recreation that did not involve his son was a trip to see relatives in Houston for Thanksgiving.

The trial court took the case under advisement and conducted a hearing on November 18, 2004, to announce her

decision. The trial judge explained that she had observed the parties and their demeanor, and she had studied the exhibits carefully, resulting in her ability to make conclusions regarding credibility of the parties and the reasonableness and consistency of their positions. The trial judge found credible that Randall lived a modest lifestyle; that he had actively sought employment as he testified; that he agreed in the divorce to pay in excess of the family support chart based upon his former income despite his unemployment at the time; that Vicki received a net income in excess of her stated monthly expenses; that the child was not being neglected in any manner; that Randall was capable of earning an imputed monthly income of $3500; and that the family support chart on that amount would be $525 per month retroactive to the date of his request for a modification.

The trial court explained that pursuant to statutory law, case law, and Administrative Order Number 10 issued by our supreme court, the parties could not make a permanently binding contract on the issue of child support. Instead, that was a matter over which the trial court retained jurisdiction as a matter of public policy. An order was entered on December 14, 2004, commemorating these findings. Appellant filed a timely notice of appeal.[2]

Appellant Vicki contends on appeal that the trial court erred in reducing appellee Randall's child support obligation from $1000 to $525 per month because (1) it was clearly erroneous to find a material change in circumstances sufficient to modify child support, and (2) it was clearly erroneous to conclude that the chart amount was not rebutted by the child's standard of living and appellee's possession of assets other than regular income. We disagree with both of her assertions and affirm the trial court's decision.

We review child-support awards de novo on the record. *Davie v. Office of Child Support Enforcement*, 349 Ark. 187, 76 S.W.3d 873 (2002) (citing *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 69 S.W.3d 414 (2002)). In de novo review cases, we will not reverse a finding of fact by the trial judge unless it is clearly erroneous. *Id.* (citing *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000)). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

[2] Randall filed a notice of cross appeal but did not pursue such an appeal before us.

Id. (citing *Nielsen*, *supra*). Further, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Id.*

The amount of child support lies within the sound discretion of the trial judge, and the trial judge's finding will not be reversed absent an abuse of discretion. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002) (citing *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *Smith v. Smith*, 337 Ark. 583, 990 S.W.2d 550 (1999)). The trial judge is required to refer to the child-support chart, and the amount specified in the chart is presumed to be reasonable. *Id.* (citing *Smith v. Smith*, *supra*).

Appellant first contends that appellee failed to show a material change in circumstances since the last order that would warrant a reduction in child support. Appellant acknowledges that the trial court retains jurisdiction over child support matters, but she asserts that at the time of the divorce, appellee was unemployed and receiving no income — just as when he petitioned for a reduction. It must be remembered that a trial court 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. *Alfano v. Alfano*, 77 Ark. App. 62, 72 S.W.3d 104 (2002). At the time of the divorce, appellee had been approved for unemployment benefit payments that provided $1000 per month in income, despite their being tardy in their delivery to appellee. Arkansas Code Annotated section 9-14-107 (Repl. 2003) provides that any change greater than twenty-percent or $100 in the payor's monthly gross income constitutes a material change in circumstances sufficient for a petition for modification of child support. Appellee's unemployment benefits expired in March 2004, so his petition in May 2004 in which his income was shown to have decreased from $1000 per month to $0 per month was a material change in circumstances.

The present set of facts is markedly distinguishable from *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996), which appellant cites. In *Schwarz v. Moody*, child support was not eliminated upon a request for modification because the mother was unemployed at both the initial setting of minimal child support required by law of an unemployed person and at her later request for an elimination of that duty. In this instance, the payor's original obligation was set in excess of the child support chart based upon

his expected acquisition of employment commensurate with his former income, with deviation upward for the child's standard of living. Although he had unemployment benefits for a while, the income situation changed materially in the ensuing months. We affirm this point on appeal.

Appellant next contends that the trial court erred in modifying the child support obligation because the family support chart amount on the imputed income was rebutted by proof of the child's standard of living and appellee's possession of other assets with which he could satisfy his support obligation. Appellant argues that the evidence showed that appellee was able to deposit nearly $40,000 in monies from his other assets in the course of the year without making any appreciable reduction in the overall value of his retirement. Despite the trial court having imputed $3500 monthly income to appellee for purposes of child support, which the court translated into a $525 per month child support duty, appellant maintains that the child's lifestyle requires $1000 per month support, which appellee has the ability to fund. In short, appellant contends that the trial court clearly erred by not deviating upward from the child support chart and leaving support at $1000 per month. We affirm the trial court.

The family support chart and statutory law set forth the presumption that the amount applicable under the chart is the correct amount. In particular, Arkansas Code Annotated section 9-12-312(a)(2) (Repl. 2002) provides:

> 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.

We are hard pressed to hold that the trial court erred where it set an imputed income to appellee and then applied *Administrative Order*

Number 10 to that amount.[3] It was incumbent upon appellant to rebut that presumption, which she did not do. The trial court expressed her understanding of the applicable law, in particular *Administrative Order Number 10.* The trial judge specifically noted that the child's accustomed life style was being accommodated and that appellee was in fact earning no income whatsoever. Obviously, the chart amount was not deemed to be unjust or inappropriate based upon the criteria applied to these facts. Because the trial court followed applicable law in this instance in setting an equitable amount of child support, we affirm its order.

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

GRIFFEN and BAKER, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse in this case because the trial court's order is based on an erroneous finding of fact that appellee was receiving unemployment benefits when the divorce decree was entered. The parties' settlement agreement expressly stated that the $1000 monthly child support was based on the child's accustomed standard of living and the fact that appellee had assets in addition to his monthly net income, which the decree stated "has recently been approximately $4,800."

Although it was not made known to the trial court at the time of the parties' divorce, appellee was unemployed at that time, having lost his job approximately one month before the order was entered. Appellee anticipated receiving unemployment benefits of $1000 per month and did, in fact, qualify to receive such benefits for the period between September 2003 to mid-March 2004. However, he did not receive his first unemployment check until November 2003.

At the conclusion of the hearing on the parties' motions, the trial court erroneously found that when the parties executed the property agreement, appellee was unemployed and was also re-

[3] Appellant did not raise or contend before the trial court that the child support award is inconsistent with the child support chart as applied to appellee's imputed income; nor does she argue such in this appeal. However, the dissenting opinion raises the issue and then argues the point on behalf of appellant. We occasionally discern issues in appeals that might have merit but were either not preserved for review by raising it before the trial court or by not arguing the matter on appeal, or both. Yet we would violate basic appellate jurisprudence if we followed the dissent's lead in this instance and began raising and addressing the merits of unappealed issues.

ceiving $1000 in unemployment benefits (which had since expired). The court further determined that appellee's income had been reduced by $5000 per month but that there was no credible evidence by which it could determine how much money he currently received from his assets. Because appellee was highly educated and was capable of earning a sufficient income to pay child support, the court determined that "he can find a job in the amount of $3500 monthly" and reduced appellee's child support to $525 monthly. The court thus found that there had been a change of circumstance to warrant modification of child support, but found no justification for deviating from the Child Support Chart.

I would reverse the trial court's order because it was clearly based on an erroneous finding of fact: that appellee was receiving unemployment benefits at the time the divorce decree was entered. Although appellee was apparently *eligible* to receive unemployment benefits for the month of October 2003, when the divorce decree was entered, he did not receive any unemployment benefits until November 2003, after the order was entered. In addition, though the trial court in the instant action stated that appellee's income had been reduced by $5000 per month, it is not apparent how the court determined that appellee lost $5000 per month.

The majority states that the change of circumstances is shown because, after the divorce decree was entered, appellee's unemployment benefits decreased from $1000 per month to $0 per month. Had appellant been receiving unemployment benefits of $1000 per month at the time the trial judge initially awarded child support, the majority's position might be more persuasive. However, we cannot ascertain, *a priori*, what decision the trial court would have reached had it proceeded from an accurate understanding of the facts surrounding appellee's employment situation, especially given that the court was unable to determine if the amount of unearned income appellee currently receives from his assets constitutes a change of circumstances. Absent proof regarding the amount of appellee's unearned income, it would seem that his petition to modify child support rises or falls on the *other* evidence regarding his financial circumstances, including the true state of his financial circumstances at the time the divorce decree was entered that were not then known to the trial court. The majority's argument to the contrary notwithstanding, where the trial court was mistaken concerning appellee's financial circum-

stances at the time the initial decree was entered, then it is not positioned to find, as fact, that a change of circumstances has occurred since then.

Additionally, upon *de novo* review, I am not convinced that the trial judge properly applied the Child Support Chart in reducing appellee's child-support obligation. The trial judge orally stated that she was not deviating from the Chart, declared appellee's income to be $3500 monthly, and awarded $525 per month in child support. The problem is first, that the presumptive amount of child support for one child where the payor's monthly income is $3500 is $594, not $525; second, the amount of $525 is not a presumptive amount for one child at *any* income level according to the Chart. Thus, I do not see how we can affirm when we cannot tell whether the trial court properly applied the Child Support Chart.

Based on the reasons noted herein, I would reverse the trial court's order reducing appellee's child-support obligation and would remand for reconsideration of the evidence. I respectfully dissent.

KAREN R. BAKER, Judge, dissenting. I dissent because no change of circumstances occurred to support the trial court's reduction of child support. The order setting child support specifically states that the $1000 child support "amount is a deviation from the child support guidelines and is based upon the accustomed standard of living of the child and that husband has assets in addition to his monthly net income which has recently been approximately $4,800." Appellee first requested that the court relieve him of his agreed child support obligation slightly over one month from the entry of the divorce decree setting the award. At that time, he claimed that he had not obtained the expected comparable employment nor was he receiving the unemployment benefits as expected. The trial court correctly denied that petition because the question was not whether the parties' expectations were met, but whether the circumstances regarding income had changed.

Testimony at trial established that appellee had at least $133,500 in one retirement account and assets from his deceased's mother's assets. He stated that he had liquidated other smaller retirement accounts, stocks, and some of this mother's assets for his living expenses and some child support before he stopped paying it. His deposits from these assets and unemployment benefits

totaled approximately $45,000 for that last year, and he asked the trial court to use that number as income. As the majority acknowledges, appellee asked that his child support be reduced because "he did not want to spend all of his retirement" to support his child.

Appellant testified that to maintain the lifestyle to which their child was accustomed, she had taken funds from her savings account but not yet from her retirement account which totaled about $56,000.

The majority finds that the "payor's original obligation was set in excess of the child support chart based upon his expected acquisition of employment commensurate with his former income, with deviation upward for the child's standard of living," but that the expiration of appellee's unemployment benefits was a material change in circumstances because the cessation of those benefits resulted in a decrease of $1000 per month income.

No, the cessation of benefits did not result in a decrease of appellee's income. Appellee was solely in control of how much, when, and in what manner his assets would be used to support himself and his son. Although diminution of earnings is a common ground for modification, a petition for modification will be denied if the change in financial condition is due to the fault, voluntary wastage, or dissipation of one's talents or assets. *Reid v. Reid,* 57 Ark.App. 289, 944 S.W.2d 559 (1997). *See generally Pierce v. Pierce,* 268 Ark. 864, 596 S.W.2d 364 (Ark.App.1980). Appellant chose what, how, and when to use his assets. On the one hand, the courts must not unduly interfere with the personal lives and career choices of individuals merely because they have been involved in a divorce. On the other hand, because there has been divorce, the courts are thrust into the middle of the parties' personal lives in order to protect the interests of the minor children who are also unwilling participants in the divorce. *Grady v. Grady,* 295 Ark. 94, 747 S.W.2d 77 (1988).

In this case, child support was set in excess of the chart amount in order to maintain the child's standard of living and was based upon the fact that appellee had assets to pay the support for the child and himself. A supporting spouse does not have total discretion in making decisions that affect the welfare of the family if the minor children have to suffer at the expense of those decisions. *Grady, supra.* The definition of income for child support purposes is intentionally broad to encompass the widest range of sources consistent with this state's policy to interpret income

broadly for the benefit of the child. *Ford v. Ford,* 347 Ark. 485, 65 S.W.3d 432 (2002). Because the child-support guidelines are remedial in nature, they must be broadly construed so as to effectuate the purpose sought to be accomplished by their drafters. *Pannell v. Pannell,* 64 Ark.App. 262, 981 S.W.2d 531 (1998).

While courts have broad discretionary powers to modify child support provisions when such modification is in the best interest of the child, and no hard and fast rule can be established regarding specific changes in circumstances or the necessary degree of the changes, *see Guffin v. Guffin,* 5 Ark.App. 83, 632 S.W.2d 446 (1982) (overruled on other grounds), a change in circumstances must still be shown before a court can modify an order regarding child support, and the party seeking modification has the burden of showing a change in circumstances. *Reynolds v. Reynolds,* 299 Ark. 200, 771 S.W.2d 764 (1989); *Ross v. Ross,* 29 Ark.App. 64, 776 S.W.2d 834 (1989). The assumption is that the trial court correctly fixed the proper amount in the original divorce decree. *Id.* Furthermore, the liberality of the original allowances cannot afford grounds for modification. *Hurley v. Hurley*, 255 Ark 68, 498 S.W.2d 887 (1973).

In this case, the trial court entered the child support award when appellee was unemployed and receiving no unemployment benefits. The only factual change from the time the decree was entered was that appellee no longer wanted to use his assets to support his son. A change in a payor's desire, or lack thereof, to support a dependent child is not a proper basis to find a change of circumstances. The effect of the majority's decision is to require the custodial parent to deplete her assets in order to maintain the minor child's standard of living, or to reduce the lifestyle to which the child is accustomed. Nothing shows how the court-ordered shift of reduction of assets to the appellant or a reduction in lifestyle for the child is in the child's best interest. No case law supports the proposition that a custodial parent must first deplete his or her assets before a noncustodial parent's assets may be liquidated. Furthermore, the original order in this case specifically relied upon the noncustodial parent's assets in setting the award of support.

Accordingly, we should reverse.

Ouida COX, Individually and as an Employee of Arkansas Electric Cooperatives, Inc. and Arkansas Electric Cooperatives, Inc. *v.* Peggy C. VERNON

CA 05-749 226 S.W.3d 24

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

Friday, Eldredge & Clark, L.L.P., by: *James C. Baker Jr.* and *Kimberly Dickerson Young*, for appellants.

M. Keith Wren, for appellee.

SAM BIRD, Judge. Appellants Ouida Cox and Arkansas Electric Cooperatives, Inc., (AEC) appeal the trial court's denial of two post-trial motions: their motion for a new trial (or alternatively, for remittitur) and their motion to strike an amended complaint filed by appellee Peggy Vernon. Appellants assert (1) that the trial court erred in denying their motion for a new trial/remittitur because Ark. R. Civ. P. 8(a) limits Vernon's recovery to less than $75,000, and (2) that the trial court erred in allowing Vernon to "escape" the limiting provision of Ark. R. Civ. P. 8(a) by amending her complaint after the verdict was rendered. We affirm.

The facts of this case are as follows. On August 1, 2000, Cox was involved in a motor vehicle accident with Vernon while Cox was driving an automobile in the scope of her employment with AEC. Vernon subsequently filed a lawsuit against Cox and AEC,

requesting "judgment in an amount sufficient to compensate [Vernon] for her medical expenses, pain and suffering, wage loss and mileage; for costs herein expended; and for all other just and proper relief." A jury awarded Vernon $122,400.

On November 19, 2004, after the jury verdict was rendered, Cox and AEC filed their motion for a new trial/remittitur. This motion claimed that, pursuant to Ark. R. Civ. P. 8(a), Vernon was limited to a recovery of less than $75,000 because her complaint failed to demand an amount in excess of that necessary for federal court diversity jurisdiction. On November 30, 2004, Vernon filed a post-trial amendment to her complaint to add such a demand. On December 1, 2004, Cox and AEC filed a motion to strike the amended complaint, arguing that Vernon could not remedy her failure to demand the requisite amount by filing a post-trial amendment to her complaint. On March 1, 2005, the trial court denied appellants' motion for a new trial/remittitur and appellants' motion to strike the amended complaint.

We first address appellants' argument that the trial court erred in denying their motion for a new trial/remittitur because Ark. R. Civ. P. 8(a) limits Vernon's recovery to less than $75,000. A question of law is reviewed on appeal using a de novo standard. *Helena-West Helena Sch. Dist. v. Monday*, 361 Ark. 82, 204 S.W.3d 514 (2005). Rule 8(a) states as follows:

> (a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether a complaint, counterclaim, crossclaim, or third party claim, shall contain (1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled. In claims for unliquidated damage, a demand containing no specified amount of money shall limit recovery to an amount less than required for federal court jurisdiction in diversity of citizenship cases, unless language of the demand indicates that the recovery sought is in excess of such amount. Relief in the alternative may be demanded.

Appellants point out that Vernon never set forth in any pleading a statement in ordinary and concise language making a demand for a specific amount of money, nor did she request an amount in excess of the federal court jurisdictional amount (*i.e.*,

$75,000). Appellants assert that, given the plain language of Ark. R. Civ. P. 8(a), Vernon's recovery should be limited to less than $75,000.

In *Interstate Oil & Supply Co. v. Troutman Oil Co.*, 334 Ark. 1, 972 S.W.2d 941 (1998), our supreme court held that the fact that the pleadings did not contain a demand for an amount in excess of the federal court jurisdictional amount in diversity-of-citizenship cases did not limit the plaintiff's proof of damages to the federal court jurisdictional amount. The court in *Interstate Oil* discussed Ark. R. Civ. P. 8(a) and specifically recognized that "[t]he obvious purpose of this section is to prevent a plaintiff from using unliquidated demands to avoid removal of diversity of citizenship cases to federal court." *Id.* at 5, 972 S.W.2d at 943 (citing the Reporter's Notes to Ark. R. Civ. P. 8). The court also reasoned that, while the appellants could have sought removal of the claim to federal court, they chose not to do so; thus, appellants' argument that the claim for damages was limited to the federal jurisdictional amount in diversity cases was found to be meritless. *Id.* at 6, 972 S.W.2d at 943.

In the case at bar, it is undisputed that there is no diversity of citizenship. Here, not only did the appellants fail to seek removal of the case to federal court — like the appellants in *Interstate Oil, supra* — but the case could not possibly have been removed because there was no diversity of citizenship. As our supreme court has recognized, the purpose of Ark. R. Civ. P. 8(a) is to prevent a party from using unliquidated demands to avoid removal of a case to federal court. When a case cannot be removed to federal court because there is no diversity of citizenship, the provisions of Rule 8(a) that limit recovery to an amount less than that required for federal court jurisdiction in diversity-of-citizenship cases are simply not applicable.

We therefore hold that the provisions of Ark. R. Civ. P. 8(a) regarding claims for unliquidated damage and the requirement of a demand for an amount in excess of the federal jurisdictional amount do not apply to cases that, for lack of diversity of citizenship, cannot be removed to federal court. Accordingly, we find that the provisions of Rule 8(a) do not limit Vernon's recovery to $75,000 simply because Vernon failed to include a demand for an amount in excess of the federal jurisdictional amount in her pleadings.

We need not address appellants' second point — that the trial court erred in allowing Vernon to escape the limiting provision of Ark. R. Civ. P. 8(a) by amending her complaint after the verdict was rendered — because the amending of the complaint is irrelevant to our disposition of the case. Here, there was no diversity of citizenship between the parties; as discussed above, the limiting provision of Rule 8(a) was not applicable.

Affirmed.

HART and NEAL, JJ., agree.

Sammy SWAN *v.* STATE of Arkansas

CA CR 04-795 226 S.W.3d 6

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

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

Mike Beebe, Ark. Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Following a bench trial in Pulaski County Circuit Court, appellant Sammy Swan was convicted of cocaine possession and use of drug paraphernalia in the course of and furtherance of a felony drug offense and was sentenced to two six-year sentences to run concurrently. On appeal, he argues that the trial court erred in admitting into evidence two plastic baggies of cocaine found on his person; a crack pipe found in the back seat of a vehicle in which he was a passenger; and a statement he made immediately after he had been arrested. We find no error and affirm.

On November 13, 2003, Sergeant Terry Kuykendall was on routine patrol in North Little Rock. While driving through the back parking lot of the Sportsman's Inn around four o'clock in the morning, he encountered a parked vehicle with three occupants. He approached the car to "make sure everything was okay" and to "check and make sure they were supposed to be on the property." Swan was sitting in the back seat of the car, and as Sergeant Kuykendall approached the vehicle, he noticed Swan "making movements." Sergeant Kuykendall testified that he "couldn't tell exactly what [Swan] was doing[, but] it appeared that he was trying to put something down in the side of the seat." Sergeant Kuykendall asked everyone to get out of the car and called for back-up

units. Sergeant Kuykendall admitted that the occupants were not free to leave at this time. He asked the driver of the vehicle for consent to search. After receiving consent, Sergeant Kuykendall searched the car and found a crack pipe in the back seat in the area where Swan had been sitting. Sergeant Kuykendall testified that while he was arresting Swan, Swan spontaneously stated that "the pipe's mine." Sergeant Kuykendall also stated that, after he had arrested Swan and as he was talking to him, Sergeant Kuykendall noticed something in Swan's mouth. He asked Swan to open his mouth, and when he did, the officer found two baggies of cocaine inside his mouth.

On March 15, 2004, Swan stood trial with Judge Barry Sims as the trier-of-fact. The trial proceeded with the testimony from two State witnesses — Sergeant Kuykendall and a forensic chemist, Felisia Brown. During Sergeant Kuykendall's testimony, Swan's counsel objected to the introduction into evidence of the pipe found in the backseat of the car and the baggies found in Swan's mouth because the officer did not have probable cause to seize or detain him. The court overruled the objection. After the State rested, the defense rested without presenting a case. The judge stated that he found Swan guilty and sentenced him to six years' imprisonment on both offenses to run concurrently. On appeal, Swan maintains that the trial court erred in admitting into evidence: (1) the crack pipe found in the vehicle; (2) the two plastic baggies found on his person; and (3) the statement he made to police immediately after he was arrested.

As an introductory matter, Swan never filed a formal motion to suppress with regard to the crack pipe, baggies, or statement. He first objected to the evidence at trial during Sergeant Kuykendall's testimony. Arkansas Rule of Criminal Procedure 16.2(b) requires that a motion to suppress be filed no later than ten days before the trial date. The court may entertain a motion to suppress at a later time for good cause. However, Rule 16.2 does not mandate the denial of every motion that is untimely. *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998). In the absence of a timely objection by the State during trial, the motion to suppress was properly before the trial court, and the trial court's ruling is properly preserved for our review. *See Hilton v. State*, 80 Ark. App. 401, 96 S.W.3d 757 (2003).

In reviewing a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error

and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004). We defer to the credibility determinations made by the trial judge when weighing and resolving facts and circumstances. *Id.*

In order to determine whether the trial court erred in its denial of Swan's motion with regard to the crack pipe found in the vehicle in which he was a passenger, we must first address the legality of the initial encounter between Sergeant Kuykendall and Swan. Arkansas Rule of Criminal Procedure 2.2 allows a law enforcement officer to "request any person to furnish information or otherwise cooperate in the investigation or prevention of crime." In *Adams v. State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988), an officer approached a parked car to investigate after noting that the car was parked in a dark lot, without the motor running despite the cold weather, and that there had been recent burglaries in the neighborhood. After approaching and asking to see the driver's license and registration, the officer smelled marijuana and asked the occupants to exit the vehicle. We held that

> under the provisions of Ark. R. Crim. P. 2.2(a), [the officer] was authorized to request identification information from appellant and the other occupant of the car . . . as a part of his duty to investigate and prevent crime. We think this was done without a "stop" as referred to in Ark. R. Crim. P. 3.1. Then, when the car window was rolled down and [the officer] smelled marijuana, he had a "reasonable suspicion" . . . to detain them for a reasonable period under Ark. R. Crim. P. 3.1.

Id. at 21–22, 758 S.W.2d at 712; *see also Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.3d 734 (1998) (noting the three categories of police-citizen encounters).

■ In the present case, Sergeant Kuykendall's initial approach to investigate was valid under Ark. R. Crim. P. 2.2; however, when the officer ordered Swan and the other occupants out of the vehicle, the stop converted to one that required the officer to have a reasonable, articulable suspicion that a crime had been or would have been committed. Swan contends that in ordering him out of the car and not allowing him to leave the premises, Sergeant Kuykendall illegally detained him without probable cause or reasonable suspicion and that this illegal seizure confers standing upon him to challenge all evidence that derived

from the illegal detention unless properly attenuated. However, it is not necessary for us to evaluate whether Sergeant Kuykendall had reasonable suspicion to support ordering Swan out of the vehicle because we hold that Swan does not have standing to contest the search of the vehicle.

Our supreme court has held that an appellant must have standing to assert Fourth Amendment rights because those rights are personal in nature. *See Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997). Furthermore, our supreme court has been constant in its holdings that a passenger in a vehicle must have an expectation of privacy in the searched vehicle in order to have standing to contest the search on Fourth Amendment grounds. *See Stanley v. State*, 330 Ark. 642, 956 S.W.2d 170 (1997); *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996); *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995); *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). Normally, this expectation of privacy must derive from a possessory interest in the passenger that was conferred by the vehicle's owner or someone with the authority to grant possession to the passenger. *State v. Bowers*, 334 Ark. 447, 976 S.W.2d 379 (1998). However, one exception to this rule is that passengers have standing to contest a search of an automobile immediately following an illegal stop because passengers have the right to assert their own Fourth Amendment rights, independent of the owner or driver of the vehicle, to challenge the initial stop or a seizure of their person. *Id.* at 450–51, 976 S.W.2d at 381; *see also Dixon*, 327 Ark. at 111, 937 S.W.2d at 646.

In this case, Swan relies on *State v. Bowers* to argue that he has standing to contest the search of the vehicle because Sergeant Kuykendall illegally seized him when he ordered Swan out of the car. Our supreme court in *Bowers* held that a passenger has standing to challenge a vehicle search that is the direct result of an illegal stop. *Bowers*, 334 Ark. at 451–52, 976 S.W.2d at 382. However, *Bowers* is distinguishable from the present case because here Sergeant Kuykendall's initial approach was valid under Ark. R. Crim. P. 2.2 and because, although Swan may have been illegally seized when the officer ordered him out of the vehicle, the driver of the car — and the person with a possessory interest in it — gave consent to the vehicle search independent of any violation of Swan's rights. In *Bowers*, there was no consent to search and the initial traffic stop of the vehicle was illegal. Therefore, the passen-

ger in *Bowers* had standing to contest the search of the vehicle because, but for the illegal stop and seizure, the search would not have occurred.

Swan's next argument on appeal is that the baggies of cocaine found on his person should have been suppressed; however, once Sergeant Kuykendall found the crack pipe in the backseat of the vehicle, he had probable cause to arrest Swan. An officer may arrest a person without a warrant if he has reasonable cause to believe that the person has committed a felony or any violation of law in the officer's presence. Ark. R. Crim. P. 4.1. Reasonable cause exists where facts and circumstances, within the arresting officer's knowledge and of which he has reasonably trustworthy information, are sufficient within themselves to warrant a man of reasonable caution to believe that an offense has been committed by the person to be arrested. *Thornton v. State*, 85 Ark. App. 31, 144 S.W.3d 766 (2004). Where an officer has the probable cause to arrest pursuant to Rule 4.1, he may validly conduct a search incident to arrest of either the person or the area within his immediate control. *Id.* at 37, 144 S.W.3d at 770.

Here, a crack pipe was found in the vehicle's back seat where Swan was sitting. Sergeant Kuykendall testified that it was his belief that Swan was attempting to stuff something between the seats. Based on this evidence, the officer had reasonable cause to believe that Swan possessed the crack pipe found in his seat, and the arrest was proper. After the valid arrest, the officer could search Swan's person, which he did. Therefore, the search of Swan's mouth resulting in the production of two baggies of crack cocaine was valid because it was a search incident to arrest, and the trial court did not err in allowing the introduction of the baggies into evidence during the criminal trial.

Swan's final argument is that the statement he made to Sergeant Kuykendall — "the pipe's mine" — should have been suppressed because he had not been read a *Miranda* warning. The evidence at trial established that Swan blurted out the statement either as he was being arrested or right afterward. Notwithstanding a suspect's entitlement to *Miranda* warnings, a spontaneous statement is admissible because the statement is neither compelled nor the result of coercion and thus does not offend his Fifth Amendment privilege against self-incrimination. *Stone v. State*, 321 Ark. 46, 900 S.W.3d 515 (1995). In *Scherrer v. State*, 294 Ark. 287, 742 S.W.2d 884 (1988), our supreme court stated that determining if a

defendant's custodial statement was spontaneous requires analysis of whether the statement was made in the context of police interrogation. The *Scherrer* court defined police interrogation as "simply direct or indirect questioning put to the incustodial defendant by the police with the *purpose* of eliciting a statement from the defendant." *Id.* at 291, 742 S.W.2d at 886.

In the present case, Sergeant Kuykendall testified that Swan spontaneously blurted out the statement after he was arrested. Although he had not been given a *Miranda* warning, no officer was interrogating him at the time the statement was made. Therefore, the statement was properly admitted into evidence.

Because the trial court did not err in allowing the State to introduce into evidence the crack pipe found in the vehicle, the two baggies of cocaine found in Swan's mouth, or the spontaneous statement Swan made during his arrest, we affirm.

Affirmed.

GLADWIN and BIRD, JJ., agree.

Kent KEAHEY, d/b/a/ Keahey Realty *v.*
Nedra PLUMLEE and Nancy Chandler

CA 05-482 226 S.W.3d 31

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

William R. Wisely, for appellants.

Todd Turner, for appellees.

LARRY D. VAUGHT, Judge. On February 7, 2005, the Garland County Circuit Court confirmed an arbitration award in favor of appellees and entered a judgment thereon but did not award appellees an attorney's fee. Appellant argues that confirmation of the award was barred by Ark. Code Ann. § 17-42-107(b) (Supp. 2005), while appellees argue that they should have received an attorney's fee pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1999). We affirm the trial court's order in all respects.

This case originated as a dispute between appellant and appellees over a real-estate commission. In April 2004, the dispute was arbitrated by a five-person panel appointed by the Arkansas Realtors Association. Following a hearing, the arbitrators found in favor of appellees and awarded them $18,500. Appellant appealed to an arbitration review tribunal, where the award was affirmed.

Appellees then petitioned the Garland County Circuit Court to confirm the award and enter judgment for $18,500 plus costs and an attorney's fee. Appellant moved to dismiss, citing Ark. Code Ann. § 17-42-107(b) (Supp. 2005), which reads:

> No salesperson, executive broker, or associate broker may sue in his or her own capacity for the recovery of fees, commissions, or compensation for services as a salesperson, executive broker, or associate broker unless the action is against the principal broker with whom he or she is licensed or was licensed at the time the acts were performed.

Appellant contended that, because he was not appellees' principal broker, section 17-42-107(b) prohibited appellees from suing him in circuit court to recover a commission.

Following a hearing, the trial court ruled that appellant's interpretation of the statute would leave appellees without a remedy. The court therefore denied appellant's motion to dismiss, confirmed the arbitration award, and entered a judgment in favor of appellees for $18,500 plus $104.65 in costs; no attorney's fee was awarded to appellees. Appellant now appeals and, while he does not challenge appellees' right to pursue their claim through arbitration, argues that, by virtue of section 17-42-107(b), appellees could not resort to circuit court to confirm their arbitration award. We review this point de novo as involving an issue involving statutory interpretation. *See Perkins v. Cedar Mountain Sewer Imp. Dist.*, 360 Ark. 50, 199 S.W.3d 667 (2004).

The first rule of statutory construction, to which all others must yield, is to give effect to the intent of the legislature. *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998). We first seek the legislative intent by giving the words of the statute their usual and ordinary meaning in common language. *R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001). If the language of the statute is not ambiguous and plainly states the legislature's intent, we will look no further. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). However, if the meaning of the statute is unclear, as it is under the circumstances of the present case, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *See Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n*, 354 Ark. 37, 118 S.W.3d 109 (2003). We

also consider the consequences of interpretation. *Citizens to Establish a Reform Party v. Priest*, 325 Ark. 257, 926 S.W.2d 432 (1996).

Section 17-42-107(b) provides that no salesperson, executive broker, or associate broker may "sue" in his or her own capacity to recover a commission, unless the action is against his or her principal broker.[1] The key question is whether the legislature, in declaring that these individuals may not "sue" for a commission, intended to prohibit them from coming into circuit court to confirm an arbitration award that they had already received. We do not believe that the legislature intended such a prohibition.

First, it appears that the purpose of section 17-42-107 is to ensure that actions for commissions against third parties are brought by the real party in interest — the principal broker — rather than a sub-agent. *See* Ark. Code Ann. § 17-42-107(a) (Supp. 2005) (providing generally that an action or suit to recover a real-estate commission or fee must be brought by a principal broker or the owner of a real estate firm that has acted through a principal broker); *see also* 12 C.J.S. *Brokers* § 269 (2004) (recognizing that the claim of a sub-agent is against the broker and not the principal to the transaction). However, this purpose would not be relevant where, as here, appellees instituted their claim in arbitration (with no objection by appellant noted in the record) and recovered an award. Under such circumstances, section 17-42-107(b) should not operate to prohibit individuals from consummating their arbitration proceeding by having the circuit court confirm their award and enter judgment thereon. *See* Ark. Code Ann. § 16-108-211 (1987) (providing that, upon application of a party, the court shall confirm an arbitration award unless grounds are urged for vacating, modifying, or correcting it); Ark. Code Ann. § 16-108-217 (Supp. 2005) (providing that the making of a written arbitration agreement confers jurisdiction on the circuit

[1] Although it is not clear from the record if appellees are "salespersons, associate brokers, or executive brokers," as defined by the Arkansas Real Estate License Law, Ark. Code Ann. §§ 17-42-101, *et seq.* (Repl. 2001 & Supp. 2005), we will assume for the purpose of our discussion that they fall into one of those categories. *See* Ark. Code Ann. §§ 17-42-103(1), (9), (14) (Repl. 2001) (defining "associate broker," "executive broker," and "salesperson" generally as persons who engage in various real-estate transactions while employed by or under the supervision of a principal broker).

court to enter judgment on an arbitration award). To hold otherwise would deprive the arbitrating parties of the traditional remedies available to them.[2]

Moreover, we do not believe that the legislature meant for section 17-42-107(b) to be applied to a petition to confirm an arbitration award. The statute's language provides that a salesperson, associate broker, or executive broker may not "sue" to recover a commission. Use of the term "sue" indicates that the legislature intended to prohibit litigation in court. Arbitration, however, is a form of alternative dispute resolution outside of conventional litigation. *See* Edward Dauer, *Manual of Dispute Resolution* § 5.02 (1994). Furthermore, the confirmation of an arbitration award is a continuation of the arbitration process rather than a lawsuit in the ordinarily understood sense, as shown by our earlier citation of Ark. Code Ann. § 16-108-211 (1987) and Ark. Code Ann. § 16-108-217 (Supp. 2005). Thus, it seems unlikely that, in using the word "sue," the legislature meant to include any aspect of arbitration.

Furthermore, the confirmation of an arbitration award cannot be likened to filing suit. It has been described as a mere summary proceeding whereby the court converts an arbitration award into a final judgment. *See* 6 C.J.S. *Arbitration* § 181 (2004). It is not a trial or a separate proceeding but a means for enforcement of an unsatisfied award. *See* 6 C.J.S. *Arbitration* §§ 178, 181 (2004).

In light of the foregoing, we uphold the trial court's confirmation of appellees' arbitration award and the entry of judgment thereon. Although we have employed a line of reasoning that differs somewhat from that used by the trial court, we note that our review of this statutory-interpretation issue is de novo. *Perkins, supra*. Additionally, the trial court may be affirmed if it is correct for any reason. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

■ On cross-appeal, appellees argue that the trial court should have awarded them an attorney's fee pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1999). Subsection (a)(1) of that statute

---

[2] Appellant argues that appellees could have pursued a different remedy in the form of a disciplinary action against him before the Arkansas Real Estate Commission. *See* Ark. Code Ann. §§ 17-42-311(a)(6), (13) (Supp. 2005); Ark. Code Ann. § 17-42-406 (Repl. 2001). Even if such a remedy were available, however, we construe section 17-42-107(b) to allow appellees to complete the process that they had begun in arbitration.

provides for an award of an attorney's fee where there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney. Subsection (b) provides that, in order to find a lack of a justiciable issue, the court must determine that the action or claim:

> was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another or delaying adjudication without just cause or that the party or the party's attorney knew, or should have known, that the action, claim, setoff, counterclaim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Subsection (d) of the statute provides that, on appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone.

After reviewing the record, we decline to hold that there was a complete absence of a justiciable issue in this case. While appellees contend that appellant raised "new arguments" in circuit court for the purpose of delay, appellant actively pursued only one of those arguments, that being the applicability of section 17-42-107(b). That statute has not, until today, been interpreted by our courts; further, the language of the statute is sufficiently unclear that a party or his attorney would be justified in making an argument regarding its meaning. In the present case, appellant's interpretation of section 17-42-107(b) is not unjustified but merely incorrect.

Appellees also contend that appellant was dilatory in not raising his argument concerning section 17-42-107(b) until the case came to circuit court. However, as appellant explains, he willingly participated in the arbitration proceedings, and his objection was that section 17-42-107(b) prohibited appellees' presence in court. A motion to dismiss prior to the circuit-court proceeding would therefore have been premature. Under these circumstances, we uphold the trial court's decision not to award appellees an attorney's fee.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

Nancy Gail EPPERSON *v.*
Charles Lawson EPPERSON

CA 05-548 226 S.W.3d 35

Court of Appeals of Arkansas
Opinion delivered February 1, 2006

The Blagg Law Firm, P.A. by: *Ralph J. Blagg*, for appellant.

Walmsley Law Firm, by: *Bill H. Walmsley* and *Murphy, Thompson, Arnold, Skinner & Castleberry*, by: *Casey Castleberry*, for appellee.

TERRY CRABTREE, Judge. The nineteen-year marriage of appellant Nancy Epperson and appellee Charles "Chuck" Epperson was dissolved by a decree of divorce dated February 1, 2003. Through mediation, the parties reconciled most of their differences as to custody, visitation, and the division of marital property. Some issues were not resolved, however, including the question of whether appellee's termination benefits under his contracts of employment were marital property. Appellant appeals the trial court's decision that those benefits were not marital property. We affirm.

Prior to and throughout the marriage, appellee worked as an agent for State Farm Insurance Company. As an agent, most of his compensation is derived from commissions earned on renewal premiums. In 1997, appellee entered into a new agency agreement (AA97) with State Farm, as well as a contract identified as "State Farm Agent's Transition Amendment" (Transition Agreement). These contracts provided termination benefits to be paid whether

the contract was terminated by either appellee, State Farm, or the agent's death. With regard to termination benefits, the parties agree that the purpose of the transition agreement was to equalize any difference between benefits that might have been owed under the pre-1997 agreement, and those potentially to be received under the 1997 contracts.

Under AA97, for all business written under the "Life Schedule of Payments," the agent would receive upon termination, if he had five or less years of service, the compensation due had the agreement not been terminated. If the agent had five or more years of service, then he would receive the compensation due through policy years six through fifteen. For all other policies attributable to the agent's account, if the agent had twenty-five years of service, State Farm would pay a percentage of the premiums collected while the policy was still in effect. Under the transition agreement, if the agent had two or more years of continuous service, State Farm was to pay a supplemental amount, based on a formula, for the first sixty months following termination. In addition, an agent was eligible for "supplemental extended termination benefits," beginning on the sixty-first month following termination, if an agent was sixty years old at the date of termination and had twenty years of service as a State Farm Agent and ten years of continuous service immediately preceding termination.

In his testimony, appellee said that he had been an agent with State Farm since 1980, that he had no intention of terminating the contract, that he planned to remain an agent indefinitely, and that he had no reason to believe that State Farm intended to sever the relationship. Evidence was introduced showing that, if the contracts were terminated as of May 31, 2004, the termination benefit had a value of $123,196. This amount was based upon a "Target Termination Amount" of $4,421 per month, and "Annuitized Model Termination Amount" of $2,425 a month, and "Supplemental Termination Payments" of $1,996 per month.

In finding that the termination benefits were not marital property, the trial court relied on the supreme court's decision in *Lawyer v. Lawyer,* 288 Ark. 128, 702 S.W.2d 790 (1986). There under consideration was the husband's termination benefits under his contract of employment with State Farm. That contract provided that, if the agreement was terminated by either party or death, the agent would be entitled to sixty monthly installments of termination pay, based on a specified percentage of his earnings

during his final year of employment, if the agent had been employed for two years or more. The contract also contained what the supreme court referred to as a "true retirement plan," called "Extended Termination Payments," that took effect if the contract was terminated after the agent reached age sixty-five and had at least twenty years of service. *Id.* at 130, 702 S.W.2d at 792. State Farm had calculated the benefits owed to the husband if the agreement were terminated as of the date of trial with the result that he would have received $1,288 a month for five years.

The trial court in *Lawyer* found that the benefits were marital property and ordered payment to the wife of half the amount received, if there were ever a termination, and if the wife were still living. The supreme court reversed, declining to extend its holding in *Day v. Day,* 281 Ark. 261, 663 S.W.2d 719 (1984). The court agreed with the husband that the eventual receipt of the benefits was too speculative for them to be considered marital property, and it reasoned that, because an agent's compensation, and in turn termination benefits, were based on commissions generated from renewal premiums, benefits that might be potentially received in the future would bear no relation to present earnings.

Though appellant argues that *Lawyer v. Lawyer, supra,* is distinguishable, we perceive no meaningful difference between the contract benefits in that case and the one before us. In both cases, compensation was due in the event of termination, whether brought about by the parties to the contract or death. Like *Lawyer,* the agreements here contain provisions that are the equivalent of retirement benefits. The only difference is that the benefits in the present case are potentially payable for a longer period of time than those in *Lawyer.* That the benefits in this case are more generous than those in *Lawyer* is a distinction without a difference in our view, and we hold that the trial court did not err in finding that the termination benefits were not marital property.

Appellant points out that other jurisdictions have held that similar termination benefits are marital property. However, in *Lawyer* the supreme court recognized that there was contrary authority, yet it specifically declined to follow it. Even if we were inclined to reexamine the issue, we are not empowered to overrule decisions of the supreme court. *Vinson v. Ritter,* 86 Ark. App. 207, 167 S.W.3d 162 (2004). If this issue is to be reconsidered, it must be done by that court.

As a final point, appellant asks us to remand for the court to determine present value of the termination benefits. That will not be necessary in light of our holding that the benefits are not marital property.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Terry HOOTEN, Special Administrator of the Estate of Sammy J. Hooten, Deceased *v.* Jacqueline JENSEN

CA 05-742 227 S.W.3d 431

Court of Appeals of Arkansas
Opinion delivered February 8, 2006

Jeff Mobley, for appellant.

Laws & Murdoch, P.A., by: *Timothy W. Murdoch*, for appellee.

ROBERT J. GLADWIN, Judge. Terry Hooten, special administrator for the estate of his deceased father, Sammy J. Hooten, appeals from an order of the Pope County Circuit Court denying his request that Sammy's marriage to appellee Jacqueline Jensen (Jackie) and certain transactions made by Sammy be set aside on the grounds that he lacked mental competency and acted under the undue influence of Jackie. The controlling question on appeal is the sufficiency of the evidence. We affirm the circuit judge's decision.

Sammy worked as a foreman for H.C. Price Company, which provided a pension plan for its employees. In 1999, Sammy designated Terry as his beneficiary, and another son, Cordy Hooten, as contingent beneficiary, for death benefits under the plan. After Sammy met Jackie at work, they became romantically involved, and she moved in with him at his house in Atkins in 2000. He added her name to his account with First Arkansas Valley Bank in Russellville on September 15, 2000.[1]

On May 7, 2001, at the age of fifty-two, Sammy showed symptoms of having suffered a stroke. He saw his family physician, Dr. William Scott, that day. Dr. Scott performed tests that indicated that Sammy had suffered two strokes. Dr. Scott referred him to Dr. J. Brett Ironside, a neurologist, who saw Sammy on May 10, 2001. On May 11, 2001, Sammy and Jackie were married by a Yell County justice of the peace, Thomas Randall. Sammy signed a

[1] Terry concedes that Sammy still had mental capacity when he added Jackie's name to this account.

form naming Jackie as his pension-plan beneficiary on May 16, 2001. The same day, he placed Jackie's name as a joint owner with right of survivorship on his account with Simmons First Bank of Russellville. Sammy traded his 2000 Dodge Ram truck and paid $5450 for a 2000 Jeep Grand Cherokee at Hagans Dodge-Chrysler-Plymouth Motors, Inc., on May 18, 2001. On June 11, 2001, he sold a 1997 Dodge truck to Floyd Harris, who gave him a check for $11,750, which was deposited in the account with First Arkansas Valley.

On June 12, 2001, Sammy was admitted to the hospital. He died on June 15. His death certificate listed his cause of death as myocardial infarction, as a consequence of stroke. Because of the rapid onset of symptoms before Sammy's death at a relatively young age, Dr. Scott recommended that Sammy's body be exhumed for an autopsy. Dr. Frank Peretti, a forensic pathologist, performed the autopsy on March 15, 2002. He concluded that hypertensive arteriosclerotic cardiovascular disease caused Sammy's death; that Sammy also had metastatic lung cancer and an enlarged heart; and that Sammy had suffered multiple heart attacks, of which he had probably not been aware. Only acetaminophen was detected by the toxicology analysis.

After being appointed as special administrator, Terry sued Jackie and H.C. Price Company on July 11, 2001, in the equity division of the Pope County Circuit Court, asking for an injunction prohibiting Jackie from receiving the pension benefits and seeking to set aside Jackie's designation as beneficiary. Terry alleged that, when Sammy signed the new designation-of-beneficiary form, he was mentally and physically incapable of making a rational decision and that Jackie took advantage of his impairment to convince him to marry her and to change his beneficiary. On August 27, 2001, Terry filed a separate lawsuit in the same court against Hagans Motors, Jackie, Mr. Harris, and Truman and Betty Tucker (who purchased the Dodge Ram truck from Hagans Motors), seeking to have the vehicle transactions set aside and the money and Sammy's other property exchanged therein returned to his estate. He also asked for an injunction directing Jackie to return the $19,500 that she had withdrawn from the two bank accounts. Terry's complaints for equitable relief were consolidated with the probate case.

At trial, Terry attempted to prove that Sammy was not mentally competent to enter into these transactions or to marry Jackie and that Jackie exerted undue influence over Sammy.

Jackie, Dr. Peretti, Mr. Randall, Cordy, Terry, Marvin Baswell, Juanita Lee, Margaret Ingram, David Ward, Jeff Hagans, and Mr. Harris testified. The depositions of Dr. Scott, Dr. Ironside, and Robin Rudell were introduced into evidence.

The trial judge issued a letter opinion on November 30, 2004, in which he found that Terry had not met his burden of proof. He explained:

> The burden of proving mental incapacity rests on the person seeking to set aside the contract or transaction; the burden of proof is by a preponderance of the evidence; [e]very case must be decided on its own peculiar facts and circumstances.
>
> There is much conflicting testimony in this case. William Scott, M.D., Sammy J. Hooten's family physician, testified that as of May 7, 2001, Sammy Hooten was not mentally competent to manage his own affairs, to contract marriage, or handle business transactions. However, Dr. Scott also testified that he referred Sammy J. Hooten to a neurologist, J. Brett Ironside, M.D., and that he would defer to Dr. Ironside's opinion because Dr. Ironside is a specialist in that area. Dr. Scott further testified that Dr. Ironside would be in a better position than himself, based upon his education, training, and experience, to make a determination of competency.
>
> J. Brett Ironside, M.D., Board Certified Adult Neurologist, testified that he first saw Sammy J. Hooten, May 10, 2001, as a result of a referral from Dr. Scott. He testified that Sammy J. Hooten at times seemed a bit slow to process some of his instructions, but this was likely due to language dysfunction which is not the same thing as cognitive abilities or intelligence. Dr. Ironside was asked,
>
> > Q. As far as his mental functioning, apart from using the wrong word or the wrong consonant, that you mentioned earlier, did you find any deficiencies?
> >
> > A. I did not.
>
> He then testified that in his opinion, although Sammy J. Hooten's language difficulties might make it at times a little tough for him to communicate what he was thinking or wanting to do, that did not imply loss of capability to do it.
>
> Under cross-examination, Dr. Ironside was asked,

> Q. And this man got married on May 11. I want to ask you this question, Sir: Do you feel that the condition that this man was in when you saw him on the 10th, that he was truly capable of making sound business decisions concerning the sale of property, entering into a marriage, negotiating the sale of vehicles, trading one for another and paying boot and that sort of thing?
>
> A. I have no reason to say that he was incapable of it.
>
> Q. Well, would this condition put him in a position to where he would be susceptible, or more susceptible, than a normal person to undue influence?
>
> A. Not more susceptible to undue influence, I wouldn't say that, no.

Dr. Ironside also testified that he would not have a reason to think Sammy Hooten's condition would change from the time he first saw him on May 10, 2001, without some new event, and that the new event occurred on or shortly prior to June 12, 2001, causing him to go to the emergency room.

In addition to the expert testimony, the majority of the lay testimony heard in this case leads the Court to believe that Sammy J. Hooten was competent to enter into the subject marriage and transactions.

The Court concludes after hearing the vastly conflicting testimony that the Special Administrator has failed to meet the burden of proving by a preponderance of the credible evidence that the marriage and transactions in question should be set aside as a result of the alleged incompetency of Sammy Hooten. Furthermore, the Special Administrator has not proven that the transactions in question should be set aside for fraud or undue influence practiced by Jacquelyn Hooten. Therefore, the Special Administrator's Complaints should be dismissed with prejudice. Jacquelyn Hooten's Petition for Dower should be granted.

In the judgment entered on December 30, 2004, the trial judge denied Terry's request that the marriage and the transactions be set aside; granted Jackie's petition for dower; found that the bank accounts, the pension benefits, and the Jeep were Jackie's

property; and declared Mr. Harris to be the owner of the 1997 Dodge truck. Terry filed a notice of appeal on January 14, 2005, from that decision.

Whether undue influence occurred in connection with a contract is a question for the trier of fact. *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993). We will not reverse a trial judge's findings regarding mental capacity or undue influence unless they are clearly erroneous, *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997), and we defer to the trial judge's superior position to decide credibility issues. *Coleman v. Coleman*, 59 Ark. App. 196, 955 S.W.2d 713 (1997).

Terry makes the following arguments on appeal: (1) Jackie unduly influenced Sammy into entering into the marriage and the disputed transactions; and (2) because Jackie was the dominant spouse, a presumption of undue influence and coercion arose, and the burden of proof should have been placed upon her.

We begin our discussion by noting that Terry cannot challenge the validity of Sammy's marriage to Jackie. Arkansas Code Annotated section 9-12-201 (Repl. 2002) provides:

> When either of the parties to a marriage is incapable from want of age or understanding of consenting to any marriage, or is incapable of entering into the marriage state due to physical causes, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction.

In *Vance v. Hinch*, 222 Ark. 494, 261 S.W.2d 412 (1953), our supreme court considered the effect of this statute's predecessor and concluded that, after a wife's death, her heirs could not attack her marriage to the appellee on the basis of her mental incompetence, because a voidable marriage can only be inquired into during both of the parties' lives. In the case at bar, the issue of whether the marriage should be set aside was argued before, and decided by, the trial court. All of the issues raised in the court below are before us for decision, and trial *de novo* on appeal in equity cases involves the determination of fact questions as well as legal issues. *See Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). We will uphold the trial court's decision unless it is clearly erroneous. Although the trial court announced that there was insufficient evidence of Sammy's alleged incompetency to warrant setting aside the marriage and transactions in question, and further stated that

the transactions in question would not be set aside for fraud or undue influence practiced by Jackie, we can affirm a trial court if it reaches the right result for the wrong reason. *Middleton v. Lockhart*, 355 Ark. 434, 139 S.W.3d 500 (2003). Therefore, in keeping with *Vance*, we affirm with respect to the trial court's decision regarding Sammy's marriage to Jackie, and address the validity of the disputed transactions separately.

According to Terry, Sammy's strokes rendered him mentally weakened and susceptible to undue influence by Jackie, on whom he depended, as illustrated by the following: (1) Mr. Randall testified that Sammy did not speak during the marriage ceremony and gave only a grunt and a nod for his "I do"; that Sammy was assisted into the building by Jackie; and that he was not sure that Sammy knew exactly what was happening; (2) on the day before the wedding, Dr. Ironside's examination of Sammy lasted only fifteen minutes and revealed that Sammy had trouble communicating; (3) Terry testified that, before the wedding, his father told him that he probably should not marry Jackie because she smoked, drank alcohol, and had children; that, after Sammy had a stroke, he mistook Terry for one of his brothers; and that Jackie prevented Terry and Cordy from seeing Sammy during his illness; (4) Jackie did most of the driving so that the transactions in question could be conducted; and (5) although Jackie insisted that Sammy was competent, she could not explain why she signed some of the relevant documents for him.

It is generally recognized that, in order to invalidate a contract on the ground of undue influence, a party must be deprived of his free will. *Dent v. Wright*, 322 Ark. 256, 909 S.W.2d 302 (1995). The questions of undue influence and mental capacity are so closely interwoven that they can be considered together. *See Noland v. Noland, supra.* The influence that the law condemns is not the legitimate influence that springs from natural affection, but the malign influence that results from fear, coercion, or any other cause that deprives the individual of his free agency. *Id.* Undue influence may be inferred from the facts and circumstances of a case. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). In the context of a will, it has been held that, where the mind of the testator is strong and alert, the facts constituting undue influence must be stronger than where the mind of the testator is impaired either by some inherent defect or by the consequences of disease or advancing age. *Pyle v. Sayers*, 344 Ark. 354, 39 S.W.3d 774 (2001).

Dr. Scott testified that, when he saw Sammy on May 7, Sammy had problems with his memory and following instructions and had left-and-right confusion; although his answers were slow, they were appropriate. He said that, when he saw Sammy on May 21, he had deficits in memory, cognitive function, and coordination. Dr. Scott stated that, when he saw Sammy on May 27, Sammy did not respond appropriately to questions and did not seem to understand what he (Dr. Scott) said. He testified that he did not believe that, on May 10, Sammy was able to make decisions for himself. However, he stated that he would defer to Dr. Ironside's opinion.

Dr. Ironside testified that, although Sammy had some difficulty in talking, he was able to provide an accurate history; that he (Dr. Ironside) found no evidence of mental deficiency; and that Sammy was competent to manage his own affairs and to make sound business decisions. He also stated that Sammy was not more susceptible than a normal person would be to undue influence, and that, although the area of Sammy's brain related to language function was damaged, he had no cognitive impairment.

Mr. Randall testified that he would not have performed the marriage ceremony if he had doubted Sammy's mental competency.

Jackie said that Sammy's visit with Dr. Ironside lasted for one to one-and-a-half hours. She testified that purchasing the Jeep was Sammy's idea, so that they would have a vehicle that was easier for her to drive. She stated that Sammy conducted the negotiations for the Jeep and that she did not discuss the transaction with the salesman, the manager, or the person who prepared the documents. Jeff Hagans testified that he negotiated with Sammy about the purchase of the Jeep while Jackie "basically sat there." He said that Sammy was very alert and that there was nothing out of the ordinary about the transaction. Although Jackie admitted signing the documents for the deal with Hagans Motors and the sale to Mr. Harris, she said that she did so at Sammy's request. David Ward, who witnessed the sale to Mr. Harris at First Arkansas Bank, testified that Sammy asked if his wife could sign the title; that he was able to understand Sammy; that there was no question about what Sammy wanted; and that Sammy and Mr. Harris "did the deal." Mr. Harris stated that Jackie was not present when he and Sammy negotiated the deal and that, although he could tell that Sammy had suffered a stroke, Sammy knew what he was doing.

Juanita Lee, who works at Simmons, testified that she saw Sammy sign the pension beneficiary-designation form and the bank account signature card. She said that Sammy's responses were appropriate; that he and she understood each other; that she was able to communicate with him; and that Jackie played very little part in the conversation.

Marvin Baswell, who knew Sammy for about three years and purchased a dozer from Sammy in April 2001, testified that, when Sammy telephoned him about a week or two before he died to ask how the dozer was running, he made sense and said nothing inappropriate. Robin Rudell, who worked on Sammy's dozers, testified that, after the stroke, Sammy talked a little loudly and slurred his words but was able to understand conversation, to work on the dozer, and to communicate how he wanted the work done on the dozer. About a week before Sammy "got really down," Robin said, Sammy seemed drunk and could not understand conversations, although he could run the dozer. He stated that he could understand Sammy as late as June 10. Margaret Ingram, who testified that she had known Sammy since 1981, said that, when Sammy brought Jackie to her house in mid-May and introduced her as his wife, he was "fine" and had no trouble speaking or understanding her.

In light of this evidence, the trial judge's findings are not clearly erroneous, and we affirm on this point.

Terry argues in his second point on appeal that the trial judge erred in placing the burden of proof on him. However, this argument was not raised to, or ruled on, by the trial judge. We will not address an argument where it is not shown that it was made in the trial court and ruled upon there. *See Turner v. Farnam*, 82 Ark. App. 489, 120 S.W.3d 616 (2003).

Affirmed.

CRABTREE, J., agrees.

ROBBINS, J., concurs.

JOHN B. ROBBINS, Judge, concurring. I concur in the majority's decision to affirm this case. I write separately because I would reach the merits of Terry's argument that Jackie unduly influenced Sammy into entering into the marriage. In light of the evidence, the trial court did not clearly err in finding no undue

influence and in failing to set aside the marriage. I agree with the majority's conclusion that none of the remaining findings were clearly erroneous.

Citing *Vance v. Hinch*, *supra*, the majority held that Terry cannot challenge the validity of the marriage because one of the parties to the marriage is deceased. However, that issue was not raised as a defense below, and we will not consider arguments that were not argued to the trial court. *See Laird v. Shelnut*, 348 Ark. 632, 74 S.W.3d 206 (2002). Moreover, Jackie does not even make this argument on appeal. It is axiomatic that we refrain from addressing issues not raised on appeal. *Phillips v. Earngey*, 321 Ark. 476, 902 S.W.2d 782 (1995). I submit that our review should be limited to the issues that have been raised and developed by the parties. And even if this issue were before this court, it would be unnecessary to affirm on the basis that the trial court reached the right result for the wrong reason because the reason given by the trial court was not wrong.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.*
Toby DIX and Carla Dix

CA 05-875 227 S.W.3d 456

Court of Appeals of Arkansas
Opinion delivered February 8, 2006

Gray Allen Turner, Office of Chief Counsel, for appellant.

JOHN B. ROBBINS, Judge. This is a one-brief appeal submitted by appellant Arkansas Department of Human Services ("DHS") concerning a dependency/neglect proceeding in Sebastian County Circuit Court. DHS argues that (1) the adjudication order has an erroneous finding regarding custody of the minor children, and (2) the circuit court erred when it did not issue findings of fact and conclusions of law as requested by DHS in a motion pursuant to Ark. R. Civ. P. 52. Because we have no jurisdiction to consider this appeal, we dismiss.

First, DHS's notice of appeal is ineffective to bring the adjudication order up for review. The filing of a notice of appeal is jurisdictional. *Brady v. Alken*, 273 Ark. 147, 617 S.W.2d 358 (1981); *Henry v. State*, 49 Ark. App. 16, 894 S.W.2d 610 (1995). Absent an effective notice of appeal, this court lacks jurisdiction to consider the appeal and must dismiss it. *Pannell v. State*, 320 Ark. 250, 895 S.W.2d 911 (1995); *Cannon v. State*, 58 Ark. App. 182, 947 S.W.2d 409 (1997); *Schaeffer v. City of Russellville*, 52 Ark. App. 184, 916 S.W.2d 134 (1996). Therefore, whether appellant filed an effective notice of appeal is always an issue before the appellate court.

In this instance, the proceeding was subject to an adjudication hearing on March 11, 2005, and at the conclusion, the trial court announced its findings, to which DHS objected regarding custody of the minor children. On March 28, 2005, at 2:58 p.m., DHS filed a "Motion for Findings of Fact and Conclusions of Law," citing to Ark. R. Civ. P. 52 and *McWhorter v. McWhorter*, 70 Ark. App. 41, 14 S.W.3d 528 (2000). The motion asked that the trial court "set forth separate written findings of fact and conclusions of law." An hour later, at 3:57 p.m, the trial court filed its "Adjudication Order," which included the following among its fourteen findings:

> 6. Legal custody of the juveniles shall remain with the Department pending further order of the Court and physical custody remains with Toni Anderson as previously ordered. The Court notes the Department's objection to the split custody arrangement. The Court makes this order based on the ruling in the case of *Linda Batiste v. Arkansas Department of Human Services*, Arkansas Supreme Court Case No. 04-486.

Thereafter, DHS filed a notice of appeal on May 11, 2005, in which DHS recited that it was appealing the March 28 adjudication order "and the denial of the motion for findings of fact entered March 28, 2005, and deemed denied on April 27, 2005."

Arkansas Rule of Appellate Procedure–Civil 2 provides specifically in subsection (c)(3)(A) that adjudication orders from juvenile cases in which an out-of-home placement is ordered are final and appealable orders. The time within which to appeal the adjudication was not tolled by the motion for findings because it was made pursuant to Ark. R. Civ. P. 52(a). While a proper motion pursuant to Ark. R. Civ. P. 52(b) would have extended the time within which to file a notice of appeal from the underlying order, *see* Ark. R. App. P. – Civ. 4(b), there is no such provision with respect to a Rule 52(a) motion. Appellant DHS failed to file a timely notice of appeal from that order because the notice was filed more than thirty days after the adjudication order was filed. Such a failure deprives this court of jurisdiction to consider the issues raised in that order. *See Jefferson v. Ark. Dep't of Human Servs.*, 356 Ark. 647, 158 S.W.3d 129 (2004); *Hawkins v. State Farm Fire and Casualty Co.*, 302 Ark. 582, 792 S.W.2d 307 (1990); *Moore v. Arkansas Dep't of Human Servs.*, 69 Ark. App. 1, 9 S.W.3d 531 (2000). Accordingly, we cannot consider DHS's arguments relating to errors made during the adjudication hearing.

To explain further, we hold that in both form and substance, DHS's motion was a Rule 52(a) motion. Rule 52(a) provides in part that "[i]f requested by a party at any time prior to the entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58[.]" In comparison, Rule 52(b) is reserved for motions or requests "made not later than 10 days after entry of judgment" that ask the trial court to amend previously made findings of fact or to make additional findings, which it may do.

The Reporter's Notes to the 2004 amendment of Rule 52 state that new wording was added to specifically overrule our appellate decision in *Apollo Coating RSC, Inc. v. Brookridge Funding Corp.*, 81 Ark. App. 396, 103 S.W.3d 682 (2003), which held that a Rule 52(a) motion could be made after entry of the judgment. Because the motion was filed before the entry of the adjudication order, it falls within Rule 52(a). Additionally, DHS's motion itself evidences that it was made pursuant to Rule 52(a). The motion asked for "separate written findings of fact and the conclusions of law," and this wording is only found in subsection (a). DHS's motion also cites to a court of appeals case that deals solely with Rule 52(a). Therefore, the time within which to appeal the adjudication order expired prior to the filing of a notice of appeal.

As another point on appeal, DHS asserts that its Rule 52 motion for findings of fact and conclusions of law was deemed denied when thirty days passed without action on it by the trial court. We disagree with DHS's characterization of the motion as "deemed denied." Subsequent to the Rule 52(a) motion, a written order followed setting forth fourteen separate findings. Thus, the entry of a written order with findings and conclusions granted DHS the relief it requested. It is axiomatic that a party who received the relief requested has no basis for appeal. *Jones v. State*, 326 Ark. 61, 931 S.W.2d 83 (1996); *Richmond v. State*, 320 Ark. 566, 899 S.W.2d 64 (1995); *Delacey v. Delacey*, 85 Ark. App. 419, 155 S.W.3d 701 (2004). If DHS was dissatisfied with the findings made in the adjudication order,[1] it was incumbent upon it to move for additional findings or amended findings within ten days as provided in Rule 52(b). In the absence thereof, we have nothing before us to review.

Appeal dismissed.

GLADWIN and CRABTREE, JJ., agree.

[1] DHS states in its brief that it prepared the adjudication order that the trial judge signed and filed.

John O'HARA *v.*
J. CHRISTY CONSTRUCTION COMPANY

CA 05-478 227 S.W.3d 443

Court of Appeals of Arkansas
Opinion delivered February 8, 2006

[Rehearing denied March 1, 2006.*]

Compton, Prewett, Thomas & Hickey, L.L.P., by: *Floyd M. Thomas Jr.*, for appellant.

* BIRD, GRIFFEN, and CRABTREE, JJ., would grant rehearing.

JOHN B. ROBBINS, Judge. This appeal concerns the denial of a workers' compensation claim for additional wage-loss disability benefits or permanent and total disability, over and above an earlier award of twenty-percent wage-loss disability. In a decision rendered by the Commission on January 15, 2005, it denied appellant John O'Hara's claim on two grounds: (1) the claim was barred by res judicata, and (2) even if the claim was not barred by res judicata, appellant failed to document "objective change in claimant's physical condition," to support his claim for additional wage-loss benefits. We reverse and remand for the Commission to reconsider its decision because it made errors of law.

This is not the first appeal in this case. Appellant John O'Hara suffered from a compensable work-related hernia on March 13, 1993, which was accepted by his employer, appellee J. Christy Construction Company. This case is controlled by the statutes and case law in effect prior to the workers' compensation law enacted in 1993. After appellant underwent surgery and convalescence, he suffered a compensable complication, that being neuropathy due to femoral nerve impingement. The impingement caused his right leg to have a burning, prickling sensation. Another surgery was performed to release the nerve, which improved his condition but did not eradicate the symptoms. His healing period ended in July 1994, whereupon he was given a twenty-percent permanent partial impairment rating to the body. All related benefits were accepted and paid by the employer up to this point. In 1996, appellant filed a claim for additional benefits in wage loss or permanent total disability, at which point the appellee controverted the claim.

The testimony taken at the hearing in March 1997 included appellant explaining his high school education and noting his disability in reading, his work history in the Air Force and then in construction, and his present physical condition. Appellant was forty-nine years old at that time. He testified that he could not work because his nerve injury prevented him from walking, standing, or exerting himself for any extended period of time. Nevertheless, appellant continued to work his cattle and farm acreage as best he could with constant pain and side effects from his medications. Video surveillance of appellant during that time showed that appellant smoked cigarettes, drove a truck, and walked with a limp. Appellee put on evidence of possible jobs that appellant could do, outside his ability and training. Appellant admitted that he had not sought any other employment because he

did not think he was capable of a full day's work. After reviewing the medical records and the other testimony and evidence, the administrative law judge issued an opinion in July 1997 that appellant was entitled to thirty-percent wage loss. Appellee appealed, and the Commission concluded that appellant was poorly motivated to return to work and somewhat exaggerating his symptoms, but also that he suffered a significant complication from his work injury that affected his earning capacity. It noted his inability to return to heavy manual labor, his age, limited education, and work experience. The Commission concluded in an opinion issued in February 1998 that appellant was entitled to twenty-percent wage loss over his twenty-percent impairment rating, a forty-percent total rating. On appeal, our court affirmed the Commission's decision in an unpublished opinion, *O'Hara v. J. Christy Constr. Co.*, CA98-599 (March 3, 1999).

Appellant filed another claim for additional wage loss or disability, which was the subject of a hearing in April 2003, six years after the last hearing. Appellant testified that his leg pain is worse than it was back in 1997, that he now wears a brace on his right leg because he suffered from a club foot, that he could not raise or lower his big toe, that he had continued falling spells, and that this was a progression of his nerve neuropathy. These worsened complications necessitated that he now use a TENS unit to ease the pain down his leg into his foot, and that he take more medication for pain and sleep. Appellant stated that he is less able to walk, that he is tired and weak all the time, and that he had sold cattle and timber because he could not do the family farm work as he had before. He rated his pain in 1997 as a six, whereas it was now between a seven and eight. At the time of this hearing, appellant was fifty-five years old. The administrative law judge found appellant to be entitled to an additional thirty-percent wage loss. Appellee appealed, and the Commission reversed in a January 13, 2005 opinion, which is the opinion we consider in the present appeal.

The Commission found in a two-to-one vote that appellant's claim for permanent and total disability from this work injury was barred by res judicata; and further that even if res judicata did not bar the claim, there were no objective diagnostic studies to show a change in his physical condition since being released from care. The Commission specifically recognized that it was applying pre-1993 Act law to his claim. Appellant timely filed a notice of appeal, arguing that this more recent claim was not barred by res

judicata if his physical condition changed; that he was not required to show change by "objective" findings; that even so, he showed objective findings of change; and that even if he had not, he fell within the odd-lot doctrine. Appellant asks that the case be remanded for reconsideration under the proper legal standards. We agree that the Commission erred by declaring his additional claim barred by res judicata and further that the Commission erred as a matter of law when it required objective findings to support a change in physical condition relative to his wage-loss claim. Therefore, we reverse and remand for a reconsideration of appellant's claim applying the correct law.

The Commission first erred in declaring this claim for additional benefits, particularly permanent and total disability, barred by res judicata. Res judicata can and does apply to workers' compensation cases if the merits of the issue have already been subject to a full and fair hearing. *See Beliew v. Stuttgart Rice Mill*, 64 Ark. App. 334, 987 S.W.2d 281 (1998); *Perry v. Leisure Lodges*, 19 Ark. App. 143, 718 S.W.2d 114 (1986). *See also Castleberry v. Elite Lamp Co.*, 69 Ark. App. 359, 13 S.W.3d 211 (2000); *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996); *Tuberville v. International Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986). Res judicata bars relitigation of that determination unless there is evidence of change following the previous order. *See Cariker v. Ozark Opportunities*, 65 Ark. App. 60, 987 S.W.2d 736 (1999); *Tuberville v. International Paper Co., supra.* Certainly, res judicata could apply where conditions have not changed. However, the adjudication that was res judicata in the case at bar was that appellant's condition *as of March 1997* entitled him to no more and no less than twenty percent wage-loss disability benefits. *See Tuberville, supra.* The Commission erred when it stated that appellant's claim for increased permanent disability benefits in 2003 was barred by res judicata, because his claim was based upon changes in his condition *post-1997.*

More importantly, the Commission proceeded to then analyze the claim, despite its having concluded that the claim was barred. Although the Commission initially articulated that appellant had not shown a change in physical condition, the Commission's discussion of the issue clearly demonstrates that the Commission imposed on appellant the burden to show by a preponderance of the evidence that there was "objective" evidence of physical change. It distinguished *Tuberville, supra*, because

in that case there was "documented" increased physical impairment. The Commission erred because had appellant proved entitlement to an additional impairment rating, then certainly objective evidence of such a change would have been necessary. *See* Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1991). This is so because a permanent impairment is usually a medically recognized condition or injury. The Commission opinions that it cited to as authority for the proposition for requiring objective diagnostic testing related to permanent physical impairments. This is inapplicable when the issue is wage-loss disability.

Former awards may be modified by the Commission in accordance with Ark. Code Ann. § 11-9-713(a)(2) upon a "change in physical condition." *See Southern Wooden Box Company v. Smith*, 5 Ark. App. 15, 631 S.W.2d 620 (1982). The statute itself does not require "objective" proof of such change, and more to the point, wage-loss disability takes into account a myriad of factors, including age and the effects of aging, which can impose a physical change. *See Tuberville, supra.*

This is made more apparent because the legislature specifically overruled *Tuberville* by enacting in 1993 section 11-9-713(e), which provides that:

> Aging and the effects of aging on a compensable injury are not to be considered in determining whether there has been a change in physical condition. Nor shall aging or the effects of aging on a compensable injury be considered in determining permanent disability pursuant to this section or any other section in this chapter. The purpose and intent of this section is to annul any and all case law inconsistent herewith, including *International Paper Co. v. Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990).

Before this change in the law, aging and the effects of aging were valid considerations in the determination of whether there had been a change in physical condition. We remand to the Commission for it to reconsider whether appellant demonstrated a change in physical condition that would support his claim for additional wage-loss disability, specifically including consideration of the fact that he aged six years between his claims and the effects of that aging. We also direct the Commission to consider, if appellant does not qualify for additional wage-loss disability under the proper analysis, whether appellant falls within the odd-lot doctrine, because it failed to render

findings on that issue. Until the General Assembly abolished the odd-lot doctrine by Act 796 of 1993, Arkansas had long recognized that one need not be utterly and abjectly helpless to be deemed totally disabled. Rather, our decisions hold that the odd-lot doctrine refers to employees who are able to work only a small amount; the fact that they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. *See M.M. Cohn v. Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App.1979). When the overall evidence places a worker prima facie within the odd-lot category, the employer bears the burden of proving the existence of suitable work that is regularly and continuously available to the worker. *See Walker Logging v. Paschal*, 36 Ark. App. 247, 821 S.W.2d 786 (1992). *See also M.M. Cohn, supra.* Because of appellant's total and permanent disability claim, appellee was on notice that the odd-lot doctrine was at issue. *Walker Logging v. Paschal, supra. See also Patterson v. Arkansas Dep't of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000); *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999); *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992).

The Commission's decision is reversed and remanded for proceedings consistent with this opinion.

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

BIRD, GRIFFEN, and CRABTREE, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. This is a one-brief workers' compensation appeal where the appellant contends that the Commission erred when it held that his claim for additional permanent disability benefits was barred by res judicata and that the Commission erred when it ruled that he failed to prove by a preponderance of the evidence that changed circumstances regarding his condition since the time of the last permanent disability award entitled him to additional permanent disability benefits. Because I find no basis for reversal, and thereby disagree with the majority, I must respectfully dissent.

Appellant's claim for additional permanent disability benefits is barred by res judicata. He initially sought permanent total disability benefits or wage loss benefits exceeding the 20% impairment rating assessed for his early 1993 recurrent inguinal hernia and femoral nerve impingement (following a right inguinal hernia repair in 1990). The Commission rejected the claim of permanent

total disability benefits, but awarded wage-loss disability benefits equal to an additional 20% to the body as a whole for a total disability award of 40% to the body. In doing so, the Commission stated that the appellant "is somewhat exaggerating the disabling effects of his injury, and is also poorly motivated to return to the work force . . ." The court of appeals affirmed that decision in an unpublished opinion. *See O'Hara v. J. Christy Constr.*, No. CA 98-599 (Ark. App. Mar. 3, 1999) (not designated for publication).

Appellant now appeals from the Commission's January 13, 2005, decision that reversed an ALJ opinion rendered on August 15, 2003, wherein the ALJ found that appellant "has sustained an increase in his permanent disability or loss of earning capacity in the amount of 30% above the previous award of 40% to the body as a whole." The Commission reversed the ALJ for two reasons. First, it held that the appellant's claim for additional benefits based on an alleged change in his physical condition was barred by res judicata. Second, the Commission held that even if the claim for additional benefits were not barred by res judicata, appellant failed to prove by a preponderance of the objective evidence that he had sustained a change in his physical condition.

I agree with the Commission that appellant's claim for additional wage-loss disability benefits is barred by res judicata. The Commission explicitly adjudicated appellant's claim for wage-loss permanent disability benefits in its February 2, 1998, decision. The present claim for additional wage-loss disability benefits merely seeks to relitigate the extent of appellant's wage-loss disability after that question has already been resolved by the Commission's finding that he suffered an anatomical impairment in an amount of 20% to the body as a whole and is entitled to wage loss disability benefits in an amount equal to an additional 20% to the body as a whole for a total disability rating of 40% to the body as a whole. The Commission's award was affirmed in the face of appellant's contention that the Commission's determination that he suffered only a 40% permanent partial disability was not supported by substantial evidence and that he is totally and permanently disabled. Thus, to the extent that appellant now challenges the Commission's denial of his claim for additional wage-loss disability benefits up to a determination that he is totally and permanently disabled under the "odd-lot" doctrine, appellant's challenge must fail. Appellant was found to not be permanently and totally disabled no later than March 3, 1999.

It is certainly true that Arkansas permits an injured worker to seek additional permanent disability benefits based on changed circumstances following a previous adjudication. Arkansas Code Annotated section 11-9-522(d) (Repl. 2002) authorizes the Commission to reconsider the question of functional disability and amend a previous disability award based on facts that have occurred after the original disability determination, provided that "any party" requests reconsideration within one year after the post-award facts have occurred. Furthermore, section 11-9-713(a) (Repl. 2002) permits a worker to petition the Commission for modification of a previous award based on change in physical condition. As appellant accurately states in his brief, the supreme court's decision in *International Paper Co. v. Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990), stands for the proposition that even advancing age qualifies as a factor that the Commission can consider in determining whether a change of circumstances has occurred. That decision does apply to appellant because his injury pre-dated the July 1, 1993, effective date of Act 796 of 1993, which abolished advanced age as a permissible factor for making increased permanent disability awards arising from changed circumstances. *See* Ark. Code Ann. § 11-9-713(e).

Nevertheless, *Tuberville* does not compel the Commission to believe a worker's allegation of increased loss of earning capacity. What the Commission decided in the present case amounts to a finding that the appellant failed to prove that his condition had changed. Appellant contends that neither the relevant statute nor the holding in *Tuberville* requires objective proof of changed circumstances, but that any change in the factors set out in *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 681 (1961), will suffice to support modifying a previous permanent disability award. That is correct; however, the worker still must prove by a preponderance of evidence that the circumstances have changed.

The Commission was certainly entitled to believe or disbelieve appellant's testimony about the extent of his incapacity. Although appellant testified during the April 17, 2003, hearing on his motion for additional benefits that his condition is worse than it was in 1997, his testimony was not corroborated or otherwise substantiated by any independent proof. Indeed, under cross-examination, appellant conceded that he was taking Amitriptyline when his claim was heard in 1997, that he takes more of that drug now but has not seen a doctor for several years, and that he testified in 1997 (as in 2003) that he had fallen several times. The Com-

mission had as much right to disbelieve appellant's testimony in 2003 as it did in 1997 (before it rendered the 20% award for wage loss-disability in the face of appellant's contention that he was entitled to permanent total disability benefits).

The Commission made no error of law when it denied the claim for additional benefits because it reasoned:

> [T]here has been no change in the claimant's documented physical condition after he reached maximum healing. Nor does the record support the ALJ's conclusion in the present matter that the claimant has sustained a "progression of the peripheral neuropathy suffered as a result of the surgical repair of the March 13, 1993 hernia."

The majority maintains that this statement, coupled by a comment about the lack of a documented objective change in appellant's physical condition, imposed an unauthorized requirement of objective findings to support a claim for additional benefits. Read in the context of the whole record, the Commission merely declared that appellant's allegations of changed circumstances have not been substantiated by any credible proof from the medical community. The Commission declared that the appellant exaggerated the extent of his affliction in its earlier decision. The only proof on the changed circumstances allegation came from appellant and from treatment providers. The Commission was certainly entitled to disbelieve appellant in the later instance where his self-serving testimony about his medication intake and other complaints was not corroborated by any persuasive proof from any treatment provider, where he had not sought treatment for his complaints of depression from the Veterans Administration (claiming that he distrusted the service he would receive from the VA in that treatment), and where appellant had apparently sought no other medical treatment consistent with his alleged increase in peripheral neuropathy for several years.

This case is not about the legal effect of the original decision in *Tuberville*. It is merely about whether the Commission's opinion contains a substantial basis for denial of the relief appellant sought. Given the Commission's ability to weigh the evidence and assess the appellant's credibility, I see no reason to reverse.

I am authorized to state that Judges BIRD and CRABTREE join in this dissenting opinion.

Leon HARRIS *v.*
ALTHEIMER UNIFIED SCHOOL DISTRICT

CA 05-646 227 S.W.3d 437

Court of Appeals of Arkansas
Opinion delivered February 8, 2006

Kearney Law Offices, by: *John L. Kearney*, for appellant.

Laser Law Firm, by: *Dan F. Bufford* and *Brian A. Brown*, for appellee.

WENDELL L. GRIFFEN, Judge. This is an appeal from an order denying appellant Leon Harris's motion for summary judgment and granting summary judgment in favor of appellee Altheimer Unified School District (school). Harris does not argue that genuine issues of material fact remain with regard to his case. Rather, he claims that he is entitled to summary judgment because it is undisputed that the school failed to comply with the Teacher Fair Dismissal Act by failing to renew his teaching contract, by failing to provide him written notice of the nonrenewal, and by failing to provide him a hearing. We affirm the grant of summary judgment in the school's favor because Harris was not a "teacher" within the meaning of the Act.

Harris holds a bachelor's degree in physical education. He worked for the school as a long-term substitute teacher and an

assistant boys' basketball coach during the 2001-2002 and 2002-2003 school years. The school hired Harris pursuant to a provisional license issued by the Arkansas Department of Education, effective August 1, 2001, through April 1, 2003.[1] Although Harris's provisional license expired on April 1, 2003, during the 2002-2003 school year, according to the deposition testimony of William Thomas, superintendent for the school district, Harris was qualified to continue teaching until the end of the school year as a substitute teacher because neither a substitute teacher nor an assistant coach in Arkansas is required to have a teaching license.

Harris's initial contracts for the 2001-2002 and 2002-2003 school years are each labeled "School Employee's Contract" for "Classified Employees." Each of his original contracts describes his employment duties as "Assisting with Boys Basketball" and "Other duties assigned by the Superintendent." His pay was determined based on his status as a "classified" employee pursuant to these contracts; thus, during these contract years, Harris was not paid at the rate a licensed teacher would be paid and was not paid from the teacher salary fund.

However, because the Department of Education chose to honor appellant's provisional letter as a provisional license for the 2001-2002 and 2002-2003 school years, appellant was actually qualified to receive pay from the teacher salary fund for those two contract years. Accordingly, the school paid Harris a total of $25,892.50 in back pay and drafted two new contracts for those years, reflecting the rate at which Harris should have been paid.

---

[1] Thomas explained, via deposition testimony, that a provisional *letter* allows a person six months to take the Praxis 1 and Praxis 2 Exams, which are teacher licensing exams that a person must pass in order to obtain a provisional teacher's license. He further explained that pursuant to a provisional teacher's *license*, a person can teach for three years. If the person thereafter passed the Praxis 3 exam, he would receive a nonprovisional five-year license. It is undisputed that Harris never successfully completed these requirements and that the school district was aware of that fact.

The undated provisional letter that was issued to Harris was faxed to the school on November 19, 2003. It clearly states that "this letter will serve as a six month, nonrenewable letter of provisional eligibility for Leon Harris." The letter further states that, if certain other contingencies were met, Harris may receive a "provisional license." However, despite the fact that the letter expressly stated that it was valid for six months, it also erroneously listed the effective dates as August 1, 2001 through April 1, 2003. Nonetheless, for reasons not explained in the record, the Arkansas Department of Education chose to honor this provisional letter as a provisional license for the time period from August 1, 2001, through April 1, 2003.

Each contract is dated June 10, 2003, but each indicates effective dates for the 2001-2002 and 2002-2003 school years, respectively. Unlike Harris's original contracts, these new contracts are each labeled "Teacher's Contract." The new contract for the 2001-2002 school year indicated that Harris was "To teach Secondary Physical Education." The new contract for the 2002-2003 indicated that Harris was "To teach Secondary Physical Education and Assist with Jr. Boys and Sr. Boys Basketball." Nonetheless, Harris's teaching license had not been renewed at the time these "new" contracts were executed.[2]

Ultimately, Harris filed suit against the school because the school did not rehire him for the 2003-2004 school year. He originally raised numerous claims but voluntarily nonsuited all of the claims except his claim under the Teacher Fair Dismissal Act (Act), found at Ark. Code Ann. § 6-17-1502 *et seq.* (Repl. 1999) & (Supp. 2001).[3] Harris filed a motion for summary judgment claiming that because the Act requires written notice of the nonrenewal of a teacher's contract as well as a hearing on the matter and because the school conceded that it not did not provide him with either, he was entitled to judgment for backpay and was entitled to be reinstated at his former job.

The school filed a competing motion for summary judgment, arguing that the Act was inapplicable because Harris "was

---

[2] Because Harris could not obtain a valid Arkansas teaching license before the 2003-2004 school year commenced, on August 25, 2003, he ostensibly obtained a Class 2 teaching license from the state of Montana that was effective from July 1, 2003, through June 30, 2008. Through Arkansas's policy of reciprocity, the Class 2 Montana license would have allowed Harris to teach as a licensed teacher in Arkansas. Based on the Montana license, on August 27, 2003, the Arkansas Department of Education issued Harris a teacher's license that was effective from January 1, 2003 through December 31, 2007.

However, the state of Montana subsequently determined that Harris's Class 2 license was issued in error because Harris had not completed all of the requirements to obtain such a license under Montana law. Therefore, Montana changed Harris's Montana license to a Class 5 license, which did not allow him to teach as a licensed teacher in Arkansas. In February 2004, after a hearing on the matter, the Arkansas Department of Education revoked Harris's Arkansas teaching license that had been issued via reciprocity. He did not appeal the Department's ruling.

[3] Harris also argued, *inter alia*, that the school was also required to given him notice of nonrenewal pursuant to the Arkansas Public School Fair Hearing Act, found at Ark. Code Ann. § 6-17-1701 *et seq.* (Repl. 1999). However, during the summary-judgment hearing, Harris moved to nonsuit his claims "for all other claims except violation of the Fair Dismissal Act" and he does not now argue that the Fair Hearing Act applies.

not nonrenewed or terminated by the school, but was simply not allowed to teach as a teacher because his provisional license expired and state law mandated that all teachers have a valid license." On November 19, 2004, a hearing was held on the parties' competing motions for summary judgment, during which the school admitted that it did not provide Harris notice of nonrenewal pursuant to the Act because it determined that he was not a "teacher," as that term is defined under the Act.

On March 16, 2005, the trial court entered an order granting summary judgment in the school's favor and a letter order explaining its ruling. In the letter order, the trial court explained its reasoning, in part, as follows:

> The rights afforded by the [Teacher Fair Dismissal Act][4] were created to protect "certified teachers" who are suspended, nonrenewed, or terminated due to reasons outside their certification. No fact question arises concerning whether the Altheimer Unified School District provided the plaintiff a timely notice, valid reasons, or a proper hearing as required by the Act. The Act is not applicable. Therefore, the Plaintiff's Motion for Summary Judgment is denied and the Defendant's Motion for Summary Judgment is granted.

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." Ark. R. Civ. P. 56(c). Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Riverdale Dev. Co., LLC v. Ruffin Bldg. Sys., Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004). The parties in this case do not argue that any facts are in dispute, only that each is entitled to summary judgment as a matter of law.

The parties' arguments are straightforward. Harris asserts that because he was a full-time, nonprobationary teacher for the

---

[4] The trial court incorrectly referred to the Teacher Fair Dismissal Act as "The Teachers Fair Hearing Act." In its discussion of "The Teachers Fair Hearing Act," however, the court specifically cited to § 6-17-1501 *et seq.*, which is the statutory citation for the Teacher Fair Dismissal Act. Thus, it is clear that in this portion of its ruling, the court was referring to the Teacher Fair Dismissal Act and not the Public Fair Hearing Act.

contract year 2002-2003 and because he had a provisional teaching license during that contract year, he was a "teacher" within the meaning of the Act. As such, he argues, the school was required to provide written notice of nonrenewal of his contract and a hearing on the nonrenewal. Because the school conceded that it did neither, he argues that he is entitled to summary judgment. The school counters that it was not required to provide Harris written notice of nonrenewal of his contract or a hearing because he was not employed as a certified teacher pursuant to the Act.

Under the Act, no public school in Arkansas may employ a teacher who is not licensed by the Arkansas State Board of Education. Ark. Code Ann. § 6-17-401 (Repl. 1999). Further, the Act defines a "teacher" as "any person, exclusive of the superintendent or assistant superintendent, employed in an Arkansas public school district who is required to hold a teaching certificate from the Department of Education as a condition of employment." Ark. Code Ann. § 6-17-1502(a) (Repl. 1999). The provisions of the Act are to be strictly construed. *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994).

The main provision of the Act at issue in this case is § 6-17-1506 (Repl. 1999), which governs contract nonrenewal, and provides that:

> (a) Every contract of employment made between a teacher and the board of directors of a school district shall be renewed in writing on the same terms and for the same salary, unless . . . :
>
> (1) by May 1 of the contract year, the teacher is notified by the school superintendent that the superintendent is recommending that the teacher's contract not be renewed[.]
>
> . . .
>
> (b)(1) Termination, nonrenewal, or suspension shall be only upon the recommendation of the superintendent.
>
> (2)(A) A notice of nonrenewal shall be delivered in person to the teacher or mailed by registered or certified mail to the teacher at the teacher's residence as reflected in the teacher's personnel file.

The first rule of statutory construction is to construe a statute just as it reads, giving the words their ordinary and usually

accepted meaning in common language. *Arkansas Pharmacist's Ass'n, Inc. v. Arkansas State & Public School Life & Health Ins. Bd.*, 352 Ark. 1, 98 S.W.3d 27 (2003). By the plain terms of § 6-17-1502(a), whether a person is a "teacher" is not contingent upon whether his teaching license was in effect when notice of nonrenewal is due under the Act, but rather, is contingent upon whether the position the person held during the contract year required a teaching certificate as a condition of employment. Despite Harris's licensure status, he was not a "teacher" within the meaning of the Act because the position for which he was hired did not require certification.[5] As such, we affirm the grant of summary judgment in the school's favor.

The case of *Sheets v. Dollarway School District*, 82 Ark. App. 539, 120 S.W.3d 119 (2003), is instructive. In that case, a certified teacher worked for the Dollarway school district from 1999-2001. He worked under the 1999-2000 contract as a coach, a position that required a teaching certificate. However, he refused to sign the 2000-2001 contract, which did not involve coaching duties, which offered him a position as a certified classroom teacher, and which reduced his pay. Instead, he endorsed his previous contract and worked in another position that did not require him to hold a teaching certificate, but for which he received the pay of a teacher.

Even though the *Dollarway* appellant received the pay of a teacher during the 2000-2001 school year, the *Dollarway* court held that he did not meet the definition of "teacher" under the Act, because for that school year, he held a position that did not require a teaching certificate. Thus, pursuant to *Dollarway*, even a person who holds a teaching certificate is not entitled to pursue a remedy under the Act if he is employed in a position for which a teaching certificate is not required.

---

[5] Despite appellant's assertion that he was a "full-time, nonprobationary teacher," if he was a "teacher" within the meaning of the Act, he was clearly a probationary teacher because he had worked for the school only two years. Ark. Code Ann. § 6-17-1502(2) (Repl. 1999) (providing that any teacher who has not completed three successive years of employment in the school district is a probationary teacher under the Act). However, even probationary teachers are entitled to notice of nonrenewal. *See Nordin v. Hartman Public Sch.*, 274 Ark. 402, 625 S.W.2d 483 (1981) (holding under a prior version of the Act, in which the definitions of "teacher" and "probationary teacher" were virtually identical to the current Act, that probationary teachers are entitled to notice of nonrenewal but are not entitled to know the specific reasons therefore or to a hearing on the matter).

Similarly here, even if Harris was certified during the 2001-2002 school year, and even though he received teacher pay under the new contracts, he did not meet the definition of "teacher" under the Act because he did not occupy a position that required a teaching license. Harris was hired as a substitute teacher. Clearly, the label assigned to his position is not dispositive as to whether he was, in fact, a teacher under the Act. *See Love v. Smackover Sch. Dist.*, 322 Ark. 1, 907 S.W.2d 136 (1995) (holding that the appellant was a teacher under the Act, regardless of the fact that she was designated as a "half-time, long-term replacement," where her contract with the school required her to be certified). Nonetheless, the uncontradicted deposition testimony of William Thomas, the school's superintendent, supports that Harris was *not* required to hold a teaching certificate in order to serve as a substitute teacher and as an assistant with the basketball program.[6] Thus, unlike the contract in the *Smackover* case, none of Harris's contracts required him to hold a certificate as a condition of employment.

Further, even though Harris executed two "teaching contracts" for the 2001-2002 and 2002-2003 school years and received back pay from the teacher salary fund, the "teaching contracts" did not change the requirements of the position for which he had been hired. Therefore, regardless of how the contracts under which Harris was paid were labeled or how much money he was ultimately paid or from what fund, the fact remains that the positions he held did not require a teaching certificate.

Simply put, it is employment in a position that requires a teaching certificate that entitles a person to remedies under the Teacher Fair Dismissal Act — not signing a document labeled a "teacher's contract" or receiving pay from the teacher salary fund. Harris did not meet the definition of "teacher" under the Act because he did not occupy a position that required a teaching license. Accordingly, we hold that the trial court did not err in

[6] The record leaves no genuine issue of material fact unresolved as to whether Harris was hired as a long-term substitute teacher. For example, a letter from the school's superintendent to the Arkansas Department of Education lists Harris as one teacher who was hired as a long-term substitute; the minutes from the school board meetings from September 19, 2002, indicate that board hired Harris as long-term substitute teacher; and the Arkansas Department of Education sent a letter to the school dated November 5, 2001, stating that Harris "is considered a long-term sub and must pass the Praxis I and Praxis II tests."

denying Harris's motion for summary judgment and in granting summary judgment in favor of the school.

Affirmed.

VAUGHT and BAKER, JJ., agree.

Dallas C. PONDER *v.* Bobby GORMAN

CA 05-817 227 S.W.3d 428

Court of Appeals of Arkansas
Opinion delivered February 8, 2006

Ramsay, Bridgforth, Harrelson and Starling L.L.P., by: *William M. Bridgforth* and *J. Jarrod Russell*, for appellant.

Kilpatrick, Williams, & Meeks L.L.P., by: *Gene Williams*, for appellee.

KAREN R. BAKER, Judge. Appellant Dallas Ponder challenges the Jefferson County Circuit Court's granting of summary judgment to appellee Bobby Gorman on appellant's negligent entrustment claim. Appellant urges us to reverse the grant of summary judgment that was based upon the finding that appellee did not know nor had reason to know that appellee's son, Joshua Lee Gorman, drove in an incompetent and reckless manner when operating the 1998 Nissan pickup truck appellee entrusted to his son. We find no error and affirm.

The collision from which this action arose occurred on August 8, 2003, at approximately 4:00 p.m. Appellant filed suit alleging the negligence of appellee's son, negligent entrustment by appellee, and another claim against appellee not at issue on appeal based upon a theory of *respondeat superior.* Appellant settled her negligence claim against appellee's son and dismissed that claim with prejudice. The specific allegations of negligent entrustment were that appellee's son "was an incompetent and reckless driver in that by reason of youth, inexperience and lack of skill and judgment, he was not qualified to operate the Gorman vehicle." It was further alleged that appellee knew or should have known of this incompetence.

At the time of the accident, appellee's son was eighteen years old and held a valid Arkansas driver's license. He had never received a traffic citation, had never been involved in a motor vehicle accident, and had never been arrested. He received no traffic citation for the accident with appellant. Significantly, there was no evidence that he was under the influence of alcohol or other drugs at the time of the accident with appellant.

In deposition testimony, appellee's son testified that he used marijuana but specifically denied using marijuana at any time the day of the accident with appellant. He explained that he did not use marijuana at his parents' home, where he also lived, and that he had been home the day of the accident. He also stated that it was possible that he used marijuana the next time that he was not at home or the day before the accident. He further explained that his father knew about his marijuana use for about six months before the accident and had imposed restrictions and rules on him related to use of the vehicle, including no use of the vehicle if he were using marijuana. He admitted that his father did not always know every single time he used marijuana.

Our standard of review for summary judgment cases is well-established. *Ginsburg v. Ginsburg,* 353 Ark. 816, 820-21, 120 S.W.3d 567, 569-70 (2003). Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Id.* The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *Id.* We no longer refer to summary judgment as a drastic remedy and now simply regard it as one of the tools in a trial court's efficiency arsenal. *Id.* Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.* Moreover, if a moving party fails to offer proof on a controverted issue, summary judgment is not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence. *Id.* at 821, 120 S.W.3d at 570.

Negligent entrustment is established by showing that: (1) the entrustee was incompetent, inexperienced, or reckless; (2) the entrustor knew or had reason to know of the entrustee's conditions or proclivities; (3) there was an entrustment of the chattel; (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; and (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant. *Mills v. Crone,* 63 Ark. App. 45, 49, 973 S.W.2d 828, 831 (1998). In *Mills*, we quoted from Section 308 of the Restatement 2d of Torts:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Id.

In *Sanders v. Walden,* 214 Ark. 523, 217 S.W.2d 357 (1949), our supreme court discussed the circumstances under which an automobile owner will be found liable for negligent entrustment:

> If the person permitted to operate the car is known to be incompetent and incapable of properly running it, although not a child, the owner will be held accountable for the damage done, because his negligence in entrusting the car to an incompetent person is deemed to be the proximate cause of the damage. In such a case of mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner in entrusting the machine to an incompetent drive, and of the driver in its operation.

Id. at 527-28, 217 S.W. 2d at 360.

In the case before us, appellant failed to present evidence of incompetence. The driver's incompetence and lack of capacity in operating the vehicle must be established first. Absent evidence of the driver's incompetence as a driver before the accident, there could be no basis for a trial court's finding that factual discrepancies existed regarding allegations that appellee negligently entrusted his vehicle to his son. Although appellant's argument seems to rely upon the premise that appellee was negligent in allowing his son to use appellee's vehicle because appellee knew that his son sometimes used marijuana, there is no evidence that appellee's son lacked the capacity to drive the car at the time of the accident because of marijuana use. Instead, appellant in her brief alludes to the driver's apparent lack of a work ethic relying upon appellee's deposition testimony that he would have fired his son for failure to show up for work but for the mother's support of their son's working only when he chose to work.

Appellant argues that she did not have to produce evidence that appellee's son was impaired at the time of the collision and that appellee entrusted the vehicle to his son knowing of his impairment. She asserts that Arkansas law does not require the entrustor to know that the entrustee will be operating in an incompetent or reckless manner at the specific moment that harm is inflicted on the plaintiff, but rather requires the entrustor to know of the entrustee's proclivities. Appellant argues that appellee knew that his son was not reliable and suffered from a general negligent trait. However, we cannot deem his son's failure to maintain a regular work schedule as evidence that appellee's son was in the habit of

driving under the influence of marijuana. Nor can we find that appellee's knowledge of his son's use of marijuana was evidence that his son habitually operated a vehicle under the influence of the substance.

Given the fact that appellee's son had never been involved in any motor vehicle accident nor received any traffic citations prior to the accident with appellant, nor did he receive a citation for the accident with appellant, and that there was no evidence that he was under the influence of alcohol or other drugs at the time of the accident with appellant, we cannot find that the trial court erred in granting summary judgment for appellee. Accordingly, we affirm.

GRIFFEN and VAUGHT, JJ., agree.

Billy Joe HENSON *v.* STATE of Arkansas

CA CR 05-679 227 S.W.3d 450

Court of Appeals of Arkansas
Opinion delivered February 8, 2006

Cecilia Ashcraft, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Billy Joe Henson was charged with theft by receiving following an incident in which he and his female companion allegedly attempted to use someone else's credit card to purchase over $100 in merchandise at an Exxon gas station (Exxon). The jury found Henson guilty of theft by receiving and sentenced him to twenty years' imprisonment as an habitual offender. Henson appeals, alleging that the trial court erred in denying his motion for directed verdict because the State failed to prove that he committed the crime of theft by receiving, and that the trial court erred in refusing to allow him to testify on his own behalf after both sides had rested but before jury instructions were administered. We affirm on both issues.

The evidence, viewed in the light most favorable to the verdict, reveals the following. On August 23, 2003, Henson and his companion Phyllis Dendy entered an Exxon and, after browsing for a few minutes, placed over $100 in merchandise at the counter next to the cash register. When Henson presented a credit card as payment, the cashier, Ella Davis, following store policy, asked Henson to provide photographic identification. Davis testified that Henson told her that he did not have any identification because it had recently been stolen and added that the credit card belonged to his companion. When pressed, Dendy also claimed

that she did not have any identification because it had been stolen. Davis refused to complete the sale. Davis testified that Henson and Dendy said some curse words and then left, indicating that they would just go somewhere else. She testified that she saw the two get into a white or gray older model car and drive off.

Davis reported the incident to her manager, who called the North Little Rock Police to report possible credit-card fraud. Officer Forney responded to the scene and viewed a videotape of the incident; he then radioed a description of the suspects and their vehicle to Patrol Officer Hart. Officer Hart spotted a vehicle matching the one from Davis's description in the parking lot of a nearby Kroger grocery store (Kroger). Officer Hart then informed Officer Forney that he had found someone fitting the description of the male suspect walking out of Kroger. While Officer Forney questioned this person, Officer Hart went to observe if anyone approached the car. Officer Forney informed the suspect, who identified himself as Billy Joe Henson, that he had been stopped because he matched the description of someone suspected of credit-card fraud. After Officer Forney ran Henson's information through the computer and discovered that there were no active warrants on Henson, he allowed Henson to leave but stated that he would keep his name and information for the future investigation.

Afterwards, Officer Hart radioed to Officer Forney that there was a woman sitting in the suspect vehicle. Both officers went to question the woman, who identified herself as Phyllis Dendy and voluntarily handed over a credit card in the name of Alyssa Loyd, as well as several receipts, including one from Books-A-Million, which was located very close to both the Exxon and the Kroger. At that time, the officers administered her Miranda rights and placed her under arrest; they also arrested Henson as he came toward the car.

At the trial, Loyd testified that she worked as a "brewista" at the Books-A-Million café and that she was unaware that she did not have her credit card until police called her later that day. She stated that she kept her card in a folio on her key ring; that she usually kept the key ring under the counter; that things were very busy on the day in question, so she inadvertently placed the key ring on top of the counter within reach of customers; and that she had never given anyone permission to use her credit cards. Davis testified that, although she could not identify him in a photo lineup shortly after the incident, she was certain that Henson was the man who handed her Loyd's credit card.

At the close of the State's case, Henson moved for a directed verdict, asserting that the State did not prove that he had committed the crime of theft by receiving; he contended that he did not give Davis the card, that he never had possession of the card, and that the videotape did not show him with possession of the card. The motion was denied. Henson's counsel advised the trial court that Henson had "just blurted out that he wanted to testify," to which the trial court responded that he wanted an answer and if Henson was not going to testify "then I want that on the record here at the bench." The following exchange then took place after Henson conferred briefly with his counsel:

> MR. PADILLA: After discussing our options, my client has decided that he chooses not to take the stand at this time.
>
> THE COURT: Is that correct, Mr. Henson, that you choose to —
>
> HENSON: Yes, but I'd like for the jury to be instructed as to my rights when I testify.
>
> THE COURT: Well, I have a jury instruction for that. They will be instructed as to that. But that is correct then, it is your decision to not testify?
>
> HENSON: Yes sir.

Defense counsel then rested and renewed his motion for a directed verdict, which was again denied. Counsel for both sides next conferred in the judge's chambers about the proper jury instructions. The following bench conference then occurred:

> MR. PADILLA: My client has decided at this time to disregard his counsel's advice and he's decided that he wishes to take the stand in his own defense and testify. I've urged him not to, and he had changed his mind in the course of the last few minutes in chambers and chooses to take the stand.
>
> THE COURT: Well, I'll make it easy on this. Depending upon what the jury's conclusion is, he may have the opportunity in the next phase. But all sides have rested and we're done, and we're going on with the jury instructions on this phase. Okay? You may all be seated.

HENSON: So, I am refused to testify.

MR. PADILLA: You are not going to be allowed to testify because both sides have rested.

Jury instructions were then read and closing arguments were presented. The jury convicted Henson of theft by receiving and sentenced him to twenty years' imprisonment as an habitual offender; this appeal ensued.

Henson first argues that the court erred in denying his motions for directed verdict because the State failed to meet its burden of proving that he committed the crime of theft by receiving. A motion for directed verdict is viewed as a challenge to the sufficiency of the evidence. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004). In reviewing a challenge to the sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the State and considers only the evidence that supports the verdict, affirming the conviction only if substantial evidence exists to support it. *Id.* Substantial evidence is evidence of adequate force and character that will, with reasonable certainty, compel a conclusion one way or the other, without resorting to either speculation or conjecture. *Id.*

In order to commit the crime of theft by receiving, a person has to receive, retain, or dispose of stolen property of another person, knowing that it was stolen or having good reason to believe that it was stolen. Ark. Code Ann. § 5-36-106 (Supp. 2003). A person is an accomplice in the commission of a crime if, with the purpose of promoting or facilitating the commission of an offense, he: "(1) [s]olicits, advises, encourages, or coerces the other person to commit it; or (2) [a]ids, agrees to aid, or attempts to aid the other person in planning or committing it; or (3) [h]aving a legal duty to prevent the commission of the offense, fails to make proper effort to do so." Ark. Code Ann. § 5-2-403 (Repl. 1997). A person does not commit an offense unless he acts with a culpable mental state with respect to each element of the offense that requires a culpable mental state. Ark. Code Ann. § 5-2-204(b) (Repl.1997). Theft by receiving requires that the defendant act "knowingly," meaning that the defendant is aware of his conduct or the attendant circumstances. Ark. Code Ann. § 5-2-202(2) (Repl. 1997). Accomplice liability requires "purposeful" action, which occurs when it is the defendant's conscious object to engage in a certain conduct or to cause a certain result. Ark. Code Ann. § 5-2-202(1).

The State argues that while Henson made timely directed-verdict motions, he only argued that there was insufficient proof that the property was recently stolen and that he acted as an accomplice; and therefore, his argument that the State failed to show that he acted with a knowing mental state is not preserved because this court does not consider arguments that are made for the first time on appeal. *Morris v. State*, 86 Ark. App. 78, 161 S.W.3d 314 (2004).

In this case, the theory of accomplice liability was implicated. One is an accomplice where he renders the requisite aid or encouragement to the principal with regard to the offense at issue. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Id.* One cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. *Id.*

Here, the State provided sufficient evidence to prove that Henson was at least an accomplice in the crime of theft by receiving. While Henson claims that the State did not prove that the credit card was recently stolen, Loyd testified that she normally kept her credit card in an ID folder attached to her key ring, that her card was indeed missing on the date in question when the police called to inform her that they had recovered her credit card, and that she had given no one permission to possess or use her card. The jury could have inferred from her testimony that the card was recently stolen. In addition, Davis testified that it was Henson who presented her with the credit card and that Henson indicated that he and Dendy were "together." The evidence also established that Dendy was in the Books-A-Million where Loyd worked around the time that the credit card was stolen, that Henson presented that credit card at the Exxon a short time later, and that he and Dendy tried to purchase over $100 in merchandise. While much of the evidence against Henson is circumstantial because it was Dendy who was placed in proximity to the theft and who actually surrendered the card to police, circumstantial evidence can provide the basis to support a conviction if it is consistent with defendant's guilt and inconsistent with any other reasonable conclusion, and such a determination is a question of fact for the fact-finder to determine. *Von Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004).

Henson also argues that Davis was not a credible witness and that the jury should not have believed her in light of the fact that she could not identify Henson from a photo line-up soon after the incident and because the videotape did not appear to show Henson actually handing the credit card to Davis. Davis testified that Henson was the man who handed her Loyd's credit card on the day in question. Also, it was undisputed that the videotape was not clear by the time the case was tried; and while the tape did not conclusively show that Henson handed the credit card to Davis, neither did it show Dendy handing the credit card to Davis. The tape essentially provided inconclusive evidence, and the jury, as the trier of fact, was entitled to believe all or part of any witness's testimony and to resolve any conflicts in testimony and inconsistencies in evidence. *Brown v. State*, 82 Ark. App. 61, 110 S.W.3d 293 (2003).

While the State asserts that the argument that it did not properly prove Henson had the requisite state of mind was not properly preserved, the issue can also be resolved in its favor. The theft-by-receiving statute states that a person's unexplained possession or control of recently stolen property gives rise to the presumption that he knows or believes the property to be stolen. Ark. Code Ann. § 5-36-106(c) (Supp. 2003). In this case, Henson offered no explanation as to why he was in possession of a credit card that did not belong to him. In sum, looking at the evidence in a light most favorable to the verdict, the verdict is supported by substantial evidence and should be affirmed.

Henson next argues that the trial court violated his constitutional rights when it refused to let him testify. A defendant in a criminal case has the right to testify in his own behalf under the First, Sixth, and Fourteenth Amendments of the United States Constitution. *Rock v. Arkansas*, 483 U.S. 44 (1987). The right to present relevant testimony is not without limitation and may, in appropriate cases, bow to accommodate other legislative interests in the criminal trial process; however, restrictions on the defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. *Id.*; *see also Whitfield v. Bowersox*, 324 F.3d 1009 (8th Cir. 2003) (holding that the defendant's right to testify is circumscribed by procedural and evidentiary rules, when the rules are neither arbitrary nor disproportionate to the right). Because the right to testify is a fundamental constitutional guarantee, only the defendant is empowered to waive this right; in addition this waiver should be made voluntarily

and knowingly. *United States v. Bernloehr*, 833 F.2d 749 (8th Cir. 1987). A voluntary and knowing waiver of the right to testify may exist where the defendant remained silent after counsel rested. *Whitfield, supra*; *see also United States v. Kamerud*, 326 F.3d 1008 (8th Cir. 2003) (holding that if a defendant desires to exercise his constitutional right to testify, he must act affirmatively and express to the trial court his desire to do so at the appropriate time or a knowing and voluntary waiver of the right is deemed to have occurred). The right to testify must be exercised at the evidence-taking stage of the trial, and once this stage has been closed, the trial court has discretion over whether to reopen for submission of additional testimony. *United States v. Jones*, 880 F.2d 55 (8th Cir. 1989). This rule promotes both fairness and order- interests that are crucial to the legitimacy of the trial process. *Id.*

In *United States v. Stewart*, 20 F.3d 911 (8th Cir. 1994), the Court of Appeals for the Eighth Circuit held that a defendant's right to testify is not unqualified and must, at times, yield to the interests of order and fairness and found that Stewart failed to assert his desire to testify in a timely fashion where he had unequivocally stated his desire not to introduce evidence and the court had informed the jury that it would next hear closing statements. The circuit court found that the trial judge did not abuse his discretion in refusing to allow Stewart to testify, particularly in light of Stewart's previous numerous efforts to delay and disrupt the trial. *Id.*

In *Jones, supra*, the court found no abuse of discretion where the trial judge refused to allow defendant to testify where he did not state his intention to do so until after the close of evidence although he was aware of his rights, and where by the time the request to testify was made, the parties had prepared jury instructions and summations and potential witnesses had been released and were unavailable.

In this instance Henson should just as well have been allowed to testify. Certainly, our supreme court has held that a trial court has the discretion to allow the State to reopen its case to provide a missing element of its case after it has rested and the defendant has made a motion for directed verdict. *See Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993) (allowing State to reopen case after defendant's motion for directed verdict, in order for six victims to testify and identify defendant as the culprit); *Cameron v. State*, 278 Ark. 357, 645 S.W.2d 943 (1983) (stating that it is "inconsequential whether flaws are recognized first by the

State or by the defendant" and finding that defendant was not prejudiced by trial court's permitting State to reopen case after defendant's motion for directed verdict). However, this court cannot say that the trial court abused its discretion in refusing to allow him to do so. Here, although Henson's response was qualified and somewhat inconsistent when the trial court first questioned him concerning his desire to testify, he responded affirmatively when the trial court again asked if it was his decision not to testify. Henson further failed to object after his attorney then rested without calling any witnesses. Henson requested that he be able to testify only after counsel had conferred in chambers to prepare jury instructions, at which point Henson's attorney stated that Henson had "changed his mind in the course of the last few minutes and chooses to take the stand."

The trial judge noted that Henson would have an opportunity to testify in the penalty phase but ruled that because both sides had rested, the trial would proceed. From these facts, we cannot say that the trial judge abused his discretion, where Henson clearly and on the record stated his intention not to testify in response to a direct question put to him by the trial court at the close of the evidence.

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.

Brenda BRADLEY and Kathleen Sasser *v.* Johnny WELCH, Steve Glass, Hodge Walker, Dixie Youth Baseball, Inc., Lafayette County Dixie Baseball, Pines Swim Club, Inc., and Maria Talley

CA 05-588 228 S.W.3d 559

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Miller, James, Miller & Hornsby, L.L.P., by: *Troy Hornsby*, and *Houston Madison Smith* for appellants.

Wright, Lindsey & Jennings, by: Charles Alston Jennings Jr., for appellee Johnny Welch.

Staci Dumas Carson and *Richard Nathaniel Watts*, for appellee Maria Talley.

JOHN MAUZY PITTMAN, Chief Judge. This case arises from the near-drowning of eight-year-old Dedrick Bradley at a swimming party held for players in a youth baseball league. Appellant Brenda Bradley, who is Dedrick's grandmother and primary caretaker, and appellant Kathleen Sasser, who is Dedrick's mother, brought suit for Dedrick's injuries against the local baseball league, its national organization, three league coaches, the swimming pool, and a team member's parent on numerous allegations of negligence, including failure to supervise Dedrick while he was at the pool. Appellants settled with the swimming pool; the remaining defendants, who are the appellees herein, were granted summary judgment. Appellants now appeal from that ruling. We affirm.

In the summer of 2000, Dedrick Bradley played baseball in the seven-and-eight-year-old division of the Lafayette County Dixie Baseball League. The league was a franchise of a national organization, Dixie Youth Baseball, Inc., a non-profit organization that describes itself as being "designed to give young southerners, who want to play baseball on a local level, an alternative to Little League." Near the end of the season, Dedrick was chosen for the county all-star team. That team played several games and was coached by appellee Johnny Welch, with assistance from appellees Steve Glass and Hodge Walker, all of whom had sons playing in the league.

Once the all-star team was eliminated from its final tournament, several parents, and possibly coaches, decided to have a party for the players to celebrate the end of the season and to hand out trophies. At some point, it was decided that a pool and pizza party would be held at the Pines Swimming Club. One of the team parents, appellee Marla Talley, was a member of the Club, and she arranged for the rental of the pool, paying twenty-five dollars to reserve the pool for 6:00 p.m. on July 25, 2000. The players' families, including Dedrick's grandmother, appellant Brenda Bradley, were notified of the date, time, and location of the party. According to Mrs. Bradley, Coach Welch called to invite Dedrick.

On the appointed date, Dedrick arrived at the pool with Mrs. Bradley and another of Mrs. Bradley's grandchildren, age three. Those eventually in attendance would include Coaches Welch, Glass, and Walker and their families; one of the players,

D.J. Ward, who came with Coach Walker because his mother could not come; and Marla Talley and her son. Shortly after arriving at the pool, Dedrick changed into his swimming trunks. Mrs. Bradley was "standing at the end of the pool" talking to the three-year-old and did not actually notice Dedrick getting into the water.[1] However, at a certain point, she realized that she could not see Dedrick, and she asked one of the other parents where he was. After a search was conducted for Dedrick and D.J., who was also missing, Coach Johnny Welch told everyone to clear the pool. He then stood on the diving board and saw the boys at the bottom of the pool. He dove in and brought them to the surface, where he and other coaches and parents administered CPR. Marla Talley, who said that she had just arrived on the scene when the search was taking place, called the police, and paramedics were dispatched. According to Steve Glass, Dedrick began breathing before an ambulance arrived. Dedrick was transported to a hospital in Hope and later to Arkansas Children's Hospital in Little Rock.

On March 18, 2002, and by subsequent amended complaints, Brenda Bradley and Dedrick's mother, Kathleen Sasser, sued Johnny Welch, Steve Glass, Hodge Walker, Marla Talley, Dixie Youth Baseball, Inc., Lafayette County Dixie Baseball, and the Pines Swim Club, alleging that their negligence was the proximate cause of Dedrick's injuries. They alleged that the coaches and the baseball leagues "sponsored" the party; that all of the defendants "planned, scheduled, and coordinated" the party; and that, upon Dedrick's arrival at the pool, he was "entrusted to the care, custody and control" of the defendants. The defendants were alleged to be negligent in numerous respects, including failing to supervise Dedrick; failing to provide various safeguards, including a lifeguard; making misrepresentations regarding the presence of a lifeguard and failing to disclose the absence of a lifeguard during the party; and failing to properly plan the party. Dixie Youth Baseball, Inc., was also alleged to be negligent in failing to provide appropriate instruction, supervision, and direction to its franchise. The defendants, in their answers, denied that they had a duty to supervise Dedrick because, at the time of the incident, he was in the care and custody of Mrs. Bradley, who was present at the scene and who stood *in loco parentis* to him.

---

[1] Photographs in the record indicate that the pool was not a very large one and was enclosed on three sides by a chain-linked fence.

Following discovery, the defendants, appellees herein, filed motions for summary judgment. They argued that, as a matter of law, they breached no legal duty to Dedrick; that the swimming pool was an open and obvious danger; that Mrs. Bradley, who was present at the pool party, had the duty to supervise Dedrick; and that the national organization had no knowledge of or participation in the party. Appellee Marla Talley specifically argued that Dedrick was a licensee to whom she owed no duty other than to warn of hidden dangers and refrain from injuring through willful and wanton conduct.[2] Appellants resisted the entry of summary judgment, contending, *inter alia*, that Dedrick was an invitee rather than a licensee; that the defendants had assumed a duty to supervise Dedrick; and that the defendants failed to take precautions to provide for a safe event.

Attached to the motions for summary judgment and responses were excerpts from the numerous depositions taken in this case. In addition to the facts previously set out in this opinion, the following matters pertinent to appellants' arguments were adduced during the depositions.

According to Mrs. Bradley, Dedrick had lived with her since he was born and she considered herself his mother. She said that Dedrick could swim, both on top of the water and under water; that he liked to swim; and that he had no prior swimming accidents. However, she said that Dedrick had not been in deep water, and, prior to the party, she told him not to engage in horseplay, go off the diving board, or go in the deep end of the pool. She stated that, when she heard that there would be a swimming party, she did not fear for Dedrick's safety because "the coaches invited him, and I assumed he was — they had chaperones" and that she trusted the coaches and the chaperones "to watch over him." However, she said that she had not talked to anyone about what type of supervision there would be at the pool, who the chaperones were, or whether there would be a lifeguard; nor did she see a lifeguard at the pool. Mrs. Bradley recognized that "you don't turn kids loose in a pool without being watched" and that "water is dangerous." However, she said that "they didn't say we had to supervise our own children." Her understanding was that, once she brought Dedrick to the pool, she had no further

[2] Mrs. Talley also claimed that she had immunity under Arkansas's recreational-use statute, Ark. Code Ann. § 18-11-305 (Repl. 2003). However, that argument was not addressed by the trial court and is not at issue on appeal.

responsibility for watching over him because she "turned him over to the league," "turned him over to the coaches," and was "not assigned" to supervise the children. She denied being told that she would be responsible for Dedrick at the pool and to bring him at her own risk.

Marla Talley was also deposed, and she said that she rented the pool for twenty-five dollars without expectation of reimbursement. She said that, when she arrived at the party, the women were at the shallow end of the pool and some of the men were at the deep end near the diving board "with the boys." The search for Dedrick and D.J. was in progress when she arrived. When she learned that the boys had been found in the water, she immediately telephoned for help. According to Mrs. Talley, she was aware prior to the party that there would be no lifeguard at the pool and she informed Coach Welch of that fact. However, she said that she did not offer to hire a lifeguard because "we would have adults there, many adults. Every child would have adults there, and we thought that would be sufficient." She also said that the issue of who would supervise the kids at the party was not discussed because "we had parents who would be there that would supervise the children that they brought." She acknowledged that no effort had been made to determine the level of the children's swimming abilities.

In Johnny Welch's deposition, he said that he began coaching in the league because he had been asked to help. When asked if he believed "there was a requirement of safety for the kids as a coach," he responded, "Oh, yes, sir." He agreed that a reasonable, careful person would have had a lifeguard at the swim party and that, if a lifeguard had been on duty, the near-drowning could have been prevented. However, he described the party as a "family event" and said that, "when we done this, we made it understood that the parents would have to be responsible for their own child," and he said that he informed Mrs. Bradley that she was responsible for supervising her child at the party (which Mrs. Bradley disputes). He also said that, at the party, Mrs. Bradley expressed no concern about the lack of a lifeguard. Welch said that all of the players who came to the party had at least one parent with them, except for D.J. Ward, who came with Coach Walker. He acknowledged that he did not ascertain whether the boys could swim.

Coach Steve Glass said that he attended the event as a family member and not as a coach. According to Glass, no one was in charge of the overall event; he did not try to determine whether

any of the boys in attendance could swim; and each parent was responsible for his own child. Two photographs were admitted through Glass's deposition. One showed a sign at the pool that included the words "Swim At Your Own Risk" and "You must obey lifeguard at all times"; another sign read "All Guests Must Register With Lifeguard."

Coach Hodge Walker said that the party was mostly taken care of by Johnny Welch. He admitted that he assumed responsibility for D.J. Ward because he took D.J. to the party and D.J.'s mother was not there. He said that, when he arrived at the party at about the same time as Mrs. Bradley, Dedrick and D.J. were "hollering" to swim, so he asked Mrs. Bradley if Dedrick could swim; she said that Dedrick had swum in a pool behind her house.

There was also deposition testimony regarding the relationship between the local league and the national Dixie organization. Johnny Welch testified that the local baseball league paid a fee to be franchised with the national organization; however, he said, the national organization did not supervise the local league and provided no money or equipment to the local league. The local league relied on parent contributions or fees, which, for Welch's team, was $35 per player. A portion of that money was sent to the national organization for insurance coverage; otherwise, it was used for team uniforms. Welch said that did not have to report to the national organization about the fact that the local league was having a swimming party, nor did he consider the party a "sanctioned event"; rather, he said, it was merely a "family event." Steve Glass also testified that it was not necessary to inform the national Dixie organization about the swim party or, as far as he knew, obtain permission. He agreed, when questioned, that the party could be considered a "Lafayette function," and a "sanctioned" party. Walker said that he did not understand the swim party to be a "sanctioned" event.

Wesley Skelton testified as the commissioner of the national organization. He said that the organization assesses a $10 fee per team and that local leagues have "almost total autonomy" as long as they abide by playing and tournament rules. He said that he was aware that, in some communities, a year-end party is held for the players. However, because the parties do not come within Dixie's rules or regulations, Dixie is not concerned about that. Further, he said, Dixie does not govern activities outside the playing field.

A hearing was held on the motions for summary judgment, after which the trial judge issued two letter opinions. He ruled that

the party was a social event organized by the team parents and thus all persons in attendance were licensees; that there were no hidden or latent defects in the pool of which the defendants had a duty to warn; that Brenda Bradley was aware that the water was inherently dangerous; that custody of Dedrick was never relinquished by Mrs. Bradley to another person; and that it was the lack of parental supervision that proximately caused Dedrick's injuries rather than any willful and wanton conduct by the defendants. Thereafter, orders were entered granting summary judgment to appellees. Appellants now appeal from those orders and make four arguments: 1) that the trial court erroneously focused on the premises-liability aspect of the case and ignored appellants' standard negligence allegations regarding failure to supervise; 2) that there was some evidence that appellees had a duty to supervise Dedrick; 3) that there was some evidence that Dedrick was not under parental supervision at the time of the accident; 4) that there was some evidence that Dedrick was an invitee rather than a licensee.

In reviewing summary-judgment cases, we need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Moses v. Bridgeman*, 355 Ark. 460, 139 S.W.3d 503 (2003). The moving party always bears the burden of sustaining a motion for summary judgment. *Id.* All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. *Id.* The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with 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. *Id.* With these standards in mind, we address each of appellants' four arguments.

Trial Court's Failure to Address Ordinary Negligence Claims

According to appellants, their complaint asserted causes of action both for premises liability, such as failure to eliminate the dangers of the pool, and negligent activity, such as failure to provide adequate supervision. They claim that appellees moved for summary judgment solely on the premises-liability claims, and that, as a result, the trial court granted summary judgment solely on that basis without regard to their claim for negligent supervision. This is evidenced, they say, by the trial court's reliance on Dedrick's status as a licensee.

This court has held that a negligent-supervision claim may be analyzed without regard to a child's status on the land. *See Anderson v. Mitts*, 87 Ark. App. 19, 185 S.W.3d 154 (2004) (recognizing that a person who assumes a duty to supervise a child may be liable for negligent supervision, regardless of whether the child is a licensee). However, a full reading of the trial court's letter opinions shows that the court considered both the premises-liability and negligent-supervision claims asserted by appellants. As evidence that the court considered both of these theories of recovery, we observe that, in addition to ruling that Dedrick was a licensee, the court ruled that Mrs. Bradley never relinquished custody of Dedrick to another person; that the appellees breached no duty of care; and that the lack of parental supervision was the proximate cause of Dedrick's injury. Thus, the court went beyond the mere determination of whether Dedrick was a licensee and explored the question of whether appellees were liable for a failure to supervise Dedrick. We find no error on this point.

Evidence That Appellees Had a Duty to Supervise Dedrick

Appellants' next point is an attempt to bring this case within the purview of *Mitts*, *supra*. In *Mitts*, a mother who was painting her house voluntarily and deliberately placed her toddler in the custody of the child's aunt, who took the child home with her. While staying at his aunt's house, the child received a severe burn, and the parents sued the aunt. In the ensuing lawsuit, the trial court directed a verdict in favor of the aunt on the basis that the child was a licensee. We reversed, and appellants correctly state the gravamen of our holding as follows: "even if a child is a licensee on the premises, a defendant, even if he or she is a landowner or occupier, owes a duty of reasonable care to provide supervision to the child *if the defendant has been entrusted with and accepted responsibility for supervising a child*." (Emphasis added.) Appellants contend that, in the case at bar, our holding in *Mitts* should apply because there is some evidence that Mrs. Bradley entrusted Dedrick to appellees and that appellees accepted the responsibility for supervising him.

For their claim that appellees accepted responsibility for supervising Dedrick, appellants rely on the fact that Dedrick was invited to the party; that the purpose of the party was to celebrate the end of the season and give out trophies; that, according to Coach Walker, Johnny Welch "mostly took care of" the party; that the party was planned by the coaches and parents; that Marla

Talley rented the pool for the league; that Steve Glass agreed in his deposition that the party was a "Lafayette function"; that Coach Welch said that "there was a requirement of safety" for the kids; that Coach Walker asked Mrs. Bradley if Dedrick could swim; that Mrs. Talley saw the coaches near the boys and thought that they were supervising the boys because they were "right there"; and that Mrs. Bradley was not told that there would be no supervision or to bring Dedrick at her own risk. For their claim that Mrs. Bradley entrusted Dedrick to appellees, appellants rely on Mrs. Bradley's statements that, once she arrived at the pool, she felt that she had no further responsibility for watching over Dedrick and "turned him over to the coaches" or "the league" or "the chaperones."

We disagree with appellants that these factors show that Mrs. Bradley entrusted Dedrick to appellees and that appellees accepted responsibility for supervising him. In *Mitts*, we quoted a passage from Dan B. Dobbs, *The Law of Torts* § 236 (2001), to the effect that a landowner owes a duty of reasonable care if he has been entrusted with *and* accepted responsibility for supervising the child. This envisions an actual transference of supervisory responsibility from the parent to another person. In the case at bar, unlike the situation in *Mitts*, there was no conscious and deliberate shifting of responsibility from the parent to the purported caretaker; rather, the evidence, even when viewed most favorably to appellants, showed that Mrs. Bradley unilaterally and without communicating her intention, claimed to have turned over responsibility for her child. Further, there is no genuine issue of material fact regarding whether appellees accepted from Mrs. Bradley the responsibility for supervising Dedrick. While appellees may have planned the party and engaged in the ordinary, instinctual supervision that most adults undertake when they are around children, there is no showing that appellees took over supervision from Mrs. Bradley. We therefore decline to bring this case within our holding in *Mitts*.[3]

---

[3] On this point, appellants also rely on the testimony of Coach Walker, who said that he felt responsible for the other injured boy, D.J. Ward. However, D.J.'s mother sent D.J. to the party with Walker. Coach Walker's acceptance of responsibility for D.J. is therefore illustrative of the situation in which a parent unequivocally relinquishes supervision of her child to another person and that person accepts the supervisory responsibility.

Evidence That Mrs. Bradley Was Not Supervising Dedrick

Unlike the previous point, in which appellants urged us to bring them within the holding of a case, on this point, appellants attempt to avoid the application of the supreme court case of *Moses v. Bridgeman, supra.* In that case, the Bridgemans invited people to their house to make plans for a family reunion. Five or six children were present, among them twelve-year-old Donganell Moses, whose mother was also present and supervising him. The children wanted to swim, and Mrs. Bridgeman provided life jackets, insisted that Donganell wear one, and asked the parents if the children could swim. Later, Donganell was found at the bottom of the pool without his life jacket, having died from drowning. The supreme court affirmed a summary judgment in favor of the Bridgemans, ruling, *inter alia,* that a swimming pool is an open and obvious danger for children and that, if the parent has been warned or the condition should be obvious to the parent, the parent's failure to supervise is the proximate cause of the child's injury. *See also Baldwin v. Mosley,* 295 Ark. 285, 748 S.W.2d 146 (1988). Appellants contend that the ruling in *Bridgeman* is dependent on the factual conclusion that the child was actually under parental supervision at the time of the accident. In the case at bar, appellants contend, there was evidence that Mrs. Bradley was not supervising Dedrick.

Although there are clearly some factual differences between *Bridgeman, supra,* and the case at bar, those differences do not change the fact that, in the present case, Mrs. Bradley was undisputedly aware of the obvious danger of the swimming pool, was on the premises when the incident occurred, had not overtly relinquished supervision of Dedrick to appellees, and, as explained previously, there had been no knowing acceptance of supervisory responsibility by appellees. For all practical purposes, therefore, Mrs. Bradley, as Dedrick's parent, was in charge of supervising Dedrick at the party. She cannot cast that responsibility aside simply by stating that she was not supervising her child.

Evidence That Dedrick Was an Invitee

For their final claim, appellants argue that there was some evidence that Dedrick was an invitee, in particular, a business invitee. A business invitee is a person invited to enter or remain on property for a purpose directly or indirectly connected with the business dealings of the possessor of the land. *Lively v. Libbey*

Memorial Medical Center, 311 Ark. 41, 841 S.W.2d 609 (1992). Appellants contend that there is some evidence that the purpose of the party was not merely social (in which case Dedrick would unquestionably be a licensee — *see Bader v. Lawson*, 320 Ark. 561, 898 S.W.2d 40 (1995)) but to encourage participation in the baseball league.

Appellants cite *Lively*, *supra*, where a plaintiff who was injured in a hot-tub accident on her employer's premises claimed that she was an invitee because the employer offered use of the hot tub as a fringe benefit to retain employees and attract prospective employees. The supreme court held that a fact question remained on the issue of whether the plaintiff was an invitee or a licensee. However, in *Lively*, there was deposition testimony by the company president that use of the whirlpool was a fringe benefit of employment. By contrast, in the case at bar, the deposition testimony is devoid of evidence that the party had any business aspect to it or that the league or the national organization benefitted economically from the party. Appellants' claim in this regard is mere conjecture, which is not sufficient to overcome a summary judgment. *See Browning v. Browning*, 319 Ark. 205, 890 S.W.2d 273 (1995). The only, or at least, primary benefit of the party, as shown by the depositions, was social. According to *Bader*, *supra*, we have declined to expand the invitee category beyond that of a public or business invitee to one whose presence is "primarily social."

In light of the foregoing, we affirm the trial court's grant of summary judgment to appellees.

Affirmed.

GLOVER and ROAF, JJ., agree.

Nery ESTACUY *v.* STATE of Arkansas

CA CR 04-1195 228 S.W.3d 567

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Rachel A. Runnels, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. This criminal case raises numerous issues relative to appellant's convictions arising out of a hit-and-run motor vehicle accident involving personal injury. After two young women were hit, and a third almost hit, by a car that then sped away, appellant was charged with and convicted of a number of crimes, including two counts of first-degree battery and one count each of aggravated assault, leaving the scene of an accident, driving while intoxicated, and driving on a suspended or revoked driver's license. He was sentenced to serve 552 months in the Arkansas Department of Correction. We affirm.

Appellant first contends that his convictions are not supported by substantial evidence. Specifically, he argues that there is no substantial evidence either that he was the driver of the vehicle in question or that he acted with the culpable mental state required to show either the batteries or the assault. We hold that there was substantial evidence to support appellant's convictions.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* If material and relevant evidence is not in dispute or there is a conflict in the evidence to the extent that fair-minded persons might draw different conclusions therefrom, the evidence is substantial. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004). In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only that evidence tending to support the verdict. *Id.*

Viewed in that light, the record clearly contains substantial evidence that appellant was the driver of the vehicle. The car that hit the women was described by witnesses as a dark, smaller

Honda with an orange temporary license plate. Shortly after the incident, a police officer found a black, early 1990s model Honda with an orange temporary tag and a broken windshield, with blood and tissue present thereon. It was found parked across the street from a downtown bar where appellant was drinking. The officer testified that appellant admitted to him that he (appellant) had been driving the car in question and that he thought that he had hit someone earlier that evening.

Furthermore, appellant's culpable mental state was more than adequately demonstrated by the proof. As pertinent here, a person commits first-degree battery when he causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-13-201(a)(3) (Supp. 2003). Aggravated assault is committed when, under circumstances manifesting extreme indifference to the value of human life, a person purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204(a)(1) (Supp. 2005). A person acts purposely with respect to his conduct when it is his conscious object to engage in conduct of that nature. Ark. Code Ann. § 5-2-202(1) (Repl. 1997).

> The plain meaning of [the] phrase ["under circumstances demonstrating extreme indifference to the value of human life"] demonstrates that the circumstances must by necessity be more dire and formidable in terms of affecting human life. *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994). In short, first-degree battery "involves actions which create at least some risk of death which, therefore, evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim." *Id.* (citing *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984)).

Harmon v. State, 340 Ark. 18, 27, 8 S.W.3d 472, 478 (2000). Here, there was evidence that, shortly after the incident, appellant had a blood-alcohol level of .23 percent. There was evidence that appellant was driving a car that hit two women and narrowly missed a third. Just before the impact, appellant was witnessed to speed up and actually swerve the vehicle toward the women's path. After the impact, he drove away. Appellant does not dispute that the two women who were hit suffered serious physical injuries, and there was evidence that

the third was afraid that her friends were "dead on the street" and that she was "dead, too." We hold that appellant's convictions are supported by substantial evidence.

Appellant next argues that the trial court erred in denying his motion for a mistrial based on a statement made by the prosecuting attorney during voir dire. A mistrial is an extreme remedy that should only be granted when the error is beyond repair and cannot be corrected by curative relief; the trial court has wide discretion in granting or denying a motion for a mistrial, and this court will not disturb the trial court's decision in the absence of an abuse of discretion or manifest prejudice to the movant. *Hudson v. State*, 85 Ark. App. 85, 100 S.W.3d 674 (2004).

The record shows that, during voir dire, a prospective juror stated that "it just kind of rubs me the wrong way, you know, for somebody to get turned loose on a technicality." The prosecutor then said, "Okay. But you understand, we're pretty much past the technicalities stage. That we're here listening to the evidence and the facts." Appellant objected and moved for a mistrial on grounds that "when [the prosecutor says we're past the technicalities stage, I believe he's commenting his personal opinion on the evidence." The court overruled the objection. We find no reversible error.

■ First, the prosecutor's statement was not necessarily wrong with regard to many aspects of a criminal prosecution that would generally be viewed as "technicalities" by lay people. Second, the prosecutor's comment did not encourage the jury not to do its job, *i.e.*, listen to the evidence and decide the facts in accordance with the instructions. Even assuming that there were some error in what was said, we cannot say that it was serious enough to have affected the fundamental fairness of the trial or to be incapable of being cured by an admonition, and we therefore hold that the trial court did not abuse its discretion in denying the motion. *See Parker v. State*, 355 Ark. 639, 144 S.W.3d 270 (2004).

■ Appellant's third point on appeal is addressed to objections made during the prosecutor's closing argument. He argues (a) that he was prejudiced by the prosecutor's statement that the jury did not have to consider the lesser-included offense instructions and (b) that "the [appellant] was prejudiced when the prosecutor argued that [appellant's] witness said things that she did not say in her testimony."

■ During his closing, the prosecutor said, "I'm going to submit to you that you won't even have to consider the lesser

includeds, when you consider the evidence that's been presented here in this trial today." Appellant objected on grounds that the prosecutor had misstated the law. The trial court agreed with appellant and told the prosecutor to clarify his argument because it was contrary to the instructions that had been given. The prosecutor then said to the jury that "[y]ou do have to consider . . . them. . . . [T]he choice is yours whether you consider the lesser includeds [to battery and assault]. . . . But I'm going to submit to you that the State has proven each and every element, beyond a reasonable doubt, of the offenses charged in the information." We find no reversible error. First, appellant requested no relief when he first objected. Second, the trial court agreed with appellant's objection and instructed the prosecutor to clarify his statement. The prosecutor did so without any further objection or request for relief. When an objection to a statement during closing argument is sustained, an appellant has been given all of the relief requested, and, consequently, there is no basis to raise the issue on appeal unless the appellant requests admonition to the jury or a mistrial. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002). As to the second subpoint in appellant's argument heading, suffice it to say that appellant makes no argument whatsoever on the issue beyond the twenty-one-word statement in his argument heading quoted above. Both the supreme court and this court have held that a mere conclusory statement in a point for appeal constitutes a waiver of the question and the issue will not be addressed on appeal. *See Dougan v. State*, 330 Ark. 827, 957 S.W.2d 182 (1997); *Brockwell v. State*, 260 Ark. 807, 545 S.W.2d 60 (1976); *Camp v. State*, 66 Ark. App. 134, 135-36, 991 S.W.2d 611, 613 n. 1 (1999).

Appellant's fourth and final point on appeal consists of three subpoints: (a) the prosecutor should not have challenged appellant's witness's credibility in the hearing of the jury; (b) the trial court erred in allowing the three young women in question to be referred to as "victims" after having granted appellant's pretrial motion in limine that such not be done; and (c) the trial court erred in allowing evidence of appellant's prior DWI conviction after having ruled prior to trial that such evidence was not relevant and would not be allowed.

The first of these arguments is not mentioned beyond the twenty-three-word conclusory statement in appellant's point for appeal, and therefore will not be addressed for the reasons stated in our discussion of appellant's third point. *See Camp v. State,*

supra. Appellant's second argument, *i.e.*, that the victims should not have been referred to as victims is limited to what is stated above, namely that reversal is required simply because the trial court permitted testimony that he had prohibited in a prior in limine order. However, a motion in limine is a threshold motion, and the trial judge is at liberty to reconsider his or her prior rulings during the course of a single trial. *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003). In the absence of any argument that the trial judge in the present case abused his discretion by doing so, appellant has stated no grounds for reversal. *See id.*

Appellant's argument regarding evidence of a prior DWI is subject to the same analysis: appellant makes no argument on appeal that the admission of such evidence constituted reversible error. Moreover, prior to the close of the hearing on the motion in limine, the trial court qualified its ruling so as to permit the State to present evidence of the prior DWI that caused the suspension of appellant's license because that was an element of the offense of driving on a suspended license for which appellant was also on trial.[1] Indeed, appellant agreed with the trial court's ruling when it was made. Given that the in limine order specifically allowed use of the one prior DWI for the limited purpose stated, that appellant actually agreed with the order, and that he makes no argument on appeal why its admission was error, appellant has failed to state grounds for reversal.

Affirmed.

GLOVER and ROAF, JJ., agree.

---

[1] Arkansas Code Annotated § 5-65-105 (Repl. 2005) makes it unlawful for one to drive on a license that has been suspended "under the provisions of this act." The Act in question is the Omnibus DWI Act found in Title 5, Chapter 65. *See* Ark. Code Ann. § 5-65-101 (Repl. 2005).

APPLE TREE SERVICE, INC., and AIG Claim Services, Inc. *v.* Gill GRIMES

CA 05-860 228 S.W.3d 515

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Huckabay, Munson, Rowlett & Moore, by: *Carol Lockard Worley* and *Melissa Ross*, for appellants.

Stricker Law Firm, P.L.L.C., by: *R. Theodor Stricker*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellants, Apple Tree Service, Inc., and AIG Claim Services, Inc., appeal from the decision of the Arkansas Workers' Compensation Commission awarding benefits to appellee, Gill Grimes. Particularly, appellants argue that the Commission's decision was not supported by substantial evidence, as appellee failed to prove by a preponderance of the evidence that illegal drugs did not substantially occasion his accident. We affirm.

An injury is not compensable if it is the result of an accident that was "substantially occasioned by the use of . . . illegal drugs . . . ." Ark. Code Ann. § 11-9-102(4)(B)(iv)(*a*) (Supp. 2005). Further, the presence of illegal drugs "shall create a rebuttable

presumption that the injury or accident was substantially occasioned by the use of" the illegal drugs. Ark. Code Ann. § 11-9-102(4)(B)(iv)(*b*). And "[a]n employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the . . . illegal drugs . . . did not substantially occasion the injury or accident." Ark. Code Ann. § 11-9-102(4)(B)(iv)(*d*). Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Woodall v. Hunnicut Constr.*, 340 Ark. 377, 12 S.W.3d 630 (2000). On appeal, we view the evidence in a light most favorable to the Commission's decision and affirm if the decision is supported by substantial evidence. *Id.* Further, the Commission determines the credibility of witnesses and the weight to be given their testimony. *Id.*

In its opinion reversing the denial of benefits by the administrative law judge, the Commission wrote that on February 19, 2003, while working for appellant Apple Tree Service, Inc., appellee and his brother and supervisor, George Grimes, were attempting to cut down a 140-foot tall dead pine tree. While they were cutting the tree, it unexpectedly fell onto a small pine tree and caused the smaller tree to snap at the roots and fall, striking and injuring appellee. Appellee's drug screen rendered positive results for the presence of marijuana metabolites. Because of the positive results, appellants controverted appellee's claim for benefits.

In awarding benefits, the Commission found as credible George Grimes's testimony that the accident was unavoidable. The Commission reiterated his testimony that the dead tree fell onto a smaller tree, causing it to snap at the roots and fall instead of just folding over. The Commission also noted Grimes's testimony that, prior to felling the tree, he and appellee discussed and determined an escape route, that Grimes knew where to run and appellee knew where to run, and that they could not run in the same direction because the rope was between them. Further, the Commission noted Grimes's testimony that he ran the same distance away from the tree as appellee did, that it was a "freak accident" because the tree that struck appellee broke in a way he had never seen in fourteen years of logging, that appellant could not have predicted that the accident would have happened or planned and avoided it, and that even if appellee had not been impaired he could not have gotten away from the falling tree. The Commission found that appellee proved by a preponderance of the evidence that illegal drugs did not substantially occasion his accidental injury.

Appellants argue that the Commission's decision was not supported by substantial evidence, as appellee failed to prove that illegal drugs did not substantially occasion his accident. Appellants assert that appellee and his brother were not credible witnesses. The credibility of witnesses and the weight to be given their testimony, however, were for the Commission to determine. Further, appellants assert that appellee did not clear a path away from the 140-foot tall tree or move very fast when it did fall and that this constituted evidence of impairment. Appellee presented, however, George Grimes's testimony that appellee ran the same distance from the tree as he did and that the accident was unavoidable. Furthermore, as the Commission found in its decision, because appellee "did not expect the smaller pine tree to snap at the roots and fall over on him, there was no reason for him to clear an escape path for this tree, as had been prudently done for the dead tree being taken down." Viewing this evidence in the light most favorable to the Commission's decision, we conclude that the decision was supported by substantial evidence.

Affirmed.

BIRD and NEAL, JJ., agree.

Daniel R. BRESHEARS *v.* STATE of Arkansas

CA CR 05-393 228 S.W.3d 508

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Darrell Blount, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. Daniel R. Breshears was convicted in a Garland County jury trial of manufacturing methamphetamine and doing so in the presence of a child. He was sentenced to forty years on the manufacturing charge and an additional term of ten years to be served consecutively for the enhancement. On appeal, he argues that the trial court erred in refusing to grant his motion to suppress evidence seized by police during an illegal search of his residence. We agree, and we reverse and remand.

At the hearing on Breshears's motion to suppress, Garland County Sheriff's Deputy Ray Cameron testified that on March 5, 2004, he was dispatched to 134 Wyles Lane in Jessieville in response to a complaint of criminal trespass. According to Deputy

Cameron, he "knocked on the door and a man [Breshears] come to the door, and I asked him was he supposed to be living there and he said yes." He then asked dispatch to call the landlord, R. L. Wyles. When Wyles arrived, he told Deputy Cameron that "no one was supposed to be living there." Wyles subsequently entered the mobile home and invited Deputy Cameron to accompany him.

Once inside, Deputy Cameron encountered a woman who appeared to be "about eight months pregnant" and a "little baby running around," which gave him the impression that "somebody was living there." He also noticed a "strange chemical odor," along with "needles and chemicals to make meth with, and generators." He claimed that he did not "search" the house for the suspected contraband but was merely "trying to secure it and check it out to see if anybody was living in it." Nonetheless, Deputy Cameron noticed drug paraphernalia "laying on the cabinet and in the floor" in the kitchen/living room area. According to Deputy Cameron, his "eyes were burning," and he ordered everyone outside while he called the Drug Task Force.

On cross-examination, Deputy Cameron admitted that when Breshears answered the door, Breshears told him that he was living in the mobile home, although he claimed that Breshears "didn't say nothin' 'bout rent." He admitted that he asked for consent to search, but Breshears refused to allow him to enter. Deputy Cameron also admitted that Wyles did not present any documents showing that he owned the dwelling and that Breshears "seemed to recognize Mr. Wyles" when the landlord came to the residence.

Wyles testified that he was the owner of the dwelling at 134 Wyles Lane and the mobile-home park in which it was situated. He stated that Breshears had rented one of his mobile homes and was living in it on March 5, 2004. Wyles noted, however, that he had "evicted" Breshears, and when he noticed smoke coming out of the vent pipe of the mobile home, he called the police. When he arrived at the scene, he found that Breshears was "still" in the dwelling. He acknowledged that Breshears "wouldn't let the police in; and they'd called me and I'd come up there 'cause I own the trailer." Wyles stated that he gave the police "the okay to go in." Later, he signed a form to consent to the search.

On cross-examination, Wyles confirmed that Breshears was renting the trailer at the time the police entered. He claimed that he had "evicted" him by either putting an eviction notice on the

door or handing it to him. The notice gave Breshears seven days to vacate. Wyles admitted that, prior to the time he gave the police permission to enter Breshears's home, he had not been inside because "I don't check on the tenants. If everybody's paying rent good, I don't check on 'em, and I — I never had been in his trailer."

Garland County Sheriff's Department Investigator Cory DeArmon testified that he was assigned to the Eighteenth East Drug Task Force on March 5, 2004, when he was summoned to Breshears's residence. Upon arrival, he was told by a Garland County deputy that there was a suspected meth lab inside. Wyles gave him the "notice to quit" and told him that no one was supposed to be living there. Investigator DeArmon asked for and received from Wyles consent to search the trailer. Inside, he found components of a meth lab. DeArmon admitted that he knew that the law required that a tenant be given ten days' notice to vacate when eviction is sought by a landlord. He confirmed that the only documentation presented to him was Wyles's notice, dated February 24, 2004, on which Wyles had scratched out the ten and wrote "7". DeArmon also conceded that the notice also recited that "date of service, Saturday, Sunday, and legal holidays" were expressly excluded from the time to vacate. Nonetheless, he claimed that he understood the law to allow a landlord to re-enter the dwelling after the expiration of ten days. DeArmon also stated, however, that he did not simply rely on the documentation but also on the information that Deputy Cameron gave him concerning the propriety of entering Breshears's residence. The trial court denied the motion to suppress.

On appeal, Breshears argues that the trial court erred in refusing to grant his motion to suppress evidence seized by police during an illegal search of his residence. He notes that there were actually two searches, the first by Deputy Cameron and the second by Drug Task Force officers. Breshears asserts that Deputy Cameron was not entitled to rely on the consent of the landlord to enter the residence, and therefore, evidence obtained by police during the subsequent illegal entry must be suppressed under the doctrine of "fruit of the poisonous tree." Breshears acknowledges that under *United States v. Matlock*, 415 U.S. 164 (1974), consent to search may be granted by a third party "if freely and voluntarily given," provided the party has "actual or apparent authority to grant the consent." He concedes that Wyles freely and voluntarily gave the consent, but asserts that Wyles had neither actual nor

apparent authority to consent. Breshears further notes that *Matlock* provides that "the validity of the consent under the Fourth Amendment standards cannot rest upon the ownership of the premises. Instead it rests upon mutual use of the property by persons generally having joint access or control for most purposes." Citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990), for the proposition that common authority must not be inferred and the burden is upon the State to prove it exists, Breshears argues that the burden is not met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. He contends that Deputy Cameron made no inquiry into Mr. Wyles's status as a person who had mutual use of or equal access to the property, even though this was the type of situation where "the facts known by police cry out for further inquiry." Accordingly, it was not reasonable for the police to proceed on the theory that "ignorance is bliss."

Regarding the second search, Breshears argues that because Deputy Cameron's entry was illegal, the Drug Task Force's subsequent entry was likewise illegal and the evidence seized was fruit of the poisonous tree. Furthermore, he asserts that the second search could not be found to be independently valid because the notice to quit that was provided to the Drug-Task-Force officers and the attendant circumstances that were made known to the Drug Task Force, including the fact that Breshears was obviously residing in the mobile home, did not support a reasonable conclusion that Wyles had the legal authority to enter the residence or consent to the police's entry. Breshears notes that the eviction procedure relied on by Wyles did not comport with Arkansas Code Annotated section 18-16-101 in either the length of time necessary for proper notice or in the steps required to retake possession of the property, and therefore, the police's entry was a mistake of law, and not a mistake of fact. We find these arguments persuasive.

Our standard of review for a trial court's action granting or denying motions to suppress evidence obtained by a warrantless search requires that we make an independent determination based upon the totality of the circumstances, giving respectful consideration to the findings of the trial judge. *Love v. State*, 355 Ark. 334, 138 S.W.3d 676 (2003). We give considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts and defer to the superior position of the trial judge to pass upon the credibility of witnesses. *Id.*

Illegal entry by law enforcement officers into the homes of citizens is the "chief evil" the Fourth Amendment is intended to protect against and therefore is of the highest degree of seriousness. *Payton v. New York*, 445 U.S. 573 (1980). It is settled law in this state that warrantless entry into a private residence is presumptively unreasonable under the Fourth Amendment. *Latta v. State*, 350 Ark. 488, 88 S.W.3d 833 (2002). Nonetheless, that presumption may be overcome if the police officer obtained consent to conduct a warrantless search. *See Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002); *see also* Ark. R. Crim. P. 11.1 (2003) ("An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search or seizure."). However, consent to search the premises can only be given by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent. Ark. R. Crim. P. 11.2(c) (2003). The determination of third-party consent, like other factual determinations relating to searches and seizures, must be judged against an objective standard. *See Hillard v. State*, 321 Ark. 39, 900 S.W.2d 167 (1995). The test is: "would the facts available to the police officer at the moment warrant a man of reasonable caution to believe that the consenting party had authority over the premises?" *Id.*

We conclude that Deputy Cameron's initial intrusion into Breshears's residence was not based on facts and circumstances that overcame the presumption that his warrantless intrusion was unreasonable. Deputy Cameron testified that he knew that Breshears resided in a mobile home park where the residents rented their dwellings from Wyles. Furthermore, it was obvious to Deputy Cameron that when he arrived at Breshears's dwelling that the occupants were not simply trespassing, but rather were "living there." Indeed, if Deputy Cameron had any doubt as to that fact, it should have been dispelled by Breshears's unequivocal declaration that he lived there. Further, when Wyles arrived, Deputy Cameron perceived that Wyles and Breshears were acquainted with each other. Under these circumstances, we believe that it was unreasonable for Deputy Cameron to rely on Wyles's consent to enter Breshears's residence without further inquiry and further evidence that Breshears had been lawfully evicted. Deputy Cameron's reliance on the fact that Wyles was the owner of the property and his claim that Breshears was trespassing as his sole basis for entry into a dwelling known by the officer to be a rental unit was the type of consent that was of course long ago found not

to pass constitutional muster. *See Chapman v. United States*, 365 U.S. 610 (1961) (holding that a landlord could not validly consent to the search of a house he had rented to another). We hold that the Fourth Amendment required Deputy Cameron to do more than simply take Wyles's "word" that it was permissible for him to enter. We believe that this situation is clearly analogous to *Goodman v. State*, where we held that it is not reasonable for the police to proceed on the theory that "ignorance is bliss." 74 Ark. App. 1, 45 S.W.3d 399 (2001) (quoting 3 Wayne R. LaFave, *Search and Seizure* § 8.3(g) at 749 (3d ed. 1996)). As the United States Supreme Court stated more than a quarter-century ago, "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573 (1980).

Likewise, the second search failed to comport with the dictates of the Fourth Amendment. Investigator DeArmon insisted that he relied in large part on the assurance of Deputy Cameron that he had authority to enter Breshears's residence. However, Deputy Cameron summoned the Drug Task Force to the scene because of the information that Cameron had gathered during his unlawful intrusion into Breshears's residence. The mere fact that entry by the Drug Task Force was undertaken at the behest of law enforcement does not change the fact that Wyles did not have the authority to give constitutionally-valid consent.

Moreover, the second search undertaken by the Drug Task Force proceeded despite clear evidence that their search was illegal. As noted previously, while Deputy Cameron simply relied on Wyles "word," Wyles actually presented Investigator DeArmon with a copy of the "notice to quit" that Wyles had left on Breshears's door, and DeArmon knew that the document did not comport with the statutory ten-day notice required before a landlord could begin the process to re-enter leased premises. *See* Ark. Code Ann. § 18-16-101. As we said in *Goodman v. State, supra*, "To determine whether the police officers had a reasonable caution in the belief that [a third party] had authority over the premises (*i.e.*, apparent authority), we must first establish that the warrantless search was based on a mistake of fact, not a mistake of law." (citing *United States v. Whitfield*, 939 F.2d 1071, 1073 (1991)). Here, we agree with Breshears that Investigator DeArmon made a mistake of law, not a mistake of fact, and therefore, we hold that Investigator DeArmon's assessment that Wyles had apparent

authority to consent to the warrantless entry into Breshears's residence was unreasonable. Accordingly, we hold that the trial court also erred in failing to suppress the evidence obtained in the second search.

Finally, we note that Breshears argues that the statement that he gave to police after he had been arrested is also fruit of the poisonous tree and should be suppressed as well. We agree and hold that the trial court also erred in failing to suppress his statement.

Reversed and remanded.

GLADWIN, ROBBINS, BIRD, and GRIFFEN, JJ., agree.

PITTMAN, C.J., dissents.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. This is an appeal from a conviction of manufacturing methamphetamine in the presence of a minor. Appellant argues that the evidence seized during two warrantless searches of his trailer should be suppressed. The majority has reversed on the grounds that both searches were invalid. I dissent because I believe that the first search was valid, and because the items seized during the second search would have inevitably been discovered as a result of the initial, valid search of the premises.

Mr. Wyles was the owner of a trailer. He testified that he believed that the former tenants had vacated the trailer after he took steps to evict them for nonpayment of rent so that, when he saw smoke coming from the trailer on March 5, he called the police because no one was supposed to be there. When Garland County Deputy Sheriff Ray Cameron arrived at the trailer in response to the criminal trespass complaint, appellant told him that he lived there and refused to let him in. Deputy Cameron then had his dispatcher call Mr. Wyles, who came to the scene and reaffirmed that no one was supposed to be living there. Mr. Wyles gave Deputy Cameron permission to enter the trailer. When Deputy Cameron did so he smelled a strong chemical odor and "saw a lady that was about eight months pregnant, and a little baby." Deputy Cameron also saw syringes, generators, and chemicals suspected to be involved in the manufacture of methamphetamine. The chemical vapors were sufficiently strong to cause Deputy Cameron's eyes to water, and he ordered all of the occupants to leave the trailer and called the Drug Task Force to the

scene. The Drug Task Force arrived, was shown the "notice to quit" by Mr. Wyles and, based on Mr. Wyles's permission, reentered the trailer and secured the items seen by Deputy Cameron.

There were thus two warrantless searches, both of which were based on Mr. Wyles's permission. I believe that the first search was valid. So long as a searching police officer reasonably believes that a person giving consent had authority to do so, the consent is valid, notwithstanding a later determination that the consentor had no authority. *Norris v. State*, 338 Ark. 397, 999 S.W.2d 183 (1999); *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979). The question is whether, on the facts available at the moment, a person of reasonable caution would be warranted in the belief that the consenting party had authority over the premises. If so, the search is valid. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Here, Deputy Cameron had prior knowledge that Mr. Wyles was the owner of the trailer court, and there is no evidence that the deputy knew appellant or that appellant had ever rented the trailer. Furthermore, Deputy Cameron was not called to evict a holdover tenant but was instead sent to investigate a complaint of criminal trespass. When Deputy Cameron, after much knocking, induced appellant to answer the door, appellant made no claim of right to the property other than saying that he "lived there." Despite the majority's assertion to the contrary, Deputy Cameron did conduct a further investigation at this point by contacting the complainant for clarification. When Mr. Wyles arrived in response to Deputy Cameron's call, Mr. Wyles told him nothing about the attempted eviction or appellant's status as a tenant, but only that Mr. Wyles had noticed smoke coming from the trailer and that "no one was supposed to be living there." Further investigation therefore *was* conducted in this case, and led only to further indications that appellant was indeed engaged in criminal trespass, the very offense Deputy Cameron had been called to investigate. Under these circumstances, I think it ludicrous to conclude, as the majority does, that Deputy Cameron could not reasonably believe that Mr. Wyles had authority to consent to the a search of the trailer.

The second search, in my view, cannot be justified on these grounds because the Drug Task Force Officers were, on arrival, informed by Mr. Wyles that the matter was actually an eviction based on faulty process. They could not, at this point, reasonably rely on Mr. Wyles's consent. Nor, in the absence of a more imminent danger, could they conduct a search solely on the basis

of exigent circumstances pursuant to our holding in *Loy v. State*, 88 Ark. App. 91, 195 S.W.3d 370 (2004). They should have secured a warrant.

Nevertheless, although the second search was illegal, the fruits thereof need not be suppressed because they would have inevitably been discovered because of the evidence obtained during the initial, legal search. The doctrine is explained in *McDonald v. State*, 354 Ark. 216, 225-26, 119 S.W.3d 41, 47 (2003), a case involving facts so similar to those presented here as to warrant quotation at length:

> McDonald advances a similar search-and-seizure challenge in connection with Sergeant Jones's actions in recording the VIN number on the red four-wheeler parked in the front yard. We need not, however, address the propriety of those warrantless activities because the lawful discovery that the mule was stolen would have inevitably led to the discovery that the red four-wheeler was also stolen. Stated another way, even if we were to conclude that McDonald's constitutional rights were violated, the circuit court's denial of his motion to suppress would still be affirmed pursuant to the "inevitable discovery" doctrine. *See, e.g., Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998).
>
> We have held that suppressed evidence is otherwise admissible if the State proves by a preponderance of the evidence that the police would have inevitably discovered the evidence by lawful means. *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000). In 1988, this court adopted the Supreme Court's rationale in upholding the "inevitable discovery" doctrine:
>
>> This court cited *Nix* with approval in *Mitchell v. State*, 294 Ark. 264, 742 S.W.2d 895 (1988), where we stated, "[t]he state must prove the 'inevitable discovery' would have occurred by a preponderance of the evidence." We find the standard adopted by the Supreme Court in 1984 well suited to the task of securing the goals of the exclusionary rule while assuring that the police are not placed in "a worse position than they would have been in if no unlawful conduct had transpired." *Nix v. Williams*, 467 U.S. 431, 445, 104 S.Ct. 2501, 2509-2510 (1984).
>
> *Brunson v. State*, 296 Ark. 220, 226, 753 S.W.2d 859, 861 (1988).
>
> We concluded in *Miller* that, even if the police officers' conduct in entering the rear of the defendants' residence after getting no

> response at the front door resulted in an illegal search, it was proper for the trial court to deny the defendants' motion to suppress evidence seized from their home under the "inevitable discovery" doctrine, where an officer who was standing in a parking lot next to the defendants' residence observed marijuana growing in their backyard. *Miller v. State, supra.* Similarly, in this case, the police lawfully recorded the VIN number on the stolen mule parked in the driveway. That information alone would have provided sufficient probable cause to procure the search warrant. Armed with a valid search warrant, the officers would have recorded the VIN number from the red four-wheeler and discovered that it was stolen. We are convinced that the State has established by a preponderance of the evidence that the police would have inevitably discovered the evidence by lawful means.

In my view, the sights and smells apparent to Deputy Cameron during the initial, valid search would unquestionably have supported issuance of a warrant for the search of the trailer, and inevitable discovery has been established by a preponderance of the evidence. I would affirm on that basis, and I respectfully dissent.

Jimmy Ray MAY *v.* STATE of Arkansas

CA CR 05-523 228 S.W.3d 517

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

John Wesley Hall Jr., for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Jimmy Ray May appeals his conviction entered after a jury trial in Boone County for first-degree sexual assault against a minor female, A.T., who was a student at his taekwondo school.[1] He was sentenced to serve six years in the Arkansas Department of Correction for this crime. On appeal, appellant argues two points for reversal: (1) that there is insufficient evidence that appellant was a "temporary caretaker, or other person in a position of trust or authority over the victim" for purposes of the first-degree sexual-assault statute, Ark. Code Ann. § 5-14-124 (Supp. 2001), and (2) that the State failed to bring him to trial in a speedy manner as required by the Arkansas Rules of Criminal Procedure. We disagree with his arguments and affirm.

We first consider the sufficiency of the evidence, as we must. *See Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). The State charged appellant pursuant to Ark. Code Ann. § 5-14-124, which provides in pertinent part:

> (a) A person commits sexual assault in the first degree if the person engages in sexual intercourse or deviate sexual activity with another person, not the person's spouse, who is less than eighteen (18) years of age and the person:
>
> . . . .
>
> (3) Is the victim's guardian, an employee in the victim's school or school district, *a temporary caretaker, or a person in a position of trust or authority over the victim.*

(Emphasis added.) Appellant argued to the trial court that the State failed to prove that he fit the descriptors emphasized in subsection (a)(3) by moving for directed verdict at the appropriate times, and he presents this argument to us on appeal.

A directed-verdict motion is a challenge to the sufficiency of the evidence. *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002). When the sufficiency of the evidence is challenged on

[1] Appellant was also charged with rape of the minor female. The jury acquitted him of that charge.

appeal from a criminal conviction, we review the evidence and all reasonable inferences in the light most favorable to the State and will affirm if the finding of guilt is supported by substantial evidence. *Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another that passes beyond mere speculation or conjecture. *Reinert v. State*, 348 Ark. 1, 71 S.W.3d 52 (2002).

In our review, we will not recite with particularity each of the multiple sexual encounters that A.T. testified to because appellant does not contest that her testimony, if believed, would be sufficient proof of sexual intercourse or deviate sexual activity. Appellant was born in 1961, so he was approximately forty years old during the time of the alleged events. A.T. was in her early teen years during the time periods in question, March 2001 to February 2003.

The victim, A.T., testified at the trial in November 2004 that she was presently seventeen years old. A.T. attended appellant's taekwondo class at his studio, Harrison Taekwondo Center, for approximately eight years beginning in 1994 when she was seven years old. She attended class regularly, generally five times per week. A.T. attained a black belt under appellant's instruction and won multiple awards at various tournaments, and for a period of time, she became a student instructor at his studio. A.T. testified that appellant's sexual interest in her began when she was thirteen years old, and it continued until she was about fifteen years old.

Appellant began driving A.T. home from class as a favor to her parents, which became more regular when A.T.'s mother had a new baby. Appellant also drove A.T. to and from tournaments in Little Rock and Memphis when her parents could not; he made arrangements with A.T.'s parents to provide this transportation. A.T. did not deny that she had a "crush" on appellant, and she recalled the first incident being just a kiss, but the incidents changed quickly into sex acts. She testified that appellant engaged in sexual contact of varying degrees with her while she was in his taekwondo studio[2] after class before he would drive her home; in

[2] The State entered into evidence laboratory test results that confirmed the presence of seminal fluid in certain locations in the taekwondo studio where A.T. described sex acts to have happened between them. Appellant and his wife testified that any seminal fluids found in and around the studio were attributable to their own conduct.

certain remote locations in their hometown where he would drive her before taking her home; during trips to or from out-of-town taekwondo tournaments; and once on his property while her father was fishing quite a distance away from them. A.T. stated that she did what appellant asked her to do because she trusted and admired him. After she revealed to her parents what had happened, she did not return to his taekwondo class, and her family subsequently moved to Branson, Missouri.

Appellant testified in his own defense, denying the allegations of sexual misconduct with A.T., but acknowledging that A.T. had a "crush" on him. Appellant said he deliberately did not respond to A.T.'s crush; he maintained that he did not have to directly address it because there was a respect that all his students showed him at his school. Appellant stated that he felt betrayed by her lies because A.T. had been a student of his for so long, and he had known her family for so long.

On this evidence, appellant challenges the sufficiency of proof that he fit within the statutory definition of "temporary caretaker or person in a position of trust or authority over the victim." Appellant asserts that to include him in it means that "practically anybody is included" and that "the line cannot be drawn anywhere." We disagree.

In *Bowker v. State*, 363 Ark. 345, 214 S.W.3d 243 (2005), our supreme court considered the meaning of the term "temporary caretaker" as defined in the second-degree sexual assault statute, Ark. Code Ann. § 5-14-125. It took guidance from an earlier decision by our court in *Murphy v. State*, 83 Ark. App. 72, 117 S.W.3d 627 (2003), that construed the first-degree sexual assault statute and the specific terms at issue here — "temporary caretaker, or a person in a position of trust or authority over the victim." In both of those cases, teenage minors were subjected to prohibited sexual activity by the defendants when the teenagers spent the night at the defendants' homes with their parents' permission. Using statutory construction that first requires a "plain-meaning" analysis, both the supreme court and our court took the position that a family friend to whom a minor is entrusted is in a position of authority or trust over that minor during the time of entrustment. Where a relationship raises a strong inference of trust and supervision, and where the appellant's function in the relationship could be characterized at a minimum to be that of a chaperone, this meets the statutory threshold. *See Murphy, supra.* Appellant argues that this statutory provision is overly broad, and

he distinguishes the present circumstances because there was no allegation that A.T. spent the night with appellant. We disagree with appellant's arguments.

We hold that the terms "temporary caretaker, or a person in a position of trust or authority over the victim" could include appellant under this set of facts and that the trial court did not err in not directing a verdict for appellant. The jury, as finder of fact, had before it sufficient evidence from which it could conclude that appellant, an adult male, was in a position of trust or authority over the victim because he had a longstanding relationship with her as her instructor and with her parents, who entrusted her to him to ensure that she was overseen during taekwondo instruction and competition and when transported back home from those times. We believe that this is precisely the kind of scenario envisioned by the legislature when it enacted Ark. Code Ann. § 5-14-124(a)(3).

Appellant adds to his argument on appeal that the State was under a duty to present proof that appellant used his position to commit the offense because it is implied by wording in subsection (a)(2) of the statute. First, this argument was not raised to the trial court or answered by it, which prevents our court from considering it on appeal. Second, were we to countenance the argument, we would disagree. The appellate court may not insert words into statutes that are not present by legislative action. In order to sustain a conviction under subsection (a)(2) of the statute, the wording requires that particularly defined "professionals" that are also in a position of trust or authority over the victim must be shown to have used the position to engage in the prohibited activity.[3] Nevertheless, subsection (a)(3) does not contain this additional wording, such that the State was not held to this additional measure of proof. We affirm the trial court's denial of appellant's motion for directed verdict.

The other issue on appeal concerns whether the State violated appellant's right to a speedy trial, which he raised in his motion to dismiss on the day of trial. Pursuant to Ark. R. Crim. P.

---

[3] Subsection (a)(2) refers to professionals defined under Ark. Code Ann. § 12-12-507(b), which relates to those persons who have a duty to report child maltreatment. The list includes twenty-nine professions, including a "teacher." Appellant provides additional argument that appellant cannot be considered a "teacher" in this context. We do not address this alternative argument because there is sufficient evidence under subsection (a)(3) to support the conviction.

28.1, the State is required to try a criminal defendant within twelve months, excluding any periods of delay authorized by Ark. R. Crim. P. 28.3. *Moody v. Arkansas County Circuit Court*, 350 Ark. 176, 85 S.W.3d 534 (2002); *Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002). The accused must be tried within twelve months of the date the charges were filed, except that if prior to that time the defendant has been continuously held in custody, or has been lawfully at liberty, the time for trial commences running from the date of arrest. *See* Ark. R. Crim. P. 28.2. If a defendant is not brought to trial within the requisite time, Ark. R. Crim. P. 30.1 provides that the defendant will be discharged, and such discharge is an absolute bar to prosecution of the same offense and any other offense required to be joined with that offense. *Moody, supra; Turner, supra.* Once the defendant presents a prima facie case of a speedy-trial violation, *i.e.*, that the trial is or will be held outside the applicable speedy-trial period, the State has the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). A defendant is not required to bring himself to trial or "bang on the courthouse door" to preserve his right to a speedy trial; the burden is on the courts and the prosecutors to see that trials are held in a timely fashion. *Nelson v. State*, 350 Ark. 311, 86 S.W.3d 909 (2002); *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002).

The State concedes that appellant presented a prima facie case of a speedy-trial violation because appellant was arrested on February 28, 2003, formally charged on March 25, 2003, and trial commenced on November 22, 2004. The dates between arrest and trial translate into 268 days beyond the one-year limitation, and the State contends that it can viably account for far greater than 268 excludable days. We agree with the State, which renders appellant's argument for dismissal unpersuasive.

We first address the largest delay of 221 days, based upon a continuance granted at the request of appellant. Appellant asserts that this period is not validly charged to him for purposes of a speedy trial, whereas the State asserts that it is.

On the first day of trial, appellant asserted that the continuance he requested on October 6, 2003, was due to defense counsel's conflicting schedule with the original October 13, 2003, trial date. Appellant's October 6 motion stated specifically that he asked the trial court to reset the trial for an "appropriate time in the future" and that "defendant agrees that any and all time for

purposes of speedy trial may be charged to defendant for purposes of this Motion for Continuance." However, he argued that it was the State's duty, not his, to ensure timely rescheduling.

In response to appellant, the prosecutor pointed out all the docket entries, letters, and the specific April 2004 order denoting the continuance and the new trial setting. On the docket sheet is handwritten, "10-6-03 Motion for continuance — Granted as excludible period. G.Webb [circuit judge]". The record reflected a letter to counsel and an order entered by the trial court, both filed on January 21, 2004, informing all parties that trial was reset for May 25, 2004. Another reminder letter was mailed and filed on February 23, 2004. These January and February letters and the January order are noted on the docket sheet. Appellant pointed out that the docket sheet did not reflect to what date the trial was continued, and further that the letters and order did not specify that this was due to a continuance charged to the defendant.

The trial judge stated his recollection that when he realized that a formal order had not been entered at the time he granted the continuance in October, he corrected the clerical error by entering a nunc pro tunc order in April 2004, and he remembered that the date set in May 2004 was the first available setting on the docket. Appellant added that the April 2004 order was filed after speedy-trial had run and was of no effect. The trial court disagreed with appellant, denying his motion to dismiss and a later renewal of that motion.

On appeal, appellant again argues that the trial court's failure to commemorate the delay with specificity on the record in a timely fashion requires dismissal of his charges. He cites to *Reed v. State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991), and cases cited therein as support for the proposition that a non-contemporaneous entry on the docket and record at such a late date is ineffectual for purposes of speedy trial. We disagree.

Arkansas Rule of Criminal Procedure 28.3 was amended by per curiam in April 1999 to address this very issue. *See In Re Ark. R. Crim. P. 28*, 337 Ark. Appx. 627 (1999). The Reporter's Notes regarding the 1999 amendment to Rule 28.3 state in relevant part that:

> These changes have been made to address recurrent problems arising in cases. *E.g.*, *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991).

> The opening paragraph was added which includes language formerly in subsection (i) [that required a written order or docket entry to evidence the excluded period], but further provides that the trial court may determine the excluded periods when the defendant has moved for dismissal pursuant to Rule 28.1 rather than at an earlier date although the judge is still free to do so earlier. This finding is a determination of the excluded periods.

The State correctly argues that reliance on *Hicks, supra,* which was cited as controlling authority in *Reed, supra,* is misplaced given the 1999 amendment, which provides that the excludible period of time "shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial[.]" Thus, it is of no consequence that the order granting the continuance to the defendant with specificity was not filed until April 2004. *See Romes v. State,* 356 Ark. 26, 144 S.W.3d 750 (2004); *Miles v. State,* 348 Ark. 544, 75 S.W.3d 677 (2002); *Jones v. State,* 347 Ark. 455, 65 S.W.3d 402 (2002); *Chenowith v. State,* 341 Ark. 722, 19 S.W.3d 612 (2000); *Bowen v. State,* 73 Ark. App. 240, 42 S.W.3d 579 (2001). For the foregoing reasons, this period of 221 days is excludible.

The State must account for 268 days of excludible time in order to demonstrate compliance with the rules on speedy trial. The State asserts in its brief that appellant does not dispute the existence of other permissible periods of delay set forth in contemporary and specific orders filed by the trial court:

> (1) June 16, 2003 to August 1, 2003, totaling 45 days; defense agrees to continuance for discovery;
>
> (2) May 13, 2004 to August 27, 2004, totaling 106 days; granted to State due to unavailable witness, noted as excluded period for speedy trial; and
>
> (3) August 27, 2004 to November 22, 2004, totaling 87 days; joint motion due to need to investigate new relevant evidence, noted as excluded period for speedy trial.

We have no hesitation in determining that the time periods listed in (2) and (3) above were properly excludible. *See* Ark. R. Crim. P. 28.3(d)(1) and 28.3(c), respectively. Adding the periods of time that the State has shown are legitimately excluded under Ark. R. Crim. P.

28.3 and relevant case law brings the total to 414 permissibly excluded days. This is well beyond the 268 days necessary for the State to demonstrate that appellant's right to a speedy trial was not violated.

Affirmed.

GLADWIN and CRABTREE, JJ., agree.

Tisha Pauline SILL *v.* Charles Bradley SILL

CA 05-703 228 S.W.3d 538

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A., by: *Mark T. Fryauf*, *Williams Law Firm*, by: *Kevin Bonner*, and *Linda Hamilton*, for appellant.

Kevin Carl Bonner, for appellee.

WENDELL L. GRIFFEN, Judge. Tisha Sill appeals from an order denying her petition to relocate and requiring her to move back to Arkansas from Oklahoma. She argues that the trial court "denied" her the presumption favoring relocation, failed to properly apply the relocation factors, and denied her petition to relocate in order to punish her for failing to comply with its previous orders. We disagree, hold that the trial court's decision is not clearly erroneous, and affirm.

I. Factual and Procedural History

Tisha and appellee Charles Sill were divorced in August 2003. Two children were born of their marriage: Mackenzie, d.o.b., October 4, 1996, and Keely, d.o.b., February 15, 2002. Tisha and Charles are both originally from Miami, Oklahoma.

Tisha lived in Rogers, Arkansas when she filed her petition to relocate; Charles lived in nearby Bentonville, Arkansas (approximately thirty miles from Rogers). Miami, Oklahoma, is located approximately one hour and fifteen minutes from the Bentonville area by automobile. Both Tisha and Charles have extended family in the Miami area; neither has extended family in Arkansas.

On July 22, 2004, Charles and Tisha were arrested for domestic battery relating to an altercation between them that occurred at Tisha's home, in front of the children. Charles thereafter filed a petition for an emergency hearing alleging that he had been denied part of his summer visitation with the children; this motion was apparently denied. Tisha countered with a petition to modify the visitation to provide for the exchange of the children to occur at a neutral site; her motion was granted on August 3, 2004.

Shortly thereafter, on August 13, 2004, Tisha filed a petition to relocate to Miami. She then relocated before the court ruled on her motion. Tisha alleged in her petition to relocate that she had obtained employment with the Miami Public School District beginning in August 2004; that she and Charles had extensive family in the Miami area; that the parties could arrange additional time for Charles's visitation so that he would not lose any visitation as a result of the relocation; and that during those times when Charles's work requires him to travel, his visitation could be exercised by his relatives, thus fostering a stronger relationship between the children and Charles's extended family. For these reasons, Tisha asserted that it was in the children's best interest for her to relocate to Miami.

In response, Charles filed a motion to modify custody and a motion for contempt, based on Tisha's failure to pay marital debt and insurance premiums as ordered in the parties' divorce decree. The trial court entered a temporary order modifying the visitation and transportation schedule in light of Tisha's relocation. Because Charles could not exercise his mid-week visitation after the move, the trial court authorized his parents, who lived near Tisha, to exercise a mid-week visitation.

The hearing on the motions was held on January 11, 2005. Tisha testified that in May 2004, she began seeking a job closer to her family because she wanted her family's moral and financial support for herself and her daughters. She also testified that she and the girls often spent weekends and holidays in Miami. She maintained that it was "easier" to be near her extended family.

Tisha is a teacher, who, at the time she filed the petition to relocate, was earning approximately $40,000 per year as a teacher in the Rogers School District; she admitted that the teaching job in Oklahoma paid only $29,000 annually. However, she claimed that the cost of living in Miami was 30%-40% lower and cited as proof the fact that she paid approximately $200 per month less in rent in Miami than in Rogers and that she thought gasoline was cheaper in Miami.

Tisha also testified that she had not paid the marital debt as ordered because she did not have the money to do so. When asked why she accepted a job paying approximately $12,000 less per year when she could not pay her marital debts due to financial difficulties, she responded, "Because money is no option when it comes to my children."

Because Charles does not cross-appeal from the trial court's denial of his petition to modify custody, and because Tisha does not appeal from the trial court's contempt findings, it is not necessary to recount in great detail the testimony or findings concerning custody or visitation. It is sufficient to recount that the trial court found that neither parent had acted in an exemplary manner, that Tisha's testimony was not credible in some respects, and that she was in contempt because she had arbitrarily altered or denied visitation to Charles.

Finding that Charles had rebutted the presumption in favor of relocation, the trial court denied Tisha's petition to relocate and ordered her to move back to Arkansas. The court concluded that Tisha

> *is not doing one thing to encourage or better the relationship with the children and their father and frankly, from watching her testify and watching the demeanor of the parties and witnesses on the stand, I am of the belief that she moved to Miami and changed jobs for the sole purpose of making it difficult for [Charles] to have contact with his children.* She has not bettered her financial situation in the least. She gave up probably $12,000 a year in income to do it.

(Emphasis added.)

The court determined that Tisha relocated "for the sole purpose of thwarting [Charles's] visitation with the minor children" and further determined that Charles had been "robbed" of any opportunity to have lunch with his daughters or participate in

extracurricular activities. It stated: "I see absolutely no good reason why [Tisha] moved away from here except to impose that burden on him and attempt to alienate his children from him."

With regard to the best interests of the children, the trial court stated:

> Frankly, she is in contempt for interfering with visits. She has interfered with the relationship. The problem is trying to decide what is in the best interest of these two little girls, and that is where I am having the biggest problem is trying to decide if I can force [Tisha], because that is what it is going to take, to comply with the court orders without taking the kids out of the home.

The court concluded that the relocation would be more detrimental to MacKenzie than having her "remain" in Arkansas and found that relocation to Miami was not in the best interest of the children.

The trial court found Tisha in contempt for her failure to pay marital debt and insurance premiums. However, it denied Charles's petition to modify custody, finding that although a material change of circumstances occurred because Tisha violated the trial court's orders regarding visitation, it was in the children's best interests for custody to remain with her. The court authorized Charles's parents to continue mid-week visitation until Tisha moved back to Arkansas. Tisha has since moved back to Arkansas with her daughters.

II. Hollandsworth Factors

Tisha now challenges only the denial of her petition to relocate, arguing that the trial court denied her the presumption in favor of relocation, that it failed to apply all of the relocation factors, that it erred in determining that the presumption in favor of relocation had been rebutted, and that it denied her petition to relocate to punish her for failing to comply with its orders.

We review the denial of a petition to relocate *de novo* but will not reverse the trial court's findings unless they are clearly erroneous. *Parker v. Parker*, 75 Ark. App. 90, 55 S.W.3d 773 (2001). 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 was committed. *Id.* Because none of Tisha's arguments leave us with a definite and firm conviction that the trial court made a mistake, we affirm.

The factors a trial court must consider when determining whether to grant a petition to relocate were set out in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 190 S.W.3d 653 (2003). These factors include: (1) the reason for relocating; (2) the educational, health, and leisure opportunities available in the new location; (3) the effect of the move on the visitation and communication schedule of the noncustodial parent; (4) the effect of move on extended-family relationships in Arkansas and the new location; (5) the children's preferences, considering the ages and maturity level of the children and the reasons given for the preference. *Id.* Even when these factors are considered, the polestar interest remains whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. *Id.* A presumption exists in favor of relocation for custodial parents with primary custody, with the burden being on a noncustodial parent to rebut the presumption. Therefore, a custodial parent is not required to prove a real advantage to herself or himself and to the children in relocating. *Id.*

Before applying the *Hollandsworth* factors to the instant case, we first consider Tisha's argument that she was "denied" the benefit of the presumption favoring relocation. She argues that she was denied the presumption because "the trial court summarily found that Mr. Sill had overcome the presumption in favor of relocation without applying the presumption standard in light of the factors to be considered." In other words, she contends that she was denied the benefit of that presumption because the trial court found that Charles rebutted the presumption.

[redacted] However, nothing in the record leads us to conclude that the trial court failed to apply the presumption in favor of relocation that was established by the holding in *Hollandsworth*. Granted, the trial court observed that Tisha "has not bettered her financial situation in the least;" yet when this comment is viewed alongside the court's other findings and comments it is clear that the court did not fail to apply the presumption. Rather, the trial court determined that the presumption had been rebutted. In fact, the trial judge made a specific finding that the presumption had been rebutted in her written order.

[redacted] Further, consideration of the *Hollandsworth* factors supports the trial court's determination that the presumption favoring relocation was rebutted. We first address the factors on which the trial court relied to the greatest extent.

A. Effect of Relocation on the Non-Custodial Parent

Clearly, the predominant factor in the trial court's decision was the effect of the relocation on Charles's visitation and communication schedule. After Tisha moved, the visitation schedule was modified to allow Charles's parents to exercise mid-week visitation because Charles was unable to exercise that visitation. Charles's visitation was also expanded to allow for the additional driving time required to transport the children a greater distance. Charles and his parents testified regarding Tisha's actions in thwarting visitation with him and them; Charles also testified regarding his inability to participate in mid-week activities, such as having lunch with the girls at school or at day care.

Tisha maintains that because the overall time that Charles would spend with the children would not be lessened by the relocation, the modification order adequately balanced Charles's visitation rights with her right to relocate. *Blivin v. Weber*, 354 Ark. 483, 126 S.W.3d 351 (2003). She further asserts that the distance between Miami and Bentonville is minimal compared with the distances in other cases in which the appellate courts have approved of the noncustodial parent's relocation. *See, e.g., Hollandsworth, supra* (approving relocation of a distance of 500 miles).

Her arguments are unpersuasive. First, *Blivin* is inapposite because there was no finding in that case that the custodial parent deliberately thwarted visitation with the noncustodial parent. By contrast, the issue for the trial court in the instant case was not the quantity of visitation that was feasible if the relocation petition was granted, but whether Tisha desired to move as part of her ongoing effort to interfere with Charles's visitation. Pursuant to the modified visitation made necessary by the relocation, the court concluded that Charles had been "robbed" of any opportunity to see his daughters during the week and that the reason Tisha moved was "to impose that burden on him and attempt to alienate his children from him." Accordingly, the court did not agree that the effect of the relocation on Charles's visitation schedule was minimal and that his visitation rights would be adequately preserved. Based on our *de novo* review of the record, we agree with the trial court's conclusion that the this *Hollandsworth* factor weighs in favor of rebutting the presumption in favor of relocation.

B. Reason for Relocation

Second, even though our courts have approved relocations of even greater distances than the distance involved in this case, the

court determined that the reasons Tisha cited for relocating were, in essence, pretextual, and that the real reason she wanted to move was to further thwart Charles's visitation. The reasons cited by Tisha were that: 1) she and Charles were from Miami, they both had extended family there, and the girls had spent a lot of time there; 2) Tisha desired the financial and moral support of her family; 3) the cost of living was 30-40% lower in Miami; 4) the girls were faring well in Miami; 5) Tisha's parents have a good relationship with the girls and with Charles's parents, and Charles's parents exercised mid-week visitation when it was granted to them. Given that Tisha did not challenge the trial court's finding that she deliberately thwarted Charles's visitation, she has little ground to argue that this factor weighs in her favor.

Moreover, while Tisha was not required to present evidence that the relocation offered an advantage to the family unit in order to receive the benefit of the presumption in favor of relocation, we cannot ignore that her own testimony regarding her pay cut and the alleged cost of living weighs in favor of the trial court's finding that the presumption had been rebutted. While Tisha paid $200 per month less for rent in Miami (a decrease of 25%), thus saving her $2400 per year in rent, she nonetheless exposed herself and her children to a net income loss of $9600 due to her pay cut (the net sum of the $12,000 pay cut minus $2400). Her assertion that money is not an option when it comes to her children is unpersuasive given her testimony that she did not have enough money while earning a *greater* income to pay debts that the court ordered her to pay before she petitioned to relocate. Logic dictates that a person does not move from one place to another *citing the need for financial assistance* when the *move itself* would *increase* the need for financial assistance.

Further, it is contradictory that Tisha would be unable to receive moral or financial support from her family if she lived in Arkansas when she asserted that she and the girls visited them often before they moved to Miami. The presumption in favor of relocating does not exist merely to make it easier for the custodial parent to receive moral or financial support from her family, irrespective of the *actual* effect of the move on the children. In any event, requiring Tisha and the girls to remain in Arkansas will not deprive them of any needed moral or financial support — Tisha's family may assist them financially and morally wherever they may

live.[1] These facts cited above, in addition to the trial court's conclusion that Tisha deliberately thwarted visitation, support the trial court's conclusion that Tisha's true reason for relocating was to further thwart Charles's visitation. As such, we agree that appellant's reason for relocating weighs in favor of rebutting the presumption favoring relocation.

C. Effect of Relocation on Extended Family Relationships

The remaining reasons for relocating cited by Tisha go to another factor, the effect of the relocation on extended-family relations. According to the testimony, no extended-family members reside in Arkansas, whereas in Miami the girls would have access to extended family on both sides of their family. Further, it appears that both the maternal and paternal grandparents were regularly involved with Mackenzie and Keely while the girls were in Miami. However, Tisha testified that she and the girls often visited relatives in Miami. Thus, relocation would not afford the girls the opportunity to become acquainted with family members they did not know; nor would remaining in Arkansas deprive the girls of the opportunity to continue their relationship with their extended families.

D. Remaining Hollandsworth Factors

The remaining factors, the educational, health, and leisure opportunities available in Miami and the preferences of the children, were not relied on by the trial court, presumably because little or no evidence was offered concerning those factors. The only evidence regarding the opportunities available in Miami seems to be that Mackenzie played soccer and was enrolled in school at Miami and that Keely was enrolled in day care, but there was no evidence that Mackenzie could not play soccer in Rogers, that the Miami school offered greater educational opportunities than the Rogers schools, or that Mackenzie or Keely otherwise fared better in Miami. The trial court made no specific finding regarding this factor and both parties concede that either Arkansas or Oklahoma would provide sufficient opportunities for the chil-

[1] It is difficult to comprehend how the distance to Miami was not so great that it would not significantly disrupt Charles's visitation with the girls, as Tisha asserts, yet, at the same time, could be significant enough to prevent Tisha from receiving the financial or moral support from her family that she desired, as she also asserts.

dren. Thus, this factor does not weigh in favor or against rebuttal of the presumption. Finally, neither child testified, so no evidence was obtained regarding the last *Hollandsworth* factor, the children's preference as to where they live.

It is true, as Tisha asserts, that the trial court did not discuss each of these factors in its oral findings or its written order. However, the trial court is not required to make specific findings with regard to each factor, unless specifically requested to do so. *See* Ark. R. Civ. P. 52(a). Tisha failed to make a request for specific findings; thus, she cannot now argue that the trial court somehow erred in failing to specifically discuss each *Hollandsworth* factor. For the foregoing reasons, we hold that the trial court properly applied the *Hollandsworth* factors and did not err when it determined that the presumption in favor of relocation had been rebutted.

III. Best Interests of the Children

We further hold that the trial court did not clearly err in determining that it was in the children's best interests to live in Arkansas. Tisha asserts that the court did not explain why it found that it would not be in the children's best interests to relocate. She maintains that there was no evidence that the children's best interests were not satisfied by the relocation to Oklahoma and that, to the contrary, the relocation caused only a slight disruption in Charles's visitation. She attempts to superimpose the presumption that relocation offers an advantage to the family unit atop the best-interest determination — that is, she seems to assert that because it is presumed that relocation offers a real advantage, it is also presumed that relocation is in the best interests of the children, regardless of the actual effect of the relocation on the children.

Rather, a trial court is to exercise all its powers of perception in viewing the witnesses and their testimony when determining the best interest of the children. *Apel v. Cummings*, 76 Ark. App. 93, 61 S.W.3d 214 (2001). Further, the court may consider the custodial parent's interference with the noncustodial parent's visitation when determining the best interests of the child. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997).

In this regard, the trial judge stated:

> Frankly, [Tisha] is in contempt for interfering with visits. She has interfered with the relationship. The problem is trying to decide what is in the best interest of these two little girls, and that is where

> I am having the biggest problem is trying to decide if I can force [Tisha], because that is what it is going to take, to comply with the court orders without taking the kids out of the home.

The judge further determined that the relocation would be more detrimental to MacKenzie than having her remain where she was and stated that relocation to Miami was not in the best interest of the children. Perhaps the trial judge's findings regarding the best interests of the children might have been more clearly stated, but we find no error because the same facts that support holding that the relocation presumption was rebutted also support the conclusion that relocation was not in the best interest of the children.

It is true that the trial court could have granted Tisha's request to relocate even though she violated prior visitation orders. *Friedrich v. Bevies*, 69 Ark. App. 56, 9 S.W.3d 556 (2000) (finding the custodial mother was entitled to move to another state, despite her prior failure to comply with visitation orders and the parties' problems with visitation, where she obtained new employment in the other state, where her salary increased from $32,000 to $55,000 per year, where her new job did not require travel and work on Saturdays as her old job had, and where the trial court was convinced that she would cooperate with her former husband regarding visitation). However, unlike the situation in *Friedrich*, here, the financial effects of the move would be detrimental to the children. Further, the trial court in *Friedrich* was convinced that the custodial parent would cooperate regarding visitation. To the contrary, based on Tisha's prior conduct, the trial court here was convinced that Tisha would continue to interfere with Charles's visitation if the girls lived in Miami. Neither the trial court nor this court is required to afford her that opportunity. Moreover, on this record, we are not inclined to ignore, let alone dispute, the accuracy of the trial court's observations and assessments concerning Tisha's motives for relocating.

While Tisha relies heavily on the fact that the girls would see their extended families to a greater extent if they lived in Miami than if they lived in Rogers, spending time with one's extended family is *not* a substitute for visitation with one's parent. The girls were certainly not deprived of a relationship with Tisha's extended family before they moved to Oklahoma and there was no evidence that they would be deprived of those relationships when they returned to Arkansas. However, they *had been* deprived of their relationship with their father while they lived in Oklahoma. On

those facts, the trial court did not err in concluding that the relocation was not in the children's best interest.

Unlike the dissent, we do not ignore the trial court's prior finding that the custodial parent in the case relocated "for the sole purpose of thwarting [appellee's] visitation with his children." Nor do we ignore the weight of the testimony presented by the custodial parent in this case simply because she was not required to offer any evidence in order to obtain the benefit of the presumption favoring relocation.

Accordingly we hold that, in light of the court's uncontested finding that Tisha thwarted her daughters' visitation with Charles, in light of evidence rebutting the presumption in favor of relocation, and in the absence of persuasive evidence that the move was in the children's best interests, the court correctly denied Tisha's petition to relocate.

Affirmed.

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

BIRD and BAKER, JJ., dissent.

SAM BIRD, Judge, dissenting. I respectfully dissent from the majority's position because I believe that the appellee, Charles Sill, failed to present sufficient evidence to rebut the presumption in favor of appellant's relocation under *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). I would therefore reverse and remand.

Following a hearing in January 2005, the court found appellant Tisha Sill to be in contempt for not paying certain financial obligations imposed upon her by the divorce decree and for her alleged failure to comply with the court's standard child-visitation order. Those findings are not appealed. The court also denied appellant's petition to relocate herself and her children to Miami, Oklahoma, expressing its belief that her move to Miami was motivated primarily by her intention to further burden appellee in the exercise of his visitation rights and to alienate him from his children.

I agree with the appellant that the evidence in this case was insufficient to rebut her presumptive right to relocate under *Hollandsworth, supra*. I am disappointed that the trial court and the

majority have chosen to disregard the dictates of that decision. In the oral recitation of her findings following the hearing, the trial judge stated:[1]

> I know it is difficult and frankly I don't think it is best for the children to be in Miami. So I am denying the petition to relocate and I am denying the petition to change custody and [appellant] is going to find herself a way to get back to this area, back to Benton County, so [appellee] can enjoy the visits he had with his children as scheduled, so he can go to school and participate in their lunch time, or he can go to school for extracurricular activities. He has been robbed of that, and I see absolutely no good reason why [appellant] moved away from here except to impose that burden on him and attempt to alienate his children.

I first note that in *Hollandsworth*, *supra*, our supreme court pronounced "a presumption in favor of relocation for custodial parents with primary custody," holding that "the noncustodial parent should have the burden to rebut the relocation presumption" and that "the custodial parent no longer has the obligation to prove a real advantage to herself or himself and to the children in relocating." *Id.* at 485, 109 S.W.3d at 663. The trial judge's finding that there was "no good reason" why appellant moved away clearly ignores this holding.

Simply put, primary custodial parents are no longer required to come up with "good" reasons or any reasons why they desire to relocate themselves and their children. They are presumptively entitled to relocate, subject to the right of the non-custodial parent to rebut that presumption with proof that the move would be detrimental to the interests of the children.

Except to complain that his scheduled visitation privileges were inconvenienced by appellant's eighty-five-mile move, appellee put on no evidence that was inimical to appellant's presumptive right to relocate. There was no evidence presented that the move would be detrimental to the children. The trial judge opined that appellant's $12,000 annual income reduction showed that her move to Miami did not improve her financial situation, reasoning, therefore, that appellant must have "moved to Miami and changed

---

[1] The trial judge in the case at bar, the Honorable Xollie Duncan, is the same trial judge whose decision to deny a relocation petition was reversed by our supreme court in *Hollandsworth, supra.*

jobs for the sole purpose of making it difficult for [appellee] to have contact with his children."[2] However, there was no evidence that the children's lifestyle had been negatively affected by the reduced income and there was evidence that the cost of living in Miami was less than in Rogers. Furthermore, since *Hollandsworth* relieves appellant, as the custodial parent, of the obligation to prove a real advantage to herself and her children in relocating, she was not required to show that she would benefit financially from the move or, for that matter, that her financial situation would not be negatively impacted by the move.

The only reason expressed by the trial judge in her oral recitation of findings for the denial of appellant's petition to relocate was that appellant had "no good reason" for the move and that her sole motive was to deprive appellee of his right "to enjoy the visits he had with his children as scheduled, so he can go to school and participate in their lunch time, or he can go to school for extracurricular activities." Similarly, the court's written order stated that appellant's motive to relocate was "for the sole purpose of thwarting [appellee's] visitation with his minor children."

A custodial parent's presumptive right of relocation is hollow indeed if it is rebutted by mere evidence that the non-custodian cannot as conveniently eat lunch with his children at school or attend their soccer games and other extracurricular school activities. As our supreme court said in *Hollandsworth, supra,* "Divorce, without exception, transforms the relationship between divorced parents, as well as between the parents and their children," noting that "[w]ithin four years of a divorce, one-fourth of all custodial mothers will move to a new location, and one out of every five Americans change residences each year." *Id.* at 476, 109 S.W.3d at 657. It is difficult for me to imagine a relocation of any distance by a custodial parent that does not, to some degree, impair, inconvenience, or interfere with the visitation preferences or privileges of the non-custodial parent. If such impairment, inconvenience, or interference with visitation is a sufficient basis to deny the relocation, then our supreme court might as well overrule *Hollandsworth*, abolish the relocation presumption, and return to the days of *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d

[2] While expressing concern about appellant's $12,000 income reduction that accompanied her move to Miami, the trial court does not appear to have considered that appellant was employed under contract as a teacher with the Miami School District, which she would be required to breach, and that she would be returning to Arkansas without employment.

517 (1994), when it was the custodial parent's burden to prove that relocation would result in a "real advantage" to the custodial parent and the children.

In *Hollandsworth, supra,* our supreme court held that "relocation alone is not a material change of circumstances" that will sustain a denial of a custodial parent's presumptive right of relocation. *Id.* at 485, 109 S.W.3d at 663. In recognition of that holding, the trial judge in the present case, although finding that a material change of circumstances had arisen from appellant's interference with appellee's visitation rights, then found that a change of custody was not in the children's best interests, but nonetheless forced appellant to return to Arkansas with her children[3] so that appellee could enjoy visitation with his children "as scheduled." In its written order, the court even ordered appellant to appear at a hearing three and a half weeks later to report to the court her progress in returning to Arkansas.

The trial court expressed its doubts as to the credibility of appellant's testimony relating to her motives for moving to Miami, Oklahoma. However, as already noted, under *Hollandsworth, supra,* the custodial parent need not prove a real advantage to herself and the children in relocating, and the burden is on the non-custodial parent to rebut the relocation presumption with evidence that the relocation would be detrimental to the best interests of the children. When called as an adverse witness by appellee, appellant testified that she decided to move to Miami because that is where her family is from, that living near her extended family made her life easier, that she had obtained a teaching job there, and that her living expenses there were less. Appellee, whose burden it was to prove that the move was detrimental to the welfare of the children, did not offer any proof in rebuttal to appellant's reasons for moving. In fact, the evidence offered by appellee established that both appellant and appellee were originally from Miami, Oklahoma, that they had moved to Arkansas only five years earlier, and that their parents and other extended members of both families still lived in Miami. Notwithstanding the total absence of any proof to the contrary, the trial court announced that "from watching her testify and watching the demeanor of the parties and witnesses on the stand, I am of the belief that [appellant] moved to Miami and

[3] In the oral presentation of her findings, the trial court stated that "where I am having the biggest problem is trying to decide if I can force [appellant], because that is what it is going to take, to comply with the court's order without taking the kids out of the home."

changed jobs for the sole purpose of making it difficult for [appellee] to have contact with his children."

To begin with, I do not understand what is not to believe about the preference of a divorced woman with two young children to live near her family. But more importantly, appellant was not required to prove that any real advantage would accrue to her or her children in making the move. Furthermore, the issue is not whether appellant offered credible reasons for her wish to relocate, but whether appellee offered proof to rebut the presumption that she could relocate for no reason at all. In my opinion, he did not.

In *Hollandsworth*, the supreme court set forth five matters that the trial court should consider in making its relocation determination, matters that the trial court here, with exception of the first one (*i.e.*, the reasons for the relocation), completely ignored. As to the appellant's reasons for relocating, the trial court concluded, in the complete absence of any evidence, that appellant's "sole" motive for relocating was to thwart appellee's exercise of visitation. The trial judge set forth no analysis whatsoever of the second through fifth of the *Hollandsworth* matters.[4] Most significantly, although the judge expressed, as her only reason for denying relocation, that appellant was motivated solely by a desire to thwart appellee's visitation rights, she gave no consideration to the third matter (*i.e.*, the visitation and communication schedule of the non-custodial parent) or to the supreme court's instructive language in *Hollandsworth*, *supra*, that the "advantages of the move should not be sacrificed solely to maintain the 'same' visitation schedule where a reasonable alternative visitation schedule is available." *Id.* at 481, 109 S.W.3d at 661 (quoting *Cooper v. Cooper*, 491 A.2d 606 (N.J. 1984)). The court in *Hollandsworth*, *supra*, also noted that "maintenance of a reasonable visitation schedule by the non-custodial parent remains a critical concern, but in our mobile society, it may be possible to honor that schedule and still recognize the right of the custodial parent to move." *Id.* at 481–82, 109 S.W.3d at 661 (quoting *Holder v. Polanski*, 544 A.2d 852 (N.J. 1988)). Here, even though the parties would have lived less than one-hundred miles apart had relocation been allowed (instead of the thirty miles apart they lived in Arkansas), the trial judge made

[4] The five matters, which have become generally known in the case law as "the *Hollandsworth* factors" are recited in the majority opinion and, for brevity's sake, will not be repeated here.

no effort to fashion an alternative visitation schedule that might have accommodated the interests of both parties or at least diminished the inconvenience to appellee. Instead, the court ordered that appellee's visitation would be granted according to "the Court's Standard Visitation Schedule," which was attached as an exhibit to the order, refusing to even allow the parties to vary from the "standard" schedule by agreement.[5]

I do not agree that a trial court has fulfilled its obligation under *Hollandsworth* by summarily announcing, without supporting evidence, that a custodial parent's relocation was intended to thwart a non-custodial parent's visitation rights, but failing to give any consideration to fashioning an alternative visitation schedule that would have allowed reasonable visitation while still recognizing the right of the custodial parent to move.

The majority's affirmance of the trial court's decision appears to arise, first, from a misunderstanding of appellant's arguments on appeal, and secondly, from a misapplication of the supreme court's decision in *Hollandsworth.* For example, appellant does not argue, as the majority contends, "that she was denied the benefit of [the relocation] presumption because the trial court found that [appellee] rebutted the presumption." Rather, appellant argues in her brief, quite clearly I believe, that she "was denied the presumption provided to custodial parents in relocation cases" because "there was insufficient evidence presented by Mr. Sill to rebut this presumption." While purporting to recognize that, under *Hollandsworth,* the burden is on the non-custodial parent to rebut the custodial parent's presumptive right to relocate, and that the custodial parent is not required to prove that any real advantage will accrue to herself or himself and the children in relocating, the majority, under the guise of de novo review, makes findings that the trial court did not make and essentially concludes that the trial court should be affirmed because: (1) appellant did not prove that her financial situation would not be impacted by the relocation; (2) appellant did not prove that the relocation would make it easier to benefit from the financial and moral support of her family in Miami; (3) appellant did not prove that the relocation would afford her daughters an opportunity to become better acquainted with family members in Miami *because they were already well acquainted as*

[5] In her oral recitation of findings, the court stated that "the standard visitation is going to be pursuant to the schedule . . ., and I am not going to leave it up to these parties to agree to something different, because they won't."

a result of frequent visits to Miami; and (4) appellant did not prove that the Miami schools offered greater educational opportunities and extra-curricular programs than the Rogers schools. What the majority refuses to acknowledge is that appellee, who had the burden of proof, offered no evidence whatsoever that appellant's relocation would be detrimental to the children's interests, relying instead solely on his evidence that his visitation rights were going to be inconvenienced by appellant's relocation.

In *Hollandsworth*, *supra*, our supreme court boldly realigned Arkansas with the states that recognize that a custodial parent, who bears the burden and responsibility for the children, should have the same right of mobility as non-custodial parents so as to enable custodial parents to also seek a better life for herself or himself and the children. The trial judge, who, as noted, is the same trial judge who was reversed in *Hollandsworth*, has not applied *Hollandsworth* here; and, regrettably, this court's refusal to reverse the trial court only serves to dilute *Hollandsworth* and return Arkansas to the days of *Staab, supra*, when the custodial parent desiring to relocate was obligated to prove that a real advantage would accrue to him or her and to the children from the relocation. In *Hollandsworth*, the supreme court expressly overruled *Staab*.

Viewing all of the evidence in this case, I am left with a definite and firm conviction that the trial judge made a mistake in denying appellant's petition to relocate with her children to Oklahoma. For this reason, I would reverse the trial court's decision, and I am authorized to state that Judge Baker joins in this dissenting opinion.

Jeff T. WALTON *v.* STATE of Arkansas

CA CR 03-395 228 S.W.3d 524

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Garnet E. Norwood, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. A Howard County jury convicted appellant Jeff Walton of delivery of crack cocaine and sentenced him to 360 months in the Arkansas Department of Correction. Garnet Norwood, appellant's attorney, petitions this court to withdraw as counsel. The motion was accompanied by a no-merit brief, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j) (2005), wherein counsel contends that all

rulings adverse to his client were abstracted and discussed. Appellant was provided a copy of this brief and was notified of his right to file pro se points for reversal. He subsequently filed a brief containing eight points for reversal. Counsel's brief does not comply with the Arkansas Rules of the Supreme Court; therefore, for the fourth time, we must deny counsel's motion to withdraw and remand this case for rebriefing.

In *Anders v. California, supra*, the United States Supreme Court discussed an attorney's obligation to his client when confronted with an appeal that he believes would be wholly without merit. Even though it recognized that an attorney may correctly conclude that an appeal on behalf of client would be without merit, it still recognized his obligation to protect his client's Sixth Amendment rights:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. . . . Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 744 (footnote reference omitted). Although the Supreme Court later held that this exact procedure was not mandated upon the States and that the States were free to adopt their own procedures, *see Smith v. Robbins*, 528 U.S. 259 (2000), this procedure forms much of the basis for our Rule 4-3(j) of the Rules of the Supreme Court. Subparagraph (1) of the rule reads in pertinent part:

> A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract and Addendum. The brief shall contain an argument section that consists of a list of *all rulings adverse to the defendant made by the circuit court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal.* The abstract and Addendum of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the circuit court.

(Emphasis added.) *See also Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). As we oftentimes state, it is imperative that counsel follow the appropriate procedure when filing a motion to withdraw as counsel. *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004). This framework is a "method of ensuring that indigents are afforded their Constitutional rights." *Campbell v. State*, 74 Ark. App. 277, 279, 47 S.W.3d 915, 917 (2001) (citing *Smith v. Robbins, supra*). In furtherance of the goal of protecting Constitutional rights, it is both the duty of counsel and of this court to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Id.*

When this case was first before this court in *Walton v. State*, CACR 03-395 (Ark. App. June 30, 2004) (not designated for publication), Mr. Norwood only addressed the sufficiency of the evidence and the trial court's admission of appellant's statement. These constituted only two of the over twenty adverse rulings in this case. Meanwhile, his client sought review of nine points, six of which were indeed addressed at trial. Mr. Norwood's brief in *Walton v. State*, CACR 03-395 (Ark. App. Jan. 12, 2005) (not designated for publication) still failed to abstract or discuss the *voir dire* proceedings, in which several objections were made. In some cases, he identified the ruling but merely stated, without explanation, that the trial court's ruling did not constitute reversible error. Other rulings went completely unaddressed. Again, we denied his motion to withdraw and ordered rebriefing. This case was before us a third time in *Walton v. State*, CACR 03-395 (Ark. App. June 29, 2005) (not designated for publication). Mr. Norwood included several adverse rulings that were identified in our previous opinions; however, other rulings remained absent from his brief. We particularly noted his failure to address the denial of his motion for a new trial and the denial for individual *voir dire* of jurors. We once again reordered rebriefing but not before making it clear that:

> [Counsel] is to address all adverse rulings, regardless of whether we identified that ruling for him or not. While it is this court's duty to fully examine the record to determine if an appeal would be wholly without merit, it is not our duty to do so with the purpose of instructing counsel what to include in a no-merit brief.

With these words, we hoped that Mr. Norwood would thoroughly review the record in this case and submit a brief (either adversarial or no-merit) that complied with our rules. However, like his previous briefs, it is clear that counsel has merely taken those flaws that we identified for him and appended those sections to the end of his existing brief.[1] Today, we are concerned that counsel's discussion of the motion to suppress the statement was not adequately addressed. Several arguments were made with regard to the statement, including that said statement was general in nature and that the statement was induced by false promises.[2] Yet, counsel merely restates a portion of the relevant facts and contends that the statement was harmlessly admitted. We are also dissatisfied with counsel's abstract of the proceedings. Our rules require that the abstract in a no-merit brief contain all rulings adverse to his client. In many places, counsel merely summarized the objection and noted the adverse ruling. A record on appeal is limited to that which is properly abstracted, *see Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997), and such abstracting does not allow us to perform a review of the record that ensures that the right to counsel is fully protected.

Rule 16(a) of the Arkansas Rules of Appellate Procedure – Criminal (2005) requires appellant's counsel to remain as his counsel throughout any appeal unless permitted by this court to withdraw in the interest of justice or for other sufficient cause.

---

[1] In his latest brief, counsel did address the denial of the motion for new trial, and this section of the brief was inserted after his discussion of why the denial of his motion for continuance during that hearing was without merit. However, this is one of the few arguments that was not simply appended to the end of his existing brief.

[2] If counsel decides to submit another no-merit brief, we would also like him to address the material-witness rule which states that "whenever an accused offers testimony that his confession was induced by violence, threats, coercion or offers of reward, 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." *Griffin v. State*, 322 Ark. 206, 213, 909 S.W.2d 625, 629 (1995); *see also Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004); *Smith v. State*, 254 Ark. 538, 494 S.W.2d 489 (1973).

Rule 1.1 of the Arkansas Rules of Professional Conduct states, "A lawyer shall provide competent representation to a client." The requirement of competent representation of a client's interest is not set aside simply because counsel is of the opinion that an appeal of his client's case is wholly without merit. Appellant chose Mr. Norwood to be his counsel, and as long as appellant continues to have him as his counsel, Mr. Norwood has an obligation to submit a brief in which his client's Sixth Amendment rights are protected, be it in the form of an adversarial brief or a no-merit brief. Mr. Norwood's work in this appeal falls short of meeting his obligations under our rules of professional conduct and the Sixth Amendment to the Constitution. We are unable to assess why counsel persists in filing no-merit briefs that come so short of the constitutional and procedural standard. However, we are certain that the latest submission, like the briefs that were previously rejected, does not pass muster.

In the case of an indigent appellant, we would have removed Mr. Norwood as counsel and appointed new appellate counsel to represent appellant. Because we have no knowledge of either the current relationship between Mr. Norwood and appellant or appellant's ability to pay for legal services, we cannot do so in this case. *See James v. State*, 329 Ark. 58, 945 S.W.2d 941 (1997). A decision to allow Mr. Norwood to withdraw would potentially leave appellant without counsel and without an ability to properly appeal his case before this court. Accordingly, we deny Mr. Norwood's motion to withdraw and remand this case for rebriefing. Finally, we grant Mr. Norwood fifteen days to demonstrate by affidavit why he should not be held in contempt for his constant failure to submit a brief in this case that complies with our rules and meets the constitutional standard. When a lawyer persistently fails to file a satisfactory brief such as has been the case in this instance, fundamental fairness requires that counsel be allowed to show why that persistence is not an effort to defy court rules or does not result from a disability that would render counsel unfit to continue in the representation.

Remanded for rebriefing.

PITTMAN, C.J., and CRABTREE, J., agree.

Jeffrey WEBB *v.* STATE of Arkansas

CA CR 05-773 228 S.W.3d 527

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Louis L. Loyd, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Jeffrey Webb appeals from the entry of his conditional guilty plea, arguing that the trial court should have suppressed the evidence of his possession of drug paraphernalia because no valid consent to search was given and because the search exceeded the scope of the officers' authority to conduct a "civil standby" to allow his wife to retrieve her personal belongings. We dismiss the appeal because appellant does not appeal from the judgment and conviction order that was entered based on his conditional guilty plea.

The search in this case occurred on March 9, 2004, after appellant's estranged wife, Jamie Webb, requested the officers to accompany her to appellant's residence to retrieve her personal belongings, a procedure referred to as a "civil standby." Mrs. Webb gave police officers consent to search the home. While Mrs. Webb was searching for her belongings, she found a box under the kitchen table that contained items consistent with the manufacture

of methamphetamine. Based on the contents of this box, appellant was charged with attempt to manufacture methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine.

Appellant filed a motion to suppress the evidence seized, arguing, *inter alia*, that Mrs. Webb had no authority to consent to the search. After a hearing, the trial court denied the motion. On March 16, 2005, appellant pleaded guilty to one count of possession of drug paraphernalia, in exchange for a five-year probationary sentence, a fine, and costs. He reserved his right to appeal from the guilty plea. He subsequently filed a notice of appeal, which expressly states that he appeals "from his Conditional Plea Agreement entered on March 16, 2005."

We dismiss the appeal because appellant's failure to appeal from the judgment and conviction order entered pursuant to his guilty plea has deprived our court of jurisdiction to decide his appeal. Arkansas Rule of Criminal Procedure 24.3(b) reserves the right of a defendant who enters a conditional guilty plea to appeal the adverse determination of a pretrial motion to suppress, if the defendant appeals from the *judgment* entered pursuant to the conditional guilty plea. Here, however, appellant does not appeal from the judgment and conviction order encompassing his plea agreement. Rather, he appeals "from his Conditional Plea Agreement entered on March 16, 2005." That is, appellant appeals from the plea agreement itself, which is insufficient under Rule 24.3 to grant this court jurisdiction to hear his appeal.

In *Hill v. State*, 363 Ark. 505, 215 S.W.3d 586, CACR 05-96 (2005), also a conditional-guilty-plea case, the Arkansas Supreme Court dismissed an appeal from the order denying the defendant's motion to suppress on the ground that the defendant failed to appeal from the judgment encompassing his guilty plea. *See also McDonald v. State*, 354 Ark. 680, 124 S.W.3d 438 (2003). Likewise here, appellant does not appeal from the judgment but from his conditional guilty plea. In fact, we found no judgment and conviction order in the record indicating that a judgment had been entered pursuant to appellant's plea agreement.

The State does not challenge the propriety of the appeal, but this issue is one of jurisdiction, which this court may raise, *sua sponte*. *Hill v. State*, 81 Ark. App. 178, 10 S.W.3d 84 (2003). Based

on the authorities noted herein, we dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

VAUGHT and BAKER, JJ., agree.

OFFICE of CHILD SUPPORT ENFORCEMENT *v.* Bobby Ray ADAMS

CA 05-802 228 S.W.3d 555

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Greg L. Mitchell, for appellant.

Wilson, Walker & Short, by: *Joe C. Short*, for appellee.

DAVID M. GLOVER, Judge. The State of Arkansas Office of Child Support Enforcement (OCSE) appeals from the trial court's decision that denied registration of a 1984 State of Washington divorce decree between appellee Bobby Adams and his then wife, Valorie Adams. The trial court based the denial of registration on its conclusion that Washington had ceded jurisdiction over Adams's support obligation in favor of Arkansas prior to the entry of the decree sought to be registered. Finding no error, we affirm.

Although the facts are undisputed, it is necessary to set out the lengthy history of this case. On July 6, 1984, a "Certificate and Order Under URESA"[1] was issued by the Spokane County, Washington, Superior Court (Washington court), accompanied by a petition for support and an affidavit that identified public assistance provided to Adams's wife, Valorie Adams, and their children. In the petition, an obligation of $438.90 a month and arrears of $8,914.80 were identified. The petition further expressly stated that no divorce decree had been issued. These documents were transmitted to OCSE in Arkansas. Thereafter, on July 23, 1984, a divorce decree was entered in the Washington court, setting Adams's child-support obligation at $350 per month.

Subsequently, an agreed order was filed on December 7, 1984, in the Hempstead County, Arkansas, Chancery Court (Arkansas court). This order established Adams's child-support obligation of $58 per week, starting November 9, 1984. The agreed order did not make any reference to the Washington divorce decree.

On April 4, 1991, at the request of OCSE, the Arkansas court entered an order in which it modified the agreed order, increasing Adams's support obligation to $64 per week, starting

[1] URESA is the Uniform Reciprocal Enforcement of Support Act. The Revised Uniform Reciprocal Enforcement of Support Act, first codified at Ark. Stat. Ann. §§ 34-2401 to 34-2440 (Repl. 1962) and later codified at Ark. Code Ann. §§ 9-14-301 to 9-14-344 (Repl. 1991, repealed by 1993 Ark. Acts 468), was in effect during this litigation until repealed and replaced by Act 468, which adopted the Uniform Interstate Family Support Act (UIFSA), Ark. Code Ann. §§ 9-17-101 to 9-17-902 (Repl. 2002). We use RURESA and URESA interchangeably and cite to the provisions in the Arkansas Code, not the Arkansas Statutes.

March 28, 1991. That order stated that Adams had willfully refused and failed to comply with the December 7, 1984 agreed order by not providing healthcare coverage. The order did not identify any arrearage or set any weekly amount to repay back support.

On October 19, 1994, again at the request of OCSE, the Arkansas court entered a second order modifying Adams's support obligation, setting biweekly support at $168 starting November 4, 1994. Likewise, this second order did not identify any arrearage or set any weekly amount to repay back support.

On June 1, 1999, a third order was entered by the Arkansas court finding that Adams's minor children had both reached the age of eighteen and had graduated from high school as of June 1, 1999. Based on this finding, the court terminated Adams's obligation to pay current support as of that date. The order, for the first time, also mentioned that Valorie Adams and Adams were divorced by a decree entered in the Washington court in July 1984. The order contained no finding of any arrearage.

OCSE commenced the present case on May 14, 2002, when it filed its petition seeking to register and enforce the Washington divorce decree. The petition, as amended, stated that it was brought pursuant to UIFSA. The petition alleged an arrearage of $8,826.18, as of March 8, 2000. In his response to the petition, Adams denied that he was in arrears, asserted that the State of Washington had relinquished jurisdiction to Arkansas, and stated that he had complied with all support orders issued by the Arkansas court. He also pled the affirmative defenses of *res judicata* and the statute of limitations.

At the hearing, Adams argued that the Arkansas court's orders could, under URESA, nullify the support provision in the 1984 divorce decree or that the court could find that jurisdiction was transferred to Arkansas. Adams also argued that he had paid all support sums ordered by the Arkansas court. In response, OCSE argued that the Arkansas court could not nullify the Washington divorce decree's support provisions without nullifying the entire decree, thereby making Adams's present marriage illegal. In its brief to the trial court, OCSE argued that RURESA did not allow Arkansas, as the responding state, to nullify the prior support provisions of the divorce decree because no specific language of nullification was used in the prior orders.

The trial court ruled from the bench, finding that the initial order issued by the Washington court on July 6, 1984, pursuant to Valorie Adams's URESA petition, ceded jurisdiction over Ad-

ams's child-support obligation to the Arkansas court. The trial court also found that this relinquishment of jurisdiction occurred prior to entry of the Washington divorce decree. The trial court specifically found that Arkansas had jurisdiction over the support issue at the time of entry of the Washington divorce decree and that the Washington decree had never been offered for registration until the present proceeding. The court expressly declared a nullification of the Washington decree's support provisions and denied registration of that decree. Finally, the court declared that Adams had satisfied all child-support obligations imposed by the orders from the Arkansas court. Judgment was entered accordingly and this appeal timely followed.

OCSE raises two points on appeal: that the trial court erred in denying registration of the Washington divorce decree and that the trial court erred in determining that Adams's child-support obligation had been satisfied. A trial court's ruling on child-support issues is reviewed *de novo* by this court, and the trial court's findings are not disturbed unless they are clearly erroneous. *Allen v. Allen*, 82 Ark. App. 42, 110 S.W.3d 772 (2003).

In its first point, OCSE argues that the trial court erred in denying registration to the Washington divorce decree because, under RURESA, a responding state cannot modify the support order of the initiating state without using specific language indicating nullification of the foreign support order. *See* Ark. Code Ann. § 9-14-331 (Repl. 1991, repealed by 1993 Ark. Acts 468); *Jefferson County Child Support Enforcem't Unit v. Hollands*, 327 Ark. 456, 939 S.W.2d 302 (1997); *Office of Child Support Enforcem't v. Troxel*, 326 Ark. 524, 526, 931 S.W.2d 784, 785 (1996); *Tanbal v. Hall*, 317 Ark. 506, 878 S.W.2d 724 (1994). However, these three cases are distinguishable from the present case in that they each involved support orders that were contained in decrees entered in other states several years prior to subsequent enforcement being sought in Arkansas under RURESA. By contrast, in the case at bar, in 1984 the Washington court referred the matter to the Arkansas court prior to entry later that month of the Washington decree. The decree was not disclosed to the Arkansas court until 1999.

Upon first notice and opportunity, the Arkansas court used language in the present order specifically nullifying the support language contained in the Washington divorce decree. Although the earlier orders issued by the Arkansas court did not contain express nullification language, OCSE concedes that the Arkansas court had not been made aware of the existence of the

Washington divorce decree and therefore could not have addressed the nullification issue any earlier. Accordingly, we affirm on this point.

In its second point, OCSE contends that the trial court erred in ruling that Adams's support obligation had been satisfied. We hold that OCSE is barred from relitigating this issue on the basis of *res judicata* in that there was no appeal from the 1999 order in which Adams's child-support obligation was determined to have been satisfied and no arrearages were found to exist at that time. *See California v. West*, 61 Ark. App. 69, 964 S.W.2d 221 (1998). If OCSE had believed that Adams owed any arrearages under the 1984 Washington divorce decree, it could have sought those arrearages in the 1999 proceedings that terminated Adams's support obligation. The May 2002 petition was too late for OCSE to do so.

Affirmed.

PITTMAN, C.J., and ROAF, J., agree.

Fred D. DAVIS III *v.* STATE of Arkansas

CA CR 05-608 228 S.W.3d 529

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Charles Sidney Gibson, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Following a jury trial in Jefferson County Circuit Court, appellant Fred Davis was found guilty of attempting to evade or defeat a state tax in violation of Ark. Code Ann. § 26-18-201(a) (Repl. 1997). The jury recommended a sentence of three years in the Arkansas Department of Correction, and the court suspended imposition for three years. Davis argues on appeal that the trial court erred in denying his motion to dismiss based on selective prosecution and in requiring him to submit a DNA sample. We find no error and affirm.

Davis was serving as a circuit judge in Jefferson County when he was charged with attempting to evade or defeat a state tax after being pulled over for a traffic citation. Davis's vehicle had an improperly-affixed dealer license plate, and he had not paid sales tax on the vehicle since its purchase two years earlier. Prior to the trial, he filed a motion to dismiss on the grounds that the State

selectively prosecuted him in violation of his constitutional rights because he was an elected official. The court denied Davis's motion.

After he was convicted and sentenced, the court entered a judgment and disposition order on February 2, 2005, requiring Davis to submit a DNA sample pursuant to Ark. Code Ann. § 12-12-1109(a)(2)(A) (Repl. 2003), and to pay costs and fees associated with the case. Davis filed a motion to correct the judgment on February 16, 2005, arguing that because the judgment stated that the jury sentenced him, it was inaccurate. On February 17, 2005, Davis filed an amended motion to correct the judgment alleging that requiring him to submit a DNA sample was improper because he had been given a suspended sentence, which he argued was not a "sentence" as discussed in Ark. Code Ann. § 12-12-1109. Davis then filed a notice of appeal from "the judgment and sentence of the Court entered in this action on the 20th day of January, 2005" on March 9, 2005. The court entered an order denying Davis's motions to correct filed on March 10, 2005.

On appeal, we must determine whether the trial court erred in denying Davis's motion to dismiss based on selective prosecution and whether the trial court erred in denying Davis's motion with regard to the DNA sample.

The defendant shoulders the burden of establishing a claim for selective prosecution. *Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003). To establish a prima facie case, a defendant must show (1) that the government singled him out for prosecution while others similarly situated were not prosecuted for similar conduct and (2) that the government's action in thus singling him out was based on an impermissible motive such as race, religion or the exercise by defendant of constitutional rights. *Id.* at 658, 128 S.W.3d at 454. If such showing is made, the burden shifts to the government to disprove defendant's case at an evidentiary hearing. *Id.*, 128 S.W.3d at 454. Before a hearing is mandated, however, a defendant's claim must be supported by specific factual allegations that take the motion past a frivolous phase and raise a reasonable doubt as to the prosecutor's purpose. *Id.*, 128 S.W.3d at 454.

In support of his case, Davis presented court records illustrating the number of prosecutions in Jefferson County for violations of two statutes: Ark. Code Ann. § 27-14-601 (Supp. 2005), pertaining to failure to pay registration fees, and Ark. Code Ann.

§ 27-14-903 (Repl. 2004), concerning failure to transfer title. Davis argued that a percentage of these violations occurred because of a failure to pay sales tax, which could have been prosecuted under Ark. Code Ann. § 26-18-201(a). He asked the court to consider the Jefferson County numbers and estimate a minimum number of possible prosecutions for the entire state. He argued that only three people had actually been prosecuted under Ark. Code Ann. § 26-18-201(a) and that all three were elected officials.

Davis's proof requires this court to assume that people charged with either failure to pay registration fees or failure to transfer title could have also been charged with attempt to defeat or evade a state tax. However, such a conclusion is not necessarily correct because a person who fails to register a vehicle or fails to transfer title does not always fail to pay sales tax.[1] Additionally, Davis fails to show any evidence that people not charged with failure to pay sales tax were situated similarly to him.

Even if we accepted his proof to establish that other persons similarly situated were treated differently, Davis fails to provide proof that the prosecutor in his case charged him based on an impermissible motive implicating the Equal Protection Clause of the Fourteenth Amendment. First, Davis asks this court to hold the entire State of Arkansas responsible for alleged selective prosecution, rather than the actual prosecutor that charged him with the offense. However, an overview of selective-prosecution cases reveals that the discriminatory intent at issue is that of the person who made the decision to prosecute. *See McCleskley v. Kemp*, 481 U.S. 279 (1987) (stating that a defendant who brings an Equal Protection argument must show that the decisionmakers in *his specific case* acted with a discriminatory purpose) (emphasis added); *United States v. Hastings*, 126 F.3d 310, 314 (4th Cir. 1997) (stating that "we will not impute the unlawful biases of the investigating agents to the persons ultimately responsible for the prosecution"); *United States v. Goulding*, 26 F.3d 656 (7th Cir. 1994) (declining to find impermissible motive where defendant failed to demonstrate that prosecutors who made the decision to charge acted vindictively). There was absolutely no evidence to prove that the special prosecutor assigned to Davis's case was involved in the decisions to charge or not charge other persons with violations of Ark. Code

[1] For instance, Ark. Code Ann. § 26-52-510(b)(1)(B) (Supp. 2005) only requires sales tax on vehicles with a purchase price that exceeds $2500.

Ann. § 26-18-201(a). Therefore, Davis failed to show that the prosecutor empowered with the authority to press charges decided to do so based on a constitutionally impermissible motive.

Davis also contends that, because the majority of the persons charged with a violation of the statute were elected officials,[2] this establishes a constitutional violation. He asks this court to hold that his status as an "elected official" places him in a protected class equal to those based on age, race, religion, or creed.

Our supreme court has stated that "[t]he Equal Protection Clause does not require that all persons be dealt with identically; it only requires that classification rest on real and not on feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that the treatment be not so disparate as to be arbitrary." *Douthitt v. State*, 326 Ark. 794, 800, 935 S.W.2d 241, 244 (1996). Additionally, the Court of Appeals for the Seventh Circuit has held that:

> Assuming that the decision to indict . . . was based in part on consideration of [the defendant's] political prominence, this is not an impermissible basis for selection. It makes good sense to prosecute those who will receive the media's attention. Publication of the proceedings may enhance the deterrent effect of the prosecution and maintain public faith in the precept that public officials are not above the law.

United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975). It appears that many other federal circuits agree. *See Hastings*, 126 F.3d at 315 (citing to several cases from various other circuits supporting the idea that potential deterrent effect of prosecuting a well-known person is proper consideration). We agree that elected officials are not members of a protected class for equal protection purposes. *See Owens v. State*, 354 Ark. at 644, 128 S.W.3d at 445. Because Davis failed to establish either requirement of his prima-facie case for selective prosecution, we affirm the trial court's decision to deny his motion to dismiss.

Davis also claims that the trial court erred when it ordered him to submit a DNA sample in accordance with Ark. Code Ann. § 12-12-1109(a)(2)(A), which requires that "a person who is

---

[2] Three people (including Davis) charged with a violation of Ark. Code Ann. § 26-18-201(a) were elected officials while one, Davis's friend who gave him the dealer tags for his car, was not.

adjudicated guilty . . . shall have a deoxyribonucleic acid (DNA) sample drawn as a condition of any sentence in which disposition will not involve an intake into a prison, jail, or any other detention facility or institution." He maintains that he was not "sentenced" because Ark. Code Ann. § 5-4-101(1) (Supp. 2005) defines suspended sentence as "a procedure whereby a defendant . . . is released by the court without pronouncement of sentence and without supervision." Therefore, he argues that because he has no "condition of sentence," he was not in the class of persons implicated by Ark. Code Ann. § 12-12-1109(a)(2)(A).

We do not have jurisdiction to entertain Davis's challenge to the DNA sample because he failed to file an amended notice of appeal after the court denied his post-trial motion to correct. Arkansas Rule of Appellate Procedure – Criminal 2(b)(2) provides that:

> A notice of appeal filed before disposition of any post-trial motions shall be treated as filed on the day after the entry of an order disposing of the last motion outstanding or the day after the motion is deemed denied. . . . Such a notice is effective to appeal the underlying judgment or order. A party who seeks to appeal from the grant or denial of the motion shall within thirty (30) days amend the previously filed notice. . . .

This rule required Davis to file an amended notice of appeal in order to challenge the denial of his post-trial motion to correct. He filed his notice of appeal on March 9, 2005, after he had filed two post-trial motions that were later denied by the trial court. To appeal either of those denials, he would have needed to file an amended notice of appeal, which he did not do. Therefore, his argument is not preserved for our review.

To reach the merits of Davis's DNA challenge, we would have to conclude that the DNA requirement was an illegal sentence. In *Bangs v. State*, 310 Ark. 235, 238, 835 S.W.2d 294, 295 (1992), our supreme court noted that "[t]he fact that an appellant does not object to an illegal sentence does not bar a challenge on appeal because Arkansas appellate courts treat allegations of void or illegal sentences much like jurisdictional questions, which can be raised for the first time on appeal."

We review questions of statutory interpretation de novo and construe criminal statutes strictly, resolving any doubts in favor of the defendant. *Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558

(2003). We also adhere to the basic rule of statutory construction, which is to give effect to the intent of the legislature. *Id.* at 144, 118 S.W.3d at 561. We construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language, and if the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. *Id.* at 144–45, 118 S.W.3d at 561. Additionally, in construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *Id.* at 145, 118 S.W.3d at 561.

Arkansas Code Annotated § 12-12-1109(a)(2)(A) requires that all persons "adjudicated guilty" are subject to the DNA requirement, even when those persons are not sentenced to jail, prison, or some other type of confinement. Arkansas Code Annotated § 12-12-1103(1) defines "adjudication of guilt" as "a finding of guilty by a jury." These statutes are clear and definite. Davis argues that these statutes conflict with Ark. Code Ann. § 5-4-101(a), which provides that a suspended imposition of sentence occurs without "pronouncement of sentence." However, Chapter 4 of Title 5 specifically notes that its definitions are for use only "in this chapter." Therefore, it would not apply to Title 12, Chapter 12 where the DNA statute is found. Our supreme court has declined to apply definitions used in one act to terms used in others when this language is present. *Southwestern Human Servs. Inst., Inc. v. Mitchell*, 287 Ark. 59, 696 S.W.2d 722 (1985).

Based on the clear, unambiguous language of Ark. Code Ann. § 12-12-1109(a)(2)(A) and Ark. Code Ann. § 12-12-1103(1), it is clear that the trial court did not illegally sentence Davis by requiring him to submit a DNA sample. As a whole, Title 12, Chapter 12 provides that the general assembly wanted all persons found guilty of a qualifying felony to submit a DNA sample. Whatever conflict Ark. Code Ann. § 5-4-101(a) may provide — if any — is resolved by the fact that those definitions are used only for Title 5, Chapter 4. Additionally, we are not entirely convinced that the requirement to give a DNA sample is even a "sentence" that can be illegal but rather an administrative function required by statute after a person has been adjudicated guilty.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

Henry Jay BUNCH *v.* STATE of Arkansas

CA CR 05-726 228 S.W.3d 534

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

Marianne L. Hudson, Public Defender, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. A jury sitting in Washington County found appellant Henry Jay Bunch guilty of aggravated robbery, three counts of attempted capital murder, felon in possession of a firearm, theft by receiving, possession of methamphetamine, possession of pseudoephedrine with intent to manufacture methamphetamine, and simultaneous possession of drugs and a firearm. Appellant was sentenced by the trial court to thirty years in prison for aggravated robbery, which was run consecutively to concurrent sentences totaling forty years for the remaining offenses, except that the twenty-five year sentence for simultaneous possession of drugs and a firearm was to run consecutively to all the other sentences, for a total of ninety-five years in prison. Appellant raises two issues on appeal. He contends that the trial court erred in failing to merge the aggravated robbery sentence into one of the counts for attempted capital murder. He also contends that the trial court erred

by failing to instruct the jury that he would be eligible for parole after serving seventy-percent of his sentence for aggravated robbery. We affirm as modified.

On November 14, 2004, appellant was suspected of shoplifting from the Wal-Mart store in Fayetteville. Appellant was confronted outside the store by two employees, manager Nathan Skelton, and Jarrod Nelson, the loss prevention officer. Appellant ran from them, but the employees tackled appellant and pinned him to the ground. Skelton let go of appellant's arms so that he could use his cell phone to call for additional help. As he did so, Skelton heard a loud pop and then felt something jabbing him in the stomach. Seeing that it was a gun, Skelton quickly rolled away. Nelson thought that Skelton had been shot, and he continued to struggle with appellant, trying his best to keep his finger behind the trigger to prevent appellant from firing the gun. As they scuffled, appellant put the gun to Nelson's head and also to his chest, saying "I'm going to get you," and "Do you want some of this"? Nelson managed to fling the gun out of appellant's hand, and then he retreated behind a pick-up truck. Appellant retrieved the gun and fired two shots at Nelson before running away.

The police had arrived by this time and Officer Thomas Reed chased after appellant. During the chase, appellant turned and fired a single shot at Reed. A short time later appellant was found hiding behind a bush at a nearby house. Appellant was wearing two pairs of pants. The legs of the inside pair of pants were tied at the ankles with speaker wire. Numerous packages of pseudoephedrine were stuffed inside the inner pair. A baggie containing methamphetamine and a .38 revolver were found. It was later determined that the revolver had been reported as stolen.

Appellant first argues that the trial court erred in denying his motion to set aside the conviction for aggravated robbery. This argument is based on the supreme court's decision in *Flowers v. Norris,* 347 Ark. 670, 68 S.W.3d 289 (2002). In that case, Flowers had been convicted of aggravated robbery, kidnaping, and attempted capital murder. Aggravated robbery and kidnaping were the underlying felonies used to support the conviction for attempted capital murder, and Flowers argued that double jeopardy precluded his being convicted and sentenced for those offenses along with attempted capital murder. The supreme court agreed, holding that because the State was required to establish the elements of one underlying felony in order to convict the appellant of attempted capital murder, it was error for the court to convict

and sentence the appellant for attempted capital murder and both of the underlying felonies. The court thus modified the judgment of conviction to merge the kidnaping conviction with the conviction for attempted capital murder.

The court's decision was based on its interpretation of Ark. Code Ann. § 5-1-110(d)(1) (Repl. 1997), which was amended in 1995 to authorize, among other things, separate convictions and sentences for capital murder and any felonies utilized as underlying felonies for the murder. The court noted that the statute was amended in response to the Supreme Court's decision in *Missouri v. Hunter,* 459 U.S. 359 (1983), where it was held that the right to be free from double jeopardy is not offended when a legislature ordains multiple punishments for the same offense. The *Flowers* court reasoned that, although the statute permitted convictions and sentencing for both capital murder and the underlying felony, the legislature had not included *attempted* capital murder in the amendment. Because the legislature had not authorized separate convictions for attempted capital murder and the underlying felony, the court ruled that it was necessary to merge one of the underlying felonies into the conviction for attempted capital murder.

The appellant in this case argues that *Flowers* mandates that his conviction for aggravated robbery must be merged into one of his convictions for attempted capital murder. In response, the State contends that the jury was instructed on three distinct grounds for conviction of attempted capital murder, such that the jury's verdict need not necessarily have rested on the charge of attempted capital murder with aggravated robbery as the underlying offense.

The State is correct that the jury was given alternative theories upon which to convict appellant of attempted capital murder. The jury instruction read:

> Henry Bunch is charged with the offense of attempted Capital Murder. A person commits the offense of Capital Murder if one, a person committed or attempted to commit the crime of aggravated robbery and two, that in the course and in furtherance of that crime or attempt or in immediate flight therefrom he caused the death of another person under circumstances manifesting extreme indifference to the value of human life ***or*** that he had the premeditated and deliberated purpose of causing a death of a law enforcement officer when such person was acting in the line of duty and with that purpose he caused the death of the victim ***or*** that with the premedi-

> tated and deliberated purpose of causing the death of another person he caused the death of another person.

(Emphasis supplied). Along with this instruction, the jury was given separate verdict forms for each count of attempted capital murder. The jury returned verdicts finding: (1) "We, the Jury, find Henry Bunch guilty of the charge of Attempted Capital Murder involving Jarrod Nelson and/or Nathan Skelton; (2) "We, the Jury, find Henry Bunch guilty of Attempted Capital Murder involving Officer Thomas Reed"; and (3) "We, the Jury, find Henry Bunch guilty of Attempted Capital Murder involving Jarrod Nelson." Based on the jury instruction and the verdict forms, the State asserts that there is nothing in the record to suggest that the jury's verdicts on any of the three counts were based on a finding that the murder attempt occurred during the commission of an aggravated robbery and that, presumably, the jury could have found that appellant acted with the premeditated and deliberate purpose to kill either another person, or a law-enforcement officer.

The State bases its argument on the decision in *Griffin v. United States,* 502 U.S. 46 (1991). A close reading of that case, however, reveals that it is not supportive of the State's position. In *Griffin*, the jury rendered a general verdict of guilty on a multi-object conspiracy charge. The question on appeal was whether there was sufficient evidence to sustain the guilty verdict when there was clearly insufficient evidence to support one of the objects of the conspiracy. The Court held that the general verdict was valid so long as it was legally supportable on any one ground.

In the course of the opinion, the Court discussed its earlier decision in *Stromberg v. California,* 283 U.S. 359 (1931), which appeared to take a contrary view. In *Stromberg*, a general verdict of guilty was entered when the jury was instructed on alternative theories for conviction. One of those theories, however, was deemed unconstitutional. The *Stromberg* Court wrote:

> The verdict against appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted

> under that clause . . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

Id. at 367-68. With respect to *Stromberg,* the Court in *Griffin* stated that "[t]his language, and the holding in *Stromberg,* do not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin,* 502 U.S. at 53.

Unlike *Griffin,* the case at bar does not concern the sufficiency of the evidence. The error complained of here is rooted in the Constitutional prohibition against double jeopardy. Thus, this case falls within the holding in *Stromberg,* and we are not able to speculate as to whether a certain verdict might have rested on a permissible ground. Based on the supreme court's decision in *Flowers* that double jeopardy precludes a conviction and sentence for both attempted capital murder and its underlying felony, we hold that the aggravated robbery conviction must be merged with one count of attempted capital murder. Our decision on this point renders moot appellant's argument that the trial court erred by failing to instruct the jury as to parole eligibility with regard to aggravated robbery.

Affirmed as modified.

GLADWIN and ROBBINS, JJ., agree.

Kathy BOVEIA *v.* STATE of Arkansas

CA CR 05-828 228 S.W.3d 550

Court of Appeals of Arkansas
Opinion delivered February 15, 2006

William R. Simpson Jr., Public Defender, by: *Erin Vinett*, Deputy Public Defender, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Kathy Boveia[1] was convicted after a bench trial for filing a false police report and was sentenced to three years' probation and a $350 fine. Boveia now appeals, asserting that the trial court erred in refusing to grant her directed-verdict motion because the State failed to prove that she filed a false police report in an attempt to conceal "criminal activity," as required for the felony charge of this offense. We agree and affirm as modified.

On July 10, 2003, the State filed a felony information alleging that Boveia filed a false police report in an attempt to conceal her own criminal activity. On November 29, 2004, Boveia stood for a bench trial in Pulaski County Circuit Court.

The State presented three witnesses at trial. Lieutenant Cheryl Williams testified that Boveia came to the Sherwood Police Department on April 9, 2003, to make a report. According to Lieutenant Williams, Boveia claimed that she had recently been in the hospital and that she was expecting Regions Bank to mail her ATM card to her residence, but she never received it. In addition, Boveia claimed that unauthorized charges in the amount of $584.63 were made on her card between April 1, 2003, and April 8, 2003. Lieutenant Williams stated that Boveia came into the police station alone, that she did not appear to have any visible cuts or scrapes, that she did not appear to be scared or nervous, and that she maybe looked tired or weak.

Detective David McLeod testified that he received information that Boveia reported that her ATM card had been stolen and used by persons unknown at several different locations. To follow up on the investigation, Detective McLeod contacted Regions Bank and asked for any photographs taken during the time frame that the ATM card was apparently used. Regions Bank forwarded him several photographs of someone using the ATM card. Detective McLeod further testified that he had never personally met with Boveia because she refused to come back to the police

[1] The briefs of appellant and appellee and several filings in the record reflect that the spelling of appellant's last name is "Bovela"; however, the correct spelling of appellant's last name appears to be "Boveia." We will refer to appellant as Kathy Boveia throughout this opinion. In addition, we note that appellant is also known as Kathy Johnson.

department but that he had a copy of her driver's license picture. He noticed that the person in the pictures from Regions Bank was the same person on the driver's license pictures; in addition, Lieutenant Williams confirmed to him that the person in the photographs and the person who filed the original police report were the same person.

Detective McLeod testified that his investigation took a different turn at this point and that he tried to contact Boveia but that she made several excuses as to why she could not meet with him. He then issued an affidavit for a warrant for filing a false police report. When Boveia was subsequently picked up, she made an additional report detailing that she had been held hostage and that she was held at knifepoint and forced to make ATM withdrawals. Detective McLeod stated that the photographs did not appear to show Boveia being held at knife point and that, in one picture, Boveia was standing in the middle of a Kroger store with no one around her. Detective McLeod also asserted that he was unable to recover any physical evidence related to the fact that she may have been abducted, threatened, assaulted, or forced to make any withdrawals.

Shannon Anderson, an employee in the fraud department at Regions Bank, testified that, in the first part of April 2003, she received some information that there may have been some fraudulent activity on Boveia's account; she stated that Boveia made the report and that the fraudulent activity apparently occurred between April 1 and April 8, 2003, but that she was uncertain about when Boveia made the report. In addition, Anderson stated that Regions's ATMs are equipped with cameras that take a series of still shots of people using them, and she identified Boveia as the user of the ATM in a series of photographs taken during the time period in question.

After the close of the State's evidence, defense counsel made a motion for a directed verdict, asserting that the State did not present a prima facie case that Boveia had committed a felony because the evidence only established that Boveia withdrew her own money, which in and of itself is not a crime. The prosecuting attorney countered that the testimony reflected that over $500 had been withdrawn from several Regions ATM locations during the time in question and that Boveia "committed the crime" on April 9 when she went to the Sherwood Police Department and said that she never received her card and did not authorize any of these transactions. The court then denied the motion. Defense counsel

then asked for a reduction of the charges to a misdemeanor, restating the contention that Boveia's withdrawing her own money is not criminal activity. The court again denied the motion.

Boveia took the stand on her own behalf. She testified at length regarding her version of the events. She claimed that Lieutenant Williams had probably been confused about what she was trying to tell her because the police report was taken in the noisy lobby but that the ATM card in question had arrived at her house and was unused as of April 1, 2003, and that she never said her card had not arrived but reported fraudulent use of the card to Lieutenant Williams. She then alleged that on April 1, 2003, a white woman named Susanna Cox knocked on her door and asked to come inside; apparently, when Boveia opened the door, two black men named "Old School" and "CiCi" pushed their way inside her home, tied her down, and held her hostage for seven days. Boveia asserted that over the seven-day period, the two men forced her to go to various ATMs to make withdrawals from her account but that they always remained out of the frame of the still photos; in addition, she claimed that the two men repeatedly raped her, struck her, pushed her down a flight of stairs, and tied her to a tree, among other things. Boveia testified that she did not report these crimes allegedly committed against her because she did not trust the Sherwood Police Department and because she was afraid for her life; however, she stated that she did immediately call a rape-crisis center, and her counselor informed her that prosecution of rape cases is a lengthy and difficult process.

Sergeant Jim Calhoun also testified and stated that he handles sex crimes, missing persons, and anything that deals with children. He testified that he came into contact with Boveia after her attorney contacted him and asked him to speak with her about her allegations of being abducted and sexually assaulted. He further testified that when he met with Boveia she told him that she had been held hostage and had been sexually assaulted numerous times; she also stated to him that her abductors had gained access to her debit card or that she was forced to make transactions from the debit card. He testified that he told her that he needed a detailed statement in chronological order if she wanted him to investigate her claims. The defense proffered into evidence a lengthy and bizarre typed statement, prepared by Boveia, detailing her version of the events. Sergeant Calhoun then stated that, at the request of Boveia, he did not go further with the investigation and filed it as

inactive. He testified that Boveia stated that she did not want the confrontation that came along with the investigation.

At the close of evidence, defense counsel renewed the motion for a directed verdict, and the court again denied it. The State closed by stating that Boveia filed an initial report on April 9, knowing that it was false, in an effort to conceal her own criminal activity, namely that by reporting the card lost, "she would somehow get free money to that effect." The court found Boveia guilty of felony filing a false police report and sentenced her to three years' probation and a $350 fine.

Boveia's sole point on appeal is that the trial court's denial of her motion for directed verdict on the felony charge was in error. On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002). The appellate court views the evidence in the light most favorable to the State and will affirm the conviction only if there is substantial evidence to support it. *Id.* Substantial evidence, whether direct or indirect, is that which is forceful enough to compel reasonable minds to reach a conclusion one way or another without resort to speculation or conjecture. *Id.*

In the information, the State alleged that Boveia violated Ark. Code Ann. § 5-54-122 (Repl. 1997) by filing a false police report in an effort to conceal her own criminal activity. This statute provides in pertinent part:

> (a) For the purpose of this section, "report" means any communication, either written or oral, sworn or unsworn.
>
> (b) A person commits the offense of filing a false report if he files a report with any law enforcement agency or prosecuting attorney's office of any alleged criminal wrongdoing on the part of another knowing that such report is false.
>
> (c)(1) Filing a false report is a Class D felony if:
>
> > (A) The crime is a capital offense, Class Y felony, Class A felony, or Class B felony; or
> >
> > (B) The agency or office to whom the report is made has expended in excess of five hundred dollars ($500) in order to investigate said report, including the costs of labor; or
> >
> > (C) Physical injury results to any person as a result of the false report; or

(D) The false report is made in an effort by the person filing said false report to conceal his own criminal activity; or

(E) The false report results in another person being arrested.

(2) Otherwise, filing a false report is a Class A misdemeanor.

Ark. Code Ann. § 5-54-122 (emphasis added).

The only subsection of the felony offense relevant to the State's case against Boveia is Ark. Code Ann. § 5-54-122(c)(1)(D).

When construing a criminal statute, the appellate court follows the rule of lenity, meaning that it strictly construes criminal statutes and resolves any doubt in favor of the defendant. *Colburn v. State*, 352 Ark. 127, 98 S.W.3d 808 (2003). There are no Arkansas cases construing Ark. Code Ann. § 5-54-122(c)(1)(D). In addition, there are no Arkansas cases clearly defining "criminal activity," although the language from several cases suggests that "criminal activity" is a criminal act as defined by statute. In *Bashaw v. State*, 364 Ark. 272, 219 S.W.3d 146 (2005), our supreme court found that the trial court did not err in finding that appellants' club constituted a public nuisance. The court noted that the club had "been cited for multiple violations," including selling unauthorized alcohol as well as other "criminal activity." *Id.* at 1; *see also Roberson v. State*, 54 Ark. App. 230, 925 S.W.2d 829 (1996) (holding that radio dispatch concerning "criminal activity" was sufficient for police to stop appellant's vehicle and that there has never been a requirement that someone know that a "crime" has been committed before an officer can conduct an investigatory stop).

At trial and now on appeal, appellant contended that the police report was not made to conceal her own criminal conduct and that the State failed to offer any proof whatsoever as to her supposed criminal activity. We agree. While Boveia's version of the events was incredible, and the trial court obviously did not believe her, this is not sufficient to sustain her felony conviction, because the State presented no evidence establishing that Boveia had committed any other crime in addition to filing the false police report.

The State argues that the filing of the police report was designed to conceal Boveia's effort to defraud the bank of her authorized withdrawals by claiming they were unauthorized. The

State cites Ark. Code Ann. § 5-36-103(a)(2),[2] the theft-of-property statute, to stand for the proposition that "[k]nowingly filing reports of unauthorized use of one's account, after performing the authorized use, is a criminal act." Even if this court assumes that knowingly filing false reports of unauthorized use of one's account with one's bank is criminalized by statute, the State failed to offer any proof that Boveia committed this crime.

First of all, the State failed to argue this during its case in chief and only mentioned in its closing argument that Boveia was attempting to get "free money" from her bank. Secondly, Regions Bank's representative, Shannon Anderson, never testified that Boveia tried to defraud the bank out of money; she only stated that Boveia reported some fraudulent activity on her account from April 1, 2003, through April 8, 2003. Ms. Anderson then stated that she was uncertain when Boveia made this report. Boveia filed her police report on April 9, and the earliest she could have filed a fraud report with the bank was April 8, 2003. Ms. Anderson, however, was unable to pinpoint an exact date. As such, the State presented no evidence that Boveia filed her fraud report to the bank prior to filing her report with the Sherwood Police Department. Even assuming that Boveia filed the bank report prior to filing the police report, the State still presented no evidence to prove that Boveia filed the fraud report with the bank with the intention of defrauding the bank out of money, and Ms. Anderson never testified that the investigation led to Boveia being offered or receiving any funds from Regions.

In essence, the State made no attempt to establish that Boveia had committed a crime that the filing of the false police report was designed to cover up. The State instead focused on proving only that the report had to be false because the pictures showed Boveia withdrawing her own funds from the various ATMs. In this regard, the State argues alternatively that the court should modify Boveia's conviction to reflect the misdemeanor offense rather than grant dismissal. The State contends, and we agree, that there was sufficient evidence to support a finding that Boveia filed a false report even if there was not sufficient evidence that she did so to conceal her own criminal activity.

---

[2] This section states that a person commits theft of property if she "knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof."

Accordingly, in light of the fact that the evidence established that Boveia filed a false police report, we modify the judgment of conviction to reflect the misdemeanor offense of filing a false police report under Ark. Code Ann. § 5-54-122(c)(2). *See Allen v. State*, 64 Ark. App. 49, 977 S.W.2d 230 (1998) (modifying conviction of second-degree battery to lesser included offense of second-degree assault).

Affirmed as modified.

PITTMAN, C.J., and GLOVER, J., agree.

Corey TURNER *v.* STATE of Arkansas

CA CR 05-912 229 S.W.3d 588

Court of Appeals of Arkansas
Opinion delivered February 22, 2006

Witt Law Firm, by: *Ernie Witt*, for appellant.

Mike Beebe, Ark. Att'y Gen, by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. This is an appeal from a conditional guilty plea to possession of a controlled substance with intent to deliver, for which appellant was sentenced to twelve years' imprisonment. On appeal, he argues that the police officer did not have probable cause to conduct the search that disclosed over fifty pounds of cocaine concealed in a false bed of the pickup truck in which he was a passenger. We affirm.

The record shows that neither the driver nor the passenger owned the vehicle but that both were using it with the permission of a third party for whom they were working. The police officer testified that he asked the driver for permission to search the truck and that the driver verbally consented.

One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent, and a co-occupant has the authority to consent to a search. *King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977). In *Love v. State*, 355 Ark. 334, 138 S.W.3d 676 (2003), the Arkansas Supreme Court said:

> The determination of third-party consent, like other factual determinations relating to searches and seizures, must be judged against an objective standard. *See Hilliard v. State*, 321 Ark. 39, 900 S.W.2d 167 (1995). Simply stated, that standard is: would the facts available to the police officer at the moment warrant a man of reasonable caution to believe that the consenting party had authority over the premises? *See id.* This court has recognized that a warrantless search can be valid where voluntary consent has been given by a third party with sufficient control or authority over the premises. *See Spears v. State*, 270 Ark. 331, 605 S.W.2d 9 (1980). Whether consent by that party is valid under the Fourth Amendment standards rests upon mutual use of the property by persons generally having joint access or control for most purposes. *See Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979). The pertinent question is whether the one giving consent possesses common authority or other sufficient relationship to the premises. *See id.*

Id. at 341-42, 138 S.W.3d at 680.

Appellant argues that the police officer's search of the exterior of the pickup truck after the search of the interior yielded no evidence of contraband exceeded the scope of the search to which the driver consented. Appellant concedes that the driver consented to a search of the truck but argues that the consent was limited to the interior.

In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error, giving due weight to inferences drawn by the trial court. *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003). On our de novo review of the record, we conclude that the driver of the vehicle generally consented to the search of the vehicle without limiting the scope of the search to the interior. Furthermore, after searching the vehicle's interior, the police officer observed modifications and irregularities beneath the bed of the truck that were, according to his training and experience, indicative of a false compartment commonly used for the concealment of contraband. The record shows that the driver did not object to the examination of the exterior of the vehicle and that he failed to object even when the police officers began drilling the holes in the bed of the truck that resulted in the discovery of the packaged cocaine.[1] We conclude that the search of the vehicle's exterior was within the scope of the consent granted by the driver and that the police officer's observations of modifications beneath the bed of the truck indicative of a false compartment for the concealment of contraband gave rise to probable cause to perform the more intrusive search of drilling holes in the truck's bed.

Affirmed.

GLOVER and ROAF, JJ., agree.

---

[1] In a similar case, the United States Court of Appeals for the Eighth Circuit has held that a driver's failure to object to such a procedure, performed in his presence, made it objectively reasonable for the police officer to conclude that it was within the scope of the consent granted by the driver. *See United States v. Martel-Martines*, 988 F.2d 855 (8th Cir. 1993).

Jim D. SWINK *v.* LASITER CONSTRUCTION, INC.

CA 05-563 229 S.W.3d 553

Court of Appeals of Arkansas
Opinion delivered February 22, 2006

[Rehearing denied April 5, 2006.]

Quattlebaum, Grooms, Tull & Burrow P.L.L.C., by: *E.B Chiles IV* and *Brandon B. Cate*, for appellant.

Newland & Associates, P.L.L.C., by: *J. Richard Newland*, *Joel F. Hoover*, and *Ray S. Pierce*, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Jim Swink appeals from a jury verdict awarding appellee Lasiter Construction a judgment for $60,500 for money Swink withheld as liquidated damages for delays in a construction project. The jury also awarded Lasiter $6,941.85 for additional landscape work. The trial court awarded Lasiter $71,037.40 in attorney's fees after reducing the hourly rates charged by Lasiter's attorneys and paralegals. Lasiter cross-appeals from the fee award, alleging that the hourly rates were reasonable. We affirm in part and reverse in part on direct appeal. We reverse and remand on cross-appeal.

Swink owns property on Highway 10 in western Pulaski County that he sought to develop in a project known as Montagne Court Phase I. White-Daters & Associates, Inc., were to be the project engineers. On September 12, 2002, Swink and Lasiter entered into a contract for the construction of the project. The contract, *inter alia*, provided that Lasiter would complete the project within 120 days of being ordered to begin construction. The contract also provided that, if Lasiter failed to timely complete the project, it would pay Swink liquidated damages of $500 per day, to be withheld from the final amount due Lasiter. The contract also provided a method for Lasiter to request additional

time to complete the project. An extension of time would not be automatically granted but granted upon terms Swink considered reasonable. If the delay was a continuing one, then only one notice was necessary. Lasiter began work on September 23, 2002, and substantially completed the project by June 2, 2003. The City of Little Rock accepted the project on June 19, 2003.

On October 20, 2003, Lasiter filed suit against Swink, seeking to collect $115,298.53, the balance due under the contract. The complaint also sought $41,599 in extended overhead costs generated by delays allegedly caused by Swink or his engineer. Lasiter also sought to foreclose on a lien filed contemporaneously with the complaint. Finally, Lasiter sought attorney's fees for enforcing its lien and for breach of contract.

Swink answered, denying liability and asserting that Lasiter had been paid all sums to which it was entitled. Swink filed a counterclaim, alleging that Lasiter had breached the contract by not completing work within 120 days after beginning construction and by not requesting extra time to complete the project as allowed under the contract. The counterclaim also alleged that Lasiter violated Ark. Code Ann. § 5-37-226 (Repl. 1997) by filing its lien and that Lasiter had damaged Swink by not properly giving notice of its lien. The counterclaim sought both compensatory and punitive damages, treble damages under section 5-37-226, and attorney's fees.

Michael Lasiter, a contractor for over twenty years, testified that the project engineers issued a work order to proceed with construction on September 16, 2002; however, Lasiter stated that he did not receive such a work order. He stated that there were delays almost from the start of the project, including not having a full set of plans until December 13, the waterline to Swink's residence not being noted or located on the plans, and groundwater seeping into the work. He added that these problems were part of Swink's responsibility in planning the project. He also identified three letters, dated October 15, 2002; December 31, 2002; and March 13, 2003, to the project engineers that he contended served as requests for additional time to complete the project.

The October 15 letter listed all three problems. The December 31 letter, written by estimator Lynn Harrell, contained a schedule calling for twenty-nine additional work days, weather permitting, to complete the project. Also attached to this letter were notes showing the daily weather conditions and the work

performed each day. The March 13 letter discussed the groundwater problem and stated that Carl Garner, a soils engineer, had suggested installing a French drain to alleviate the problem. The letter also noted that the groundwater problem was brought to the attention of the project engineers earlier in the project construction. Finally, the letter stated that Lasiter would not be responsible for delays attributable to the lack of engineering regarding the groundwater problem, delays from the lack of an easement necessary for the installation of the sewer line, and delays for having to relocate Swink's waterline.

Lasiter also testified that the French drain resolved the groundwater problem and allowed the project to be substantially completed by June 2, although some additional work was done on June 23 and in August. He stated that Swink's engineers stopped calculating liquidated damages on June 2. Lasiter stated that the October 15 letter was sent within seven days of encountering the groundwater problem and the lack of an easement for the sewer. He also stated that he did some extra work placing sod and grass over the easement area for which he was not paid.

Lasiter identified two estimates where liquidated damages were not withheld. He stated that his company was not paid for pay estimate 5. He identified the final pay estimate and revised final estimate, which withheld $69,500. Lasiter testified that he wrote a September 2, 2003, letter stating that Swink was responsible for all of the delays mentioned in the March 13 letter. The September 2 letter also stated that Swink did not have the property ready to begin construction until December 13 and that, by not issuing a notice to proceed, Swink waived his right to withhold liquidated damages.

Lasiter stated that he was seeking $150,000, which included the withheld liquidated damages. He stated that Lasiter had spent $318,223.21 to complete the project and that Swink had agreed to pay $321,000, although that sum was increased by the change orders. He said that Swink had paid only $181,655 to date.

On cross-examination, Lasiter admitted that the easement agreement was sent to his office on October 21 but that it did not include the grade plans. He also noted that the contract's special provisions concerning completion of the work and liquidated damages appear conflicting: one sentence stated that, should the contractor fail to complete the project on time, the owner shall immediately begin to withhold liquidated damages, while the last

sentence of that special provision stated that all liquidated damages shall be withheld from the final pay estimate.

Jim Burt, the former superintendent for Lasiter, testified that he had worked on two projects where White-Daters served as the engineer and that, in both cases, he never began work with a complete set of plans. He said that, although it is customary to receive a notice to proceed, one was not received on this project. He stated that the project was not completed within 120 days, as provided by the contract, because of several delays, including not having an easement for part of the sewer, a groundwater problem, and not having a full set of plans. He also said that the plans did not locate all existing utilities. He said that additional work was performed but that no additional days were sought or granted for this additional work.

Burt testified that Lasiter received the sewer plans on November 2 but did not receive the plans for the storm drain until mid-December, causing a delay. According to Burt, the lack of an easement for the sewer caused a delay because sewers are built from the deepest part first. He stated that work could not have started in the middle of the line due to possible misalignment. Another delay resulted from not having the plans approved by the city. Burt said that obtaining the easement and obtaining approval of the plans by the city was the responsibility of Swink or the engineers.

He next described the problem with groundwater keeping the site muddy all of the time. Burt said that the engineers were advised of the problem several times before Lasiter hired its own soils engineer, Carl Garner, who suggested a French drain, which solved the problem. He also described several instances of additional work by Lasiter for which Lasiter did not seek additional time because it did not believe that the contract time had started due to the lack of a notice to proceed. He also stated that Swink and the engineers did not mention liquidated damages until the end of the project. According to Burt, the project was substantially complete but additional work was done on June 23, 2003, installing storm-drain pipe.

Terri Mathis, Lasiter's bookkeeper and controller, testified that she did not receive payment for pay estimate 5 in the amount of $60,956.68. She stated that she called Swink about the matter but that he did not mention liquidated damages. She stated that all of the extra costs that Lasiter incurred, including the landscaping, totaled $55,289.09. On cross-examination, she admitted that the

contract allowed Lasiter a method to request payment for this extra work but that she was not familiar with that method. She also admitted that she had no knowledge of Lasiter's billing Swink for this extra work. The charge for the landscape work was $6,941.85. She stated that this was the "hard" cost.

Jim Swink testified that the site was wet in December 2002, due to a lot of rain, and asserted that the only delay Lasiter told him about was due to the weather. He also stated that Lasiter never asked for an extension of time but that, if the engineer had so recommended, he would have agreed to one. Swink stated that the time for completion had expired prior to the time for pay estimates 3, 4, and 5 but that all three estimates were approved for payment. According to Swink, he started calculating the liquidated damages the day after the 120-day period expired and withheld them from the final pay estimate, as required by the contract. He also said that he told Jim Burt and Lasiter that he was charging liquidated damages, both before and after the 120-day deadline expired. He stated that he did not pay estimate 5 because the liquidated damages exceeded the amount requested in that estimate. He also admitted that he withheld liquidated damages but did not know that Lasiter was going to seek payment for additional work.

Swink admitted that he was a convicted felon, having pled guilty to aiding and abetting securities fraud. He disputed Jim Burt's testimony that the site was so muddy that it would "suck your boots off." He stated that Lasiter ruptured the water line to his house but disputed Lasiter's assertion of when it happened or that it delayed the project three weeks.

Swink asserted that Lasiter's crew did not return for approximately six weeks, from September to November. He admitted that it may have rained a day or two during this time. Swink testified that, during his fall conversations with Burt, he asked if Burt was aware of the 120-day deadline and that Lasiter could be assessed liquidated damages of $500 per day and that Burt was aware. He also related another telephone conversation with Burt that occurred when he was angry at Burt for the delays and that Burt told him that Michael Lasiter tells him (Burt) where to send the crews and equipment and that he had been moved to another project. He also asserted that Lasiter did very little work in January.

Next, Swink recounted the Christmas meeting with Lynn Harrell at Lasiter's office. He stated that Harrell was told that the contract would be enforced, meaning that liquidated damages

would be withheld. He also stated that Michael Lasiter joined the meeting and that there was a discussion about the delays being caused by rain. Swink stated that the result of this meeting was Lasiter's December 31 letter. He stated that Harrell and Lasiter assured him that they would give the project priority and arrange a schedule for completion and that he agreed to that schedule.

Brian Dale, an engineer with White-Daters, testified that he was involved in the project and that he was familiar with the contract and its provision calling for completion within 120 days. He stated that he prepared and sent the notice to proceed on September 16 and that Lasiter started work on September 23. He said that neither Lasiter nor the engineers were aware of the location of the water line to Swink's residence because it was a private service line. It was his opinion that the delay in dealing with this water line did not cause Lasiter to miss the 120-day deadline.

Dale admitted that it was necessary to obtain an easement for the sewer system but that the delay did not cause Lasiter to miss the deadline. However, he asserted that Lasiter could have begun in the middle of the sewer while the easement issue was resolved. He also stated that it was not unusual for all of the plans not to be prepared or not to have all city approvals prior to beginning construction.

According to Dale, he did not receive Lasiter's October 15 letter and indicated that he did not consider it a request for an extension of time to complete the project. He also stated that the statements concerning groundwater would not have alarmed him because it was early in the project and groundwater is frequently encountered. He also described a fall conversation with Jim Burt concerning groundwater and stated that he wanted to wait until March 2003 to address the groundwater issue. He also admitted that the site was wet between October and March but asserted that this site was no wetter than other project sites. He said that Carl Garner's suggestion of French drains was consistent with his fall conversation with Burt because, by March, all utilities had been installed and it was the proper time to address the issue before installing the roadbed.

Dale said that Lasiter's December 31 letter was not considered a request for an extension of time because it did not specifically mention that Lasiter needed additional time. He stated that the letter gave an estimate of twenty-nine days to complete the

project. He said that he made the liquidated-damages calculations and that nothing in the contract required Swink to notify Lasiter that liquidated damages were being withheld or calculated. He testified that pay estimate 6 was intended to be final pay estimate but that it incorrectly calculated the damages from the date of the contract rather than the date of the notice to proceed.

On cross-examination, Dale admitted that Lasiter could not have begun work on the storm drains until after the plans were approved on October 16 by Little Rock Wastewater. He also asserted that Lasiter was not ready to do that work. He also stated that the storm drain was not staked out until December 13, roughly ninety days from the notice to proceed.

Joe White, a civil engineer with White-Daters, testified that he was primarily responsible for drafting the contract for the project. He described the contract as fairly standard in the industry, stating that the $500-per-day figure for the liquidated damages was about average and, in part, based upon the size of the project. He stated that he was familiar with the contract language calling for the liquidated damages to be withheld from the contractor's final payment and that the language calling for the damages to be immediately withheld referred to the date that calculation of damages was to begin. The time begins to run from the notice to proceed, he said, adding that giving a contractor fifteen days to file a claim for extra work was generous. According to White, liquidated damages were not withheld from pay estimates 3 or 4 because the contract required that they be deducted from the final payment.

White stated that time was important on the project and that delays can occur, causing the contractor to need additional time. He also said that it was important for any requests for additional time to be in writing. White said that he signed the notice to proceed on September 16 and that Lasiter began work on September 23. He admitted that not all of the plans were approved by the city until after the project began but that this was the case in nine of ten projects. He added that Lasiter could have been working on other parts of the project while waiting for the approvals.

According to White, the problem with the water line to Swink's residence did not delay Lasiter. He also said that the problem in obtaining the easement for the sewer was not unusual and did not delay Lasiter because work could have begun in the middle of the line, at manhole five. He said that Lasiter's October

15 letter was not a request for additional time and that the issues raised were typical problems. He said that Lasiter indicated that it encountered the waterline on October 11, within seven days of the October 15 letter. He added that, if Michael Lasiter said that they encountered groundwater within seven days of October 15, he could not dispute that.

White described groundwater as common in west Little Rock and stated that he wanted to get all of the utilities installed before addressing the groundwater and French drains because the installation of the utility trenches would lower the groundwater. He said that the French drain would be the last item installed because it is the shallowest. He said that it was not necessary to address the issue until March, when all of the utilities were in place. He denied that it was a failure on White-Daters's part to deal with the issue before March. Although the storm-drain plans were approved on October 16, White said that Lasiter did not ask that the drain be staked out prior to December. He also said that White-Daters did not prevent Lasiter from asking that the drain be laid out earlier and suggested that it could have been installed in October.

Lasiter's December 31 letter did not alarm White because Lasiter said that it could complete the job in twenty-nine days, two weeks after the deadline. He said that it was reasonable for Lasiter to ask for twenty-nine more days.

White said that it was possible for Lasiter to finish the job within 120 days but that they did not finish until June. He also said that it was no surprise that Swink withheld liquidated damages. He asserted that Lasiter gave Swink notice of the lien at a meeting with Swink, Michael Lasiter, Lynn Harrell, Jim Burt, and himself in attendance. He said that he was mistaken when he said in his deposition that Lasiter could wait until a problem was resolved before seeking an extension of time. He also asserted that Lasiter did not make its one claim necessary for a continuing delay.

At the close of Lasiter's case and again, at the close of all of the evidence, Swink made motions for directed verdicts, which were denied. The case was submitted to the jury on interrogatories. The jury answered the interrogatories as follows:

> INTERROGATORY NO. 1
> With the October 15, 2002, letter from Michael Lasiter to Brian Dale, did Lasiter Construction, within 7 days of the event causing

delay, request from Mr. Swink an extension of time to complete the contract beyond the 120 days provided by the contract? YES. (10 votes)

INTERROGATORY NO. 2
In response to the October 15, 2002, letter from Michael Lasiter to Brian Dale, did Mr. Swink grant Lasiter Construction an extension of time to complete the contract beyond the 120 days provided by the contract? NO. (unanimous)

INTERROGATORY NO. 3
With the December 31, 2002, letter from Lynn Harrell to Joe White, did Lasiter Construction, within 7 days of the event causing delay, request from Mr. Swink an extension of time to complete the contract beyond the 120 days provided by the contract? YES. (10 votes)

INTERROGATORY NO. 4
In response to the December 31, 2002, letter from Lynn Harrell to Joe White, did Mr. Swink grant Lasiter Construction an extension of time to complete the contract beyond the 120 days provided by the contract? YES. (9 votes)

INTERROGATORY NO. 5
With the March 13, 2003, letter from Michael Lasiter to Joe White, did Lasiter Construction, within 7 days of the event causing delay, request from Mr. Swink an extension of time to complete the contract beyond the 120 days provided by the contract? YES. (11 votes)

INTERROGATORY NO. 6
In response to the March 13, 2003, letter from Michael Lasiter to Joe White, did Mr. Swink grant Lasiter Construction an extension of time to complete the contract? NO. (unanimous)

INTERROGATORY NO. 7
If you answered yes to Interrogatory No. 2, and/or Interrogatory No. 4, and/or Interrogatory No. 6, then answer Interrogatory No. 7. Otherwise, go to Interrogatory No. 8. Without including the amount of two checks that Mr. Swink tendered to Lasiter Construction ($22,563.53 on August 25, 2003, and $3,351.98 on October 16, 2003), what amount of the $69,500 in liquidated damages that Mr. Swink withheld should be awarded to Lasiter Construction? $60,500.00. (unanimous)

INTERROGATORY NO. 8
Did Lasiter Construction perform work for Mr. Swink outside the contract for which it is entitled to payment? YES. (unanimous)

INTERROGATORY NO. 9
Did Lasiter Construction submit written claims for extra costs to Mr. Swink within fifteen days after the additional work outside the contract had been completed? YES. (unanimous)

INTERROGATORY NO. 10
What amount does Mr. Swink owe Lasiter Construction for Lasiter Construction performing additional work outside the contract? $6,941.85–Landscape (unanimous)

INTERROGATORY NO. 11
Did Lasiter Construction file its lien against Mr. Swink's property on October 20, 2003, knowing that it had not performed work within the last 120 days? NO. (unanimous)

Judgment was entered on the jury verdict on September 9, 2004. Swink filed a motion for judgment notwithstanding the verdict on September 23, 2004. The motion sought a new trial or, in the alternative, a remittitur on both the liquidated damages and landscape claims. The motion was deemed denied on October 25, 2004. Lasiter filed its motion seeking attorney's fees of $124,936.73 on September 1, 2004, prior to entry of judgment.[1] Lasiter asserted that the fees were authorized under Ark. Code Ann. §§ 18-44-128 (Repl. 2003) and 16-22-308 (Repl. 1999). On November 12, 2004, the trial court awarded Lasiter attorney's fees of $71,037.40, after reducing the hourly rates charged by Lasiter's attorneys and paralegals. The trial court did not explain its reasons for reducing the hourly rates. Swink filed his notice of appeal on November 18, 2004, and Lasiter filed its notice of cross-appeal on November 22, 2004. Lasiter filed an amended motion for fees on September 23, 2004. An agreed amended order as to fees was entered on February 4, 2005. Swink filed a notice of appeal from the amended order on February 7, 2005. Lasiter cross-appealed on February 10, 2005.

On appeal, Swink raises nine points: that the trial court abused its discretion by not instructing the jury to disregard Lasiter's "send-a-message" argument; that the trial court abused its

[1] We note that there are some slight mathematical errors concerning the total fees sought in Lasiter's motion.

discretion by not granting a mistrial for Lasiter's impeachment of Swink before Swink took the witness stand; that the trial court abused its discretion in admitting evidence of Swink's prior conviction and in permitting him to be questioned on the details of the conviction; that the judgment that Swink improperly withheld liquidated damages is not supported by substantial evidence; that the liquidated-damages award is not supported by substantial evidence; that the jury's responses to the liquidated-damages interrogatories were inconsistent; that the extra-costs judgment is not supported by substantial evidence; that the extra-costs damages award is not supported by substantial evidence; and that the judgment dismissing Swink's counterclaim is not supported by substantial evidence. Lasiter, on cross-appeal, raises three points: that the trial court abused its discretion in reducing the hourly rates for Lasiter's attorneys; that the trial court abused its discretion because the request for fees was reasonable considering the amount of money potentially at stake in the litigation; and that the trial court abused its discretion because the request for fees was reasonable given the difference between the fees charged to the prevailing and losing parties.

Direct Appeal

I. Improper Jury Argument

For his first point, Swink argues that the trial court erred by failing to instruct the jury to disregard Lasiter's closing argument in which it asked the jury "[s]end them a message to do what's right." Swink argues that such an argument is improper where, as in this case, no punitive damages were sought. A trial judge has wide discretion to control counsel's argument, and we do not reverse that decision absent a manifest abuse of that discretion. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003); *Butler Mfg. Co. v. Hughes*, 292 Ark. 198, 729 S.W.2d 142 (1987).

This argument has been waived because Swink did not object at the first opportunity. After Lasiter's first argument asking the jury to "send a message" was made, Swink made no objection and proceeded to give his closing argument. In the rebuttal portion of its argument, Lasiter again asked the jury to "[s]end them the message that this is unacceptable, and tell them to pay for what they got." Swink did not object until after Lasiter had completed its argument and the trial court was ready to submit the case to the jury. In similar situations, the supreme court has held that, where

a party waited until after closing arguments when out of the presence of the jury to make a motion for mistrial, that party waived the objection by not giving the trial court the opportunity to correct any error committed during the closing argument. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001); *John Cheeseman Trucking, Inc. v. Dougan*, 313 Ark. 229, 853 S.W.2d 278 (1993); *Butler Mfg. Co., supra.*

In his reply brief, Swink argues that the argument is not waived because, even if he waived the first instance of the improper argument, he promptly objected when Lasiter repeated the argument in its rebuttal. However, it is clear that Swink waited until after Lasiter finished its rebuttal argument before raising the objection. After Lasiter completed its rebuttal argument, the trial court started to address an issue concerning a juror who had to leave at a certain time in order to catch a flight. At that point, Swink's attorney asked to approach the bench and made his objection to Lasiter's argument. The trial court responded, "[o]kay. I understand," before resuming its consideration of the issue of the juror with a flight to catch. Because Swink did not object at the first opportunity, we affirm on this point.

II. Swink's Prior Conviction

Swink's second and third points deal with Lasiter's use of Swink's prior conviction for impeachment. In those points, Swink argues that the trial court erred in allowing Lasiter to impeach him prior to his taking the witness stand and in allowing Lasiter to question him concerning the details of the conviction.

The issue arose during *voir dire* examination of the jury when Lasiter's counsel asked the prospective jurors whether they had knowledge of Swink's former business, a securities firm known as Swink & Company. One juror indicated that he was aware of some accusations of securities violations. Some of the other jurors indicated that they had heard the name Swink & Company, including one who indicated that criminal charges were involved. Lasiter's attorney then asked the jury panel whether any of the jury panel knew someone with a criminal record. Several jurors indicated that they knew people with criminal records or people in jail. At this point, Swink objected, stating that it was not proper for *voir dire*. Lasiter's counsel indicated that he wanted to ask a follow-up question about family members in jail. The trial court responded, "[o]kay."

While Michael Lasiter was testifying as to the amount of money Swink owed Lasiter, he stated that he believed that he was being taken advantage of and added that, "with Mr. Swink's criminal history, I believe he is trying to do it here again." Swink objected and asked for a mistrial, arguing that he could not be impeached until he took the stand. The trial court instructed the jury to "disregard the comment concerning the criminal matter. You will disregard that last comment by the witness." The court also ruled that, if the impeachment testimony of Swink did not come in during Lasiter's case in chief and Swink had a basis for a mistrial, Swink could seek a mistrial at the close of Lasiter's case.

Later, Lasiter called Swink as a witness during its case in chief. Swink admitted to being a convicted felon, having pled guilty to aiding and abetting securities fraud. When counsel sought to ask a follow-up question, Swink objected, arguing that, once Swink admitted to the fact of conviction, he could not be asked about the details of the conviction. The trial court sustained the objection. Swink also moved for a mistrial, which was denied. Swink also asked for a limiting instruction to the jury. The trial court said that it would consider such an instruction during a recess. At the close of Lasiter's case in chief, Swink renewed his motion for a mistrial based on the comments during *voir dire* and Michael Lasiter's comment about Swink's past. The trial court denied the motion for a mistrial, ruling that Michael Lasiter was not actually reading the details of Swink's conviction and that a curative instruction was not necessary.

Arkansas Rule of Evidence 609(a) provides in part that,

> [f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness or (2) involved dishonesty or false statement, regardless of the punishment.

The admissibility of prior convictions must be decided on a case-by-case basis. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004). The trial court has considerable discretion in determining whether the probative value of a prior conviction outweighs its prejudicial effect, and that decision will not be reversed absent abuse. *Id.*; *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

Swink argues that the trial court should have declared a mistrial when Michael Lasiter referred to Swink's being a convicted felon because it was an attempt to impeach Swink prior to his taking the stand and putting his credibility at issue. The trial court had sustained Swink's objection but denied the motion for a mistrial and admonished the jury to disregard the comment. It is well settled that an admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. *Moore v. State*, 323 Ark. 529, 915 S.W.2d 284 (1996); *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994). Swink cites several cases from other states to show that it is improper to allow impeachment evidence before the witness sought to be impeached takes the stand. However, those cases do not show how the statement at issue in the present case is so patently prejudicial as to call for a mistrial. Further, Swink did take the stand and admitted that he was, in fact, a convicted felon. This usually removes error in the admission of evidence. *Long v. State*, 607 S.W.2d 482 (Tenn. Crim. App. 1980); *see also Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996). Therefore, Swink cannot show prejudice on this point.

Swink relies on the supreme court's decision in *Floyd v. State*, 278 Ark. 342, 645 S.W.2d 690 (1983), for the proposition that he cannot be questioned about the details of his prior conviction. However, in *Lincoln v. State*, 12 Ark. App. 46, 670 S.W.2d 819 (1984), this court held that the *Floyd* court rejected the argument that, when a witness takes the stand and admits he has been convicted of a felony, he has been impeached and the opposing party should not be allowed to further impeach him.

We do not see any prejudice in Lasiter's asking Swink a question attempting to clarify Swink's testimony about the nature of the conviction. A convicted felon can be questioned about the nature of the offense. *Long, supra.* This is because Rule 609, by requiring that probative value be weighed against prejudice and by admitting all convictions involving dishonesty, undeniably contemplates that the jury will know just what crimes the witness has been convicted of. *Simmons v. State*, 278 Ark. 305, 645 S.W.2d 680 (1983). We affirm on these points.

III. Liquidated-Damages Issues

In his fourth, fifth, and sixth points, Swink contends that the jury's verdict on the liquidated damages is not supported by

substantial evidence and that the jury's answers to the interrogatories on the liquidated damages are inconsistent. When a jury verdict is challenged, the court will affirm the verdict and judgment of the trial court if the verdict is supported by any substantial evidence, with the evidence and all reasonable inferences therefrom examined in the light most favorable to the appellee. *Clark v. Farmers Exch., Inc.*, 347 Ark. 81, 61 S.W.3d 140 (2001).

In its answers to the interrogatories, the jury found that each letter from Lasiter to Swink (October 15, 2002, December 31, 2002, March 13, 2003) constituted a request for extension of time for Lasiter to complete the project. However, the jury found that Swink approved an extension of time based only upon the December 31 letter. Swink argues that there is no substantial evidence that Lasiter requested, and Swink granted, additional time to complete the project. Swink also argues that there is no evidence to support a finding that he granted Lasiter an additional 120 days to complete the project.[2]

Swink argues that the October 15 letter cannot be a request for an extension of time. Under the contract, a request for an extension of time had to be made within seven days of the event causing the delay. Further, if the delay is a continuing one, only one request for extension is necessary. Michael Lasiter testified that he considered the October 15 letter to be a request for an extension of time and that the groundwater problem was a continuing one. The field notes attached to the December 31 letter show that the first day it was too wet for Lasiter to work was October 14. There is no explanation of why it was too wet that day. Further, Joe White said that he could not dispute Michael Lasiter's testimony that the groundwater was first encountered less than seven days prior to the October 15 letter.

The fact that the jury did not find that Swink granted an extension of time based on the October 15 letter is of no moment because Swink was required to grant a reasonable request for an extension of time. *City of Whitehall v. Southern Mech. Contracting, Inc.*, 269 Ark. 563, 599 S.W.2d 430 (Ark. App. 1980). There is nothing in the contract that requires Swink to immediately grant or deny each request for an extension. Further, Swink did grant an extension based on the December 31 letter. He

[2] Both parties agree that the jury's award of $60,500 corresponds to 121 days of liquidated damages.

testified that, during a meeting with Lynn Harrell and Michael Lasiter, they told him that they would come up with a schedule to complete the project and that the extra twenty-nine days would put the project only a few days over the deadline, so he agreed to extend the deadline. This is substantial evidence to support the jury's verdict. After all, the jury was not asked how many days Swink agreed to extend the deadline. *See Schmidt v. Pearson, Evans, & Chadwick*, 326 Ark. 499, 931 S.W.2d 774 (1996).

As part of this point, Swink also argues that the award of liquidated damages withheld should be remitted because the award is irrational or based upon conjecture. The argument is that there is no way to calculate how the jury arrived at the 121-day figure. Because of the unusual amount involved, the jury obviously had some type of formula in mind when it arrived at its damages figure. One possible explanation for how the jury arrived at the figure for the liquidated-damages award to Lasiter is as follows: if the 120-day deadline is calculated as beginning September 23, the date Lasiter commenced construction, the deadline would expire on January 20. If that deadline is extended twenty-nine days in accordance with Lasiter's December 31 letter, the new deadline becomes February 18. That date is 121 days from June 19, the date the City of Little Rock accepted the work. Another explanation could be, as Lasiter suggests in its brief, that the jury was awarding Lasiter the approximate amount of the unpaid pay estimate 5 in the amount of $60,956.68.

Swink also argues that the jury's answers to interrogatories 4 and 7 are inconsistent because only nine jurors agreed in interrogatory 4 that Swink granted Lasiter an extension of time beyond 120 days to complete the work, while all twelve jurors agreed in interrogatory 7 to award Lasiter $60,500 of the liquidated damages Swink had withheld. This verdict is consistent because each interrogatory answered by the jury is a special verdict on that particular fact. *Ozarks Unlimited Res. Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998); *Carroll-Boone Water Dist. v. M.&P. Equip. Co.*, 280 Ark. 560, 661 S.W.2d 345 (1983); *McChristian v. Hooten*, 245 Ark. 1045, 436 S.W.2d 844 (1969). In *McChristian*, the appellant argued that the jury's answers to the interrogatories were inconsistent and conflicting because two of the ten jurors agreeing on the issue of damages had not agreed on the issue of liability. The supreme court, citing Arkansas Constitution Amendment 16, held

that it was not necessary that each interrogatory be signed by the same nine jurors in order for each interrogatory to be considered the verdict of the jury on such issue.

We affirm on these points.

IV. "Extra Work" Landscape Damages

In his seventh and eighth points, Swink contends that the judgment awarding Lasiter damages for its extra landscape work is not supported by substantial evidence. The standard of review is whether the verdict is supported by any substantial evidence, with the evidence and all reasonable inferences therefrom examined in the light most favorable to the appellee. *Clark, supra.*

In interrogatory 8, the jury found that Lasiter did extra work outside the contract for which it is entitled to payment. In interrogatory 9, the jury found that Lasiter submitted written claims for this extra work within fifteen days of completing the extra work. In interrogatory 10, the jury found that Lasiter was entitled to $6,941.85 for the extra work. Swink argues that there is no evidence that Lasiter complied with the contract's terms regarding the submission of extra work for payment. The contract required Lasiter to submit claims for extra costs to Swink within fifteen days of performing the additional work. Lasiter's bookkeeper, Terri Mathis, stated that Swink was never presented a bill for these extra costs. Michael Lasiter and Mathis both testified that Mathis did not prepare the figures for the extra-work costs until approximately four weeks prior to trial. Lasiter contends that the provision requiring submission of claims for extra work within fifteen days does not apply because Swink ordered the extra work. However, there is nothing in the record to show that Swink ordered the landscaping work. We hold that there is no substantial evidence to support the jury's answer to interrogatory 9 that Lasiter submitted its written claim for the extra work within fifteen days of performing that work. Because there is no substantial evidence to support the jury's answer to interrogatory 9, the jury's award of the extra-work costs cannot stand. In order to recover those costs, Lasiter was required to timely submit its claim. *Wait v. Stanton & Collamore*, 104 Ark. 9, 147 S.W. 446 (1912). We reverse on this point.

V. Counterclaim

In his ninth point, Swink argues that the trial court erred in dismissing his counterclaim. The counterclaim alleged that Lasiter improperly filed its lien in violation of Ark. Code Ann. § 5-37-226(a).[3] In interrogatory 11, the jury found that Lasiter did not file its lien on October 20, 2003, knowing that it had not performed work within 120 days of filing the lien. Swink's argument is directed to a finding that the jury was not asked to make. He is arguing that Lasiter's lien filing was untimely, while the jury was asked whether Lasiter knew that it had not performed any work within 120 days of filing its lien. Here, Michael Lasiter testified that the last work on the project was on June 23, 2003, and unspecified days in August, within 120 days of the lien. Therefore, substantial evidence supports the jury's answer to interrogatory 11 that Lasiter did not file its lien knowing that no work had been performed within 120 days of the lien filing.

Lasiter's Cross-appeal

In its cross-appeal, Lasiter challenges the trial court's award of attorney's fees. Lasiter argues that the trial court abused its discretion by reducing the hourly rates charged by Lasiter's attorneys. Lasiter sought fees under both the general fee statute, Ark. Code Ann. § 16-22-308 (Repl. 1999), and under Ark. Code Ann. § 18-44-128 (Repl. 2003), for enforcing its lien. The trial court's order relied on section 16-22-308. The trial court granted a fee after reducing the hourly rates charged but did not explain why it was necessary to reduce the rates.

A trial court is not required to award attorney's fees, and because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing

---

[3] Section 5-37-226(a) provides:

> It shall be unlawful for any person . . . to have placed of record . . . any instrument clouding or adversely affecting the title or interest of the true owner . . . or clouding or adversely affecting any bona fide interest in real property with the knowledge of the instrument's lack of authenticity or genuineness, and with the intent of clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property, which may prevent the true owner . . . from disposing of the real property, transferring or granting any interest in the real property, or with the intent of procuring money or value from the true owner . . . to clear the instrument from the records of the office of the recorder.

party's counsel, we usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *Marcum v. Wengert*, 344 Ark. 153, 40 S.W.3d 230 (2001); *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000); *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998); *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

When addressing a trial court's award of attorney's fees, our courts have often observed that there is no fixed formula in determining what is reasonable. *See South Beach Beverage Co., Inc. v. Harris Brands, Inc.*, 355 Ark. 347, 138 S.W.3d 102 (2003); *Phi Kappa Tau Housing Corp. v. Wengert*, 350 Ark. 335, 86 S.W.3d 856 (2002); *see also Chrisco, supra.* It has, however, been held that a trial court should be guided in that determination by the following long recognized factors:

> (1) the experience and ability of counsel; (2) the time and labor required to perform the legal service properly; (3) the amount involved in the case and the results obtained; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged in the locality for similar services; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

South Beach Beverage, 355 Ark. at 356, 138 S.W.3d at 108; *see also Phi Kappa Tau Housing Corp.*, 350 Ark. at 341, 86 S.W.3d at 860. Here, the trial court specifically stated that it was considering the appropriate factors and discussed some of those factors. The court specifically found that the hours claimed were reasonable. The court, however, did not state why it believed that the hourly rates charged should be reduced. This failure to explain the reason for the reduction in the hourly rates warrants a remand for further explanation. *Bailey v. Rahe*, 355 Ark. 560, 142 S.W.3d 634 (2004).

In *Bailey*, a guardianship case, the trial judge made no findings of fact justifying a reduction in the attorney's hourly rate from $150 to $125. The supreme court reversed, stating: "[W]e are unable to discern exactly on what basis [the trial court] did so."

355 Ark. at 566, 142 S.W.3d at 638. The supreme court instructed the trial court to consider the relevant factors, including the hourly rate. Other cases have followed *Bailey*. *See Phelan v. Discover Bank*, 361 Ark. 138, 205 S.W.3d 145 (2005); *Scott v. Estate of Prendergast*, 90 Ark. App. 66, 204 S.W.3d 110 (2005). *See also Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995) (remanding an attorney fee issue for reconsideration where the trial court's order gave no explanation for the denial of fees under Ark. Code Ann. § 16-22-308). Because the reason for the trial court's reduction in the attorneys' hourly rates is not readily apparent, we reverse on cross-appeal.

Affirmed in part, reversed in part on direct appeal. Reversed and remanded on cross-appeal.

ROBBINS and CRABTREE, JJ., agree.

Daniel Thomas FITING *v.* STATE of Arkansas

CA CR 05-628 229 S.W.3d 568

Court of Appeals of Arkansas
Opinion delivered February 22, 2006

James Law Firm, by: *William O. James Jr.*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Nicana Corinne Sherman*, for appellee.

SAM BIRD, Judge. Appellant Daniel Thomas Fitting[1] was convicted by a jury of possession of drug paraphernalia with intent to manufacture methamphetamine under Arkansas Code Annotated section 5-64-403 (Supp. 2003). He was sentenced to fourteen years' imprisonment in the Arkansas Department of Correction. On

[1] Appellant is variously referred to as "Daniel Fitting" and "Daniel Fiting" throughout his brief on appeal. This opinion refers to appellant as "Daniel Fitting" because that is the name contained in the judgment and commitment order and the notice of appeal.

appeal, appellant contends that the trial court erred in denying his motions for a directed verdict. He argues that the State provided no evidence to show that he was in actual or constructive possession of drug paraphernalia with intent to manufacture; that there was no corroboration of the accomplice's testimony; and that the trial court improperly allowed the State to introduce evidence in violation of Ark. R. Evid. 404(b) in order to corroborate the accomplice's testimony. We find no error; thus, we affirm.

At trial, Rhonda Fitting testified that she and appellant had been married for nineteen years, but they were not living together on May 12, 2004. She said that appellant was staying at Eddie McCann's house and that she went to McCann's residence on May 12 to speak to appellant. According to Ms. Fitting's testimony, she and appellant had an argument and she called the police. She told police that she smelled a "strong odor" while at McCann's residence. She admitted that she had previously pled guilty to possession of methamphetamine.

On cross-examination, Ms. Fitting said that appellant did not move in with McCann but that he just stayed at McCann's house "off and on for a couple of weeks." She explained that the strong odor that she smelled when she arrived at McCann's smelled like "something burning or something burnt" and that it "didn't smell like a chemical smell." She said that she did not know who lived with McCann, other than a female named Jennifer Foster and McCann's daughter.

On re-direct examination, Ms. Fitting testified that she "didn't know for sure" whether the burning odor could be methamphetamine. She said that she never entered McCann's house but that she "stood at the door on the front porch." The State also questioned her about a statement that she had previously signed, which said that she "smelled a really strong odor and suspected that they were in the middle of cooking meth" when she was at McCann's house. She explained that she told the officer that the odor "may be methamphetamine," but she did not know for sure. She also said that she thought the appellant was angry that she showed up at McCann's house because she "knew the people that stayed over there were involved with cooking." On re-cross examination, she admitted that she did not know for sure whether methamphetamine was cooking and said that "it just smelled like something was burnt."

Eddie McCann also testified at trial. He said that he was incarcerated because of events that occurred at his home on May

12, 2004, and that he had pled guilty to conspiracy to manufacture methamphetamine, maintaining a drug premise, and possession of drug paraphernalia. He stated that on May 12, 2004, appellant and a female named Jennifer Foster were "cleaning up a cook" when he came home from work and that the police showed up "soon after that." He said that he was in the back bedroom at the time the police arrived, and that appellant and Foster were in the bathroom "wiping everything down" and "bagging everything up." McCann also said that he was "getting ready to burn it" and that he "knew what they were doing."

McCann testified that the police knocked on the front and back doors, but he did not answer. According to McCann, the police left after they knocked the first time. McCann explained that he went outside to "light the stuff in the burn barrel," but his lighter would not work so he came back into the house. McCann said that the police knocked a second time and he answered the door; he then gave consent to the officers to search the house. He said that appellant had been staying with him "off and on for four to six weeks." He also said that appellant would come over to the house for "two or three days at a time" and would then "leave for a couple of days." According to McCann's testimony, appellant lived at McCann's house "part-time." McCann admitted that he had a previous felony conviction for delivery of methamphetamine in 1988.

On cross-examination, McCann said that he lied to police to "cover [his] butt" and that he was "willing to say whatever it takes to get . . . out of trouble." McCann explained that appellant would "come and go" and that appellant had a key to McCann's house. He also said that the back door to his home was always unlocked. He stated that he thought appellant was "hiding" in the bathroom after police arrived.

On re-direct examination, McCann said that he was "not denying that [he] knew what had been going on at [his] house for the five or six weeks that [appellant] had been staying there." He also said he was "getting free meth," so he "knew what was going on." He admitted that, in the sense that he had an agreement with appellant to use his house, he conspired to manufacture methamphetamine.

On re-cross examination, McCann said that he knew what appellant and Foster were doing outside of his bedroom because he was "moving around a lot" going to get something to eat and

drink. He admitted that he tried to minimize his involvement when he spoke to the police. He said that appellant and Foster were trying to clean up. He also said that he had worked all day when he walked into the house, which "smelled just like a meth lab."

The State then attempted to put on evidence that, sixteen days after the events occurring on May 12, 2004, police discovered drug paraphernalia in appellant's work vehicle. The State also proposed to introduce a statement from appellant admitting that the drug paraphernalia in the work vehicle was his. Appellant objected, arguing that the evidence was more prejudicial than probative under Ark. R. Evid. 404(b), and asked the court not to admit it. The trial court overruled the objection, stating as follows:

> [T]he reason I'm going to overrule your objection . . . and the reason I'm going to allow it would be because it does corroborate Mr. McCann's testimony. Regardless of whether or not Mr. McCann is lying or making this up or whatever, that's strictly up to the jury to decide. But what it does is, Mr. McCann indicated that they had been doing some cooking in there before. He never did say, and no one asked, if Mr. Fitting, the defendant, had cooked there before, but it does give some indication that — he did indicate that Mr. Fitting had cooked there that day. So, it would corroborate Mr. McCann's testimony that he gave today. Whether that testimony is believable or not doesn't matter.

Ivan Hanson then testified for the State that he was appellant's employer in May 2004. He said that on May 28, 2004, he gave law enforcement officers permission to search a company vehicle, which appellant had used as his personal vehicle and had parked at a local gas station. On cross-examination, Hanson testified that he did not see appellant put anything into the vehicle or lock it.

Lieutenant James Kulesa also testified. He said that on May 28, 2004, Hanson gave him permission to search a company truck that was parked at a gas station. During the search, Kulesa found a briefcase behind the driver's seat with components known to be utilized in the manufacture of methamphetamine. Specifically, the briefcase contained a container of Red Devil Lye, a bottle of peroxide, a green balloon, coffee filters, gloves, a plastic container with a red lid, a glass bottle with "reddish" residue, a plastic bag with a white granular substance, a bottle of drain opener, a

Mountain Dew bottle with clear liquid, a glass jar with a bi-layer liquid, a plastic bottle with a hose attached, and a glass bottle with stained filters. Kulesa said that an informant had called him to tell him that the items were in the truck parked at the gas station. He also said that he "processed the truck" and took samples from the items in it.

Kulesa further testified that, on May 31, 2004, appellant came to the Lonoke County sheriff's office and agreed to speak to Kulesa about the items found in the truck. Kulesa said that appellant told him that everything in the vehicle belonged to appellant and that appellant said he "had pretty much been good for thirty days" and "intended to throw the items in a dumpster, but he was running late for work." According to Kulesa, appellant also said that he "was trying to be good and get away from it and he was just trying to get rid of that stuff."

Kulesa also testified that he came into contact with appellant at Eddie McCann's residence around 6:00 p.m. on May 12, 2004, and that appellant was there with McCann and Jennifer Foster. Kulesa stated that he did not receive an answer after he knocked on the front door, so he knocked on the back door. Kulesa said that he noticed a burn barrel near the back door, which contained a can of camp fuel and a bottle that "looked like it had been burned with some kind of sludgy material in it." Kulesa left the house and parked in an adjacent driveway, and McCann came out of the back door of his residence and walked over to the burn barrel. Kulesa returned to McCann's residence, knocked on the back door, and McCann "walked out and put his hands behind his back like to be handcuffed." According to Kulesa, McCann said that appellant and Foster were "hiding in the bathroom" and gave police permission to search his home.

When Kulesa first entered the house, appellant and Foster were "walking toward the living room from the back area of the house where the bathroom and bedroom [were]." Kulesa said that he took them into custody and then searched the rest of the house. Police found the following items in the burn barrel outside: a plastic bag with used balloons, a corner of a plastic bag with black crystal residue, one empty gallon Coleman fuel can, one plastic bottle containing a white-crystal-type material consistent with table salt, and one burnt plastic bottle with white crystal substance emitting acid fumes. Police also found "numerous" coffee filters with staining residue in the area of the burn barrel.

Police found one empty twenty-four-count blister pack labeled "Pseudoephedrine HCl, sixty milligrams" and two syringes by the back door. They also found a plastic bottle containing "the crystal material emitting acid vapors," stained plastic tubing, an aluminum foil boat, and four empty twenty-four-count blister packs labeled "Pseudoephedrine, sixties" in the trash bag hanging on the back door. There were also "numerous" aluminum cans containing thirty-six-count blister packs labeled "Pseudoephedrine HCl, sixty milligrams," as well as a piece of plastic capsule, a plastic baggie and cotton, a syringe cap, and a razor blade. Kulesa said that most of the empty blister packs were actually stuffed inside empty soda cans.

Under the bathroom sink, police found the following: a gallon bottle (approximately half-full) of "seven percent iodine tincture," one full gallon of Ozark camp fuel, and two full-quart bottles of "Rooto" drain opener. On the bathroom counter, they found one full-quart bottle of seventy-percent alcohol, and there was a "grainy, grayish, granular substance" in the toilet. There was also a "white sludge type substance" with an odor of cleaning solvents in the bathtub. Two-quart glass jars and a plastic bottle containing a gray, granular material were found in the clothes hamper in the bathroom.

Under the stove, police found an electric skillet containing a syringe and two rubber gloves with brown stains. On the dresser in one of the bedrooms, there was a large glass pickle jar containing a "red and yellow residue." A small ceramic bowl containing seven burnt hand-rolled cigarettes was on the nightstand. In the other bedroom, there was a piece of plastic straw and a glass mirror "stained with residue." A plastic baggie and four coffee filters were found under the bed. On the couch in the living room, police found one stained coffee filter with residue. Kulesa said that all of these items were collected and sent to the state crime lab for sampling and testing. Kulesa also testified that, on the day after appellant was arrested, he (Kulesa) noticed that appellant's hands had "some type of light orange tint to them."

On cross-examination, Kulesa said that he could not say "specifically" which room appellant and Foster came out of when he first entered McCann's residence to search. He also explained that, when he first entered the residence, there was a "chemical odor." He said that when someone manufactures methamphetamine, the odor can linger for a period of time. Kulesa could not say who put the items in the burn barrel, and he testified that he did

not see appellant put them there. He also said that he could not tell who put the seized items in McCann's house, that he did not know how long they had been there, and that he did not see appellant touch any of the items.

Jennifer Perry, a forensic chemist, testified for the State and explained the general methamphetamine manufacturing process. She also explained that the items seized from the house were commonly used in the manufacture of methamphetamine. She said that she tested the seized coffee filters and found "methamphetamine, phosphorus, and iodine residue" on them. She explained that this was "sludge that they cooked that was not transformed into usable methamphetamine yet." She also said that one of the two-quart glass jars contained a methamphetamine residue. She further explained that the stains on the rubber gloves found were "consistent with iodine staining," and that "sometimes cooks will use gloves to keep their hands from being stained." According to Perry, the red and yellow residue found in the glass pickle jar tested positive for methamphetamine and phosphorus residue.

On cross-examination, Perry admitted that she did not see appellant handle any of these items and that she did not identify any fingerprints. She also said that she did not know who handled the items or who was in possession of them and she did not know how long they had been there or where they had come from. She testified that she took a sample of the gray, granular substance that was in the bathroom toilet, but she did not test it in the lab. She stated that she did not know exactly what the substance was, but said that it was consistent with an HCl generator (*i.e.*, a substance used in the methamphetamine manufacturing process). Perry admitted that this was speculation on her part.

At the close of the State's evidence, appellant moved for a directed verdict on the basis that McCann's testimony was uncorroborated accomplice testimony. The court denied this motion. Appellant also argued that he was entitled to a directed verdict because the State failed to show that he was in constructive possession of the contraband. The trial court also denied this motion. Appellant renewed his motions at the close of all of the evidence, and the court again denied them.

On appeal, appellant contends that the trial court erred in denying his motions for a directed verdict, arguing that the State provided no evidence to show that he was in actual or constructive possession of drug paraphernalia with intent to manufacture; that

there was no corroboration of the accomplice's testimony; and that the trial court improperly allowed the State to introduce evidence in violation of Ark. R. Evid. 404(b) in order to corroborate the accomplice's testimony.

I. *Sufficiency of the Evidence*

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 trial errors. *Wells v. State*, 93 Ark. App. 106, 217 S.W.3d 145 (2005). It is well settled that we treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.*

a. *Actual or Constructive Possession*

Appellant first argues that the State failed to provide substantial evidence to show that he was in actual or constructive possession of drug paraphernalia with intent to manufacture, as required by Ark. Code Ann. § 5-64-403 and our case law. In *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003), our supreme court explained how an appellate review is conducted in connection with a sufficiency-of-the-evidence challenge to possession when two or more persons occupy the residence where the contraband was found:

> Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed. We have further explained:
>
> > Constructive possession can be implied when the controlled substance is in the joint control of the accused and another. Joint occupancy, though, is not sufficient in itself to establish possession or joint possession. There must be some

> additional factor linking the accused to the contraband. The State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband.
>
> When seeking to prove constructive possession, the State must establish (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband.
>
> *Darrough v. State* is consistent with a long line of cases holding that "it cannot be inferred that one in non-exclusive possession of premises knew of the presence of drugs and had joint control of them unless there were other factors from which the jury can reasonably infer the accused had joint possession and control."

Id. at 595-96, 112 S.W.3d at 353-54 (citations omitted).

In the case at bar, appellant claims that there was no evidence presented at trial to connect him with the commission of an offense and that the State failed to show that he exercised "care, control, and management" over the contraband in question. To support his arguments, appellant points to the fact that he did not live at McCann's residence (where the items were found), that Lt. Kulesa could not specifically identify the room in which appellant was found prior to his arrest, and that Kulesa did not see the appellant put anything into the burn barrel or touch any of the items.

Here, the evidence viewed in the light most favorable to the State reveals that Eddie McCann testified that when he came home from work, appellant and Jennifer Foster were inside his residence "cleaning up a cook." Specifically, McCann said that they were in the bathroom "wiping everything down" and "bagging everything up." He also said that when he walked into the house after work, it "smelled just like a meth lab." Because McCann was an accomplice in this case, the question of whether his testimony was sufficient to show that appellant possessed, either actually or constructively, the drug paraphernalia with the intent to manufacture methamphetamine depends upon whether McCann's testimony was properly corroborated.

b. *Uncorroborated Accomplice Testimony*

Appellant next argues that the evidence was not sufficient to support his conviction because the State offered uncorroborated testimony from an accomplice, Eddie McCann. Appellant points

to McCann's testimony that he thought appellant was cooking methamphetamine, but "didn't know." Appellant also points to McCann's statement that he lied to police to "cover [his] butt." Furthermore, appellant claims that the State offered no evidence to corroborate McCann's testimony other than evidence that violated Ark. R. Evid. 404(b).

Arkansas Code Annotated section 16-89-111(e) (Repl. 2005) provides as follows:

> (e)(1)(A) A conviction or an adjudication of delinquency cannot be had in any case of felony upon the testimony of an accomplice, including in the juvenile division of circuit court, unless corroborated by other evidence tending to connect the defendant or the juvenile with the commission of the offense.
>
> (B) The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

In *Tate v. State*, 357 Ark. 369, 167 S.W.3d 655 (2004), our supreme court discussed the requirement of corroborating evidence for accomplice testimony:

> The corroboration must be sufficient, standing alone, to establish the commission of the offense and to connect the defendant with it. The test for corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission.
>
> Corroboration must be evidence of a substantive nature, since it must be directed toward proving the connection of the accused with the crime, and not directed toward corroborating the accomplice's testimony. Circumstantial evidence may be used to support accomplice testimony, but it, too, must be substantial. Corroborating evidence need not, however, be so substantial in and of itself to sustain a conviction. Rather, it need only, independently of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the crime. However, evidence that only raises a suspicion of guilt is insufficient. The presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime are relevant facts in determining the connection of an accomplice with the crime.

Id. at 374-75, 167 S.W.3d at 658 (citations omitted). The court in *Tate* recognized that the appellant's presence in the proximity of

manufacturing-related items was circumstantial evidence of his involvement and said that, "Where circumstantial evidence is used to support accomplice testimony, all facts in evidence can be considered to constitute a chain sufficient to present a question for resolution by the jury as to the adequacy of the corroboration, and this court will not look to see whether every other reasonable hypothesis but that of guilt has been excluded." *Id.* at 377, 167 S.W.3d at 660. Thus, the court concluded that appellant's presence in a room filled with drug manufacturing paraphernalia and smelling strongly of methamphetamine was sufficient to "tend to contact him to the offenses with which he was charged." *Id.*

In light of *Tate, supra,* we hold that the evidence here tends to connect appellant with the offense with which he was charged — possession of drug paraphernalia with intent to manufacture methamphetamine. In addition to McCann's testimony, Lt. Kulesa testified that, when he entered McCann's residence, appellant and Jennifer Foster were "walking toward the living room from the back area of the house where the bathroom and bedroom [were]." Thus, appellant was in close proximity to the manufacturing items that were seized from the residence. Moreover, appellant's wife said that she thought appellant was angry that she showed up at McCann's house because she "knew the people that stayed over there were involved with cooking." She also said that she smelled a "strong odor" while she was at McCann's house and she told police that it might be methamphetamine, although she was not sure. In addition, Lt. Kulesa testified that appellant's hands had "some type of light orange tint to them" on the day after appellant was arrested. All of this evidence was sufficient to corroborate McCann's testimony; accordingly, we hold that the evidence was sufficient to support appellant's conviction in this case.

II. *Rule 404(b) Evidence*

Appellant's final argument is that the trial court improperly allowed the State to introduce evidence in violation of Ark. R. Evid. 404(b). Our supreme court has held that trial courts are afforded wide discretion in evidentiary rulings. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). Specifically, in issues relating to the admission of evidence under Ark. R. Evid. 401, 403, and 404(b), a trial court's ruling is entitled to great weight and will not be reversed absent an abuse of discretion. *Id.*

In this case, Lt. Kulesa testified that appellant's employer gave consent to search appellant's work truck and that, during the search, Kulesa found a briefcase in the truck containing components used to manufacture methamphetamine. Kulesa also said that appellant came to the sheriff's office and told Kulesa that "everything in the vehicle belonged to him." Appellant claims that this evidence was offered by the State in violation of Rule 404(b), which states:

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

The State claims that the evidence was properly admitted under Rule 404(b) to show that appellant "had the requisite knowledge and wherewithal to manufacture methamphetamine." However, appellant argues that the evidence was offered "for nothing more than the unfair prejudicial effect it would have had on [him]." Furthermore, appellant claims that the evidence was "all the State could muster in its attempt to corroborate Mr. McCann's uncredible testimony."

In *Cluck*, *supra*, our supreme court stated as follows regarding the analysis of a Rule 404(b) issue:

> If the evidence of another crime, wrong, or act is relevant to show that the offense of which the appellant is accused actually occurred and is not introduced merely to prove bad character, it will not be excluded.... We have held that in order to find prior crimes admissible under Rule 404(b), this court must find that the evidence is "independently relevant, thus having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

Cluck, 365 Ark. at 786, 226 S.W.3d at 174-75 (citations omitted). We note that the case at bar involves appellant's *subsequent* acts rather than *prior* crimes as discussed in *Cluck*, *supra*; however, this court has recognized that Rule 404(b) also applies to evidence of subsequent bad acts by an appellant. *See Turner v. State*, 59 Ark. App. 249, 956 S.W.2d 870 (1997) (noting that the trial court did not abuse its discretion by allowing into evidence under Rule 404(b) subsequent

acts committed by an appellant, because they followed in close proximity and showed motive, intent, plan, or knowledge by appellant).

Here, the trial court allowed the State to introduce testimony concerning the items that were found in appellant's work vehicle sixteen days after the appellant was arrested at McCann's residence, together with appellant's statement to Kulesa that the items in the vehicle were his, for the purpose of corroborating McCann's testimony. We hold that the trial court did not abuse its discretion by allowing the testimony into evidence under Rule 404(b) for this purpose. Our supreme court has recognized that evidence offered by the State to corroborate other evidence is relevant. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996). Furthermore, our supreme court has stated that the list of exceptions to inadmissibility under Rule 404(b) is not an exclusive list, but instead is representative of the types of circumstances under which evidence of other crimes or wrongs or acts would be relevant and admissible. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001). In *Price v. State*, 268 Ark. 535, 538, 597 S.W.2d 598, 599 (1980), the court recognized that Rule 404(b) "clearly permits evidence [of other crimes or wrongs or acts] if it has relevancy independent of a mere showing that the defendant is a bad character." The court in *Price* affirmed the trial court's decision to admit evidence under the rule, noting that evidence of petitioner's incriminating references on tape to other criminal activity was relevant to show petitioner's "guilty knowledge" of the offense with which the petitioner was charged, and was also "particularly valuable in corroborating the testimony of petitioner's alleged accomplice." *Id.* at 539, 597 S.W.2d at 600.

In light of *Price*, *supra*, we hold that the evidence in question here falls within the Rule 404(b) exception because it was independently relevant to corroborate McCann's testimony. Thus, our next inquiry is whether the evidence is so prejudicial that it should be excluded under Ark. R. Evid. 403. *See Price*, *supra*.

Rule 403 of the Arkansas Rules of Evidence generally states that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In the case at bar, appellant argued to the circuit court that Kulesa's testimony was "more prejudicial than probative"; however, appellant failed to obtain a ruling on this particular issue and is

therefore precluded from raising it on appeal. *See Cluck*, *supra* (recognizing that, where appellant failed to obtain a ruling on his Rule 403 argument, it was not preserved for appellate review).

Affirmed.

HART and NEAL, JJ., agree.

David Lee SCOTT *v.* STATE of Arkansas

CA CR 04-922 229 S.W.3d 578

Court of Appeals of Arkansas
Opinion delivered February 22, 2006

DeeNita D. Moak, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. On April 29, 2004, David Lee Scott was tried for aggravated robbery before the bench in the Faulkner County Circuit Court. He was convicted and sentenced to twenty years' imprisonment in the Arkansas Department of Correction. He now appeals, contending that the trial court erred in finding that he was not indigent and "in failing to provide counsel" to represent him. We hold that the trial court abused its discretion by

determining non-indigency and granting the public defender's motion to be relieved as counsel on the basis of Scott's posting bond. Therefore, we reverse and remand for a new trial.

The crime precipitating Scott's arrest was the March 20, 2003, nighttime robbery of a pizza deliveryman at an apartment complex in Conway, Arkansas. Scott was implicated that night after the arrests of four other suspects. He was arrested in the early morning of March 21 and, like the others, was charged with aggravated robbery. In the first appearance before the trial court, on the day of Scott's arrest, he and the others charged were informed of their rights as defendants in a criminal case. The court stated:

> We'll talk about what you're charged with, the issue of bond, whether or not you're entitled to the services of the public defender, and give you a court date. . . .
>
> You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you by the Court at no cost. Does everybody understand that?

The court set Scott's bond at $50,000, and Scott inquired about the possibility of getting a sheriff's bond. The court replied, "I'll leave that up to the sheriff. I've approved you for the public defender."[1]

Scott did not make his bond initially and was jailed. Public defender Karen Walker Knight represented him at the arraignment hearing on April 7, 2003, and the court accepted Scott's plea of not guilty. September 16 and 29, 2003, were set as dates for a pretrial hearing and trial. Knight requested that bond be reduced to $20,000, informing the court of her understanding that it had been set at $40,000. The trial court, agreeing with the State that bond

[1] The affidavit of indigency filed with the court on March 21, 2003, is a printed form divided into two parts: one for the defendant's financial information and the other for a spouse. Handwritten answers assert that Scott had no employer, that his sole expense was "Auto Insurance 140" [sic], and that his only personal property was an '86 Cadillac valued at $300. Nothing is written in the blanks for his take-home pay, income from other sources, SSI, AFDC, social security disability, or "other." Despite a declaration that there was no spouse, $690 is shown as the spouse's monthly SSI.

should not be reduced, left it at $40,000.[2] On April 15, 2003, Knight filed a motion for discovery and a demand for speedy trial. On July 2, 2003, the public defender's office filed a motion to be relieved as counsel, setting forth the following:

> 1. Public Defender . . . was appointed to represent the Defendant, David L. Scott, in the above matter on April 7, 2003.
>
> 2. The Defendant's bond was set at $40,000.00.
>
> 3. The Defendant posted said bond on June 5, 2003.
>
> 4. Due to the lack of indigency, the Public Defender Office respectfully requests to be relieved as counsel for the defendant.

At the pretrial hearing on September 16, 2003, the following exchange transpired between the trial court and Robert L. Thacker of the public defender's office:

> MR. THACKER: Your Honor, this case is another one where the public defender has filed a motion to be relieved on the basis of the information we've received. Mr. Scott has apparently posted a bond in the amount of forty thousand dollars. So, we are moving to be relieved, on that basis. He showed me a copy of the bond, your Honor. I'll let you review, also. Apparently, he only paid part of the premium and was paying out the balance on it.
>
> THE COURT: At this point in time, I am going to find that you're not indigent. When you make a forty thousand dollar bond, I think you have the ability to hire an attorney. So, therefore, I'm going to leave you on for September 29th. You need to be back here with your attorney on that date, telling me who that attorney is.

On September 29, 2003, Scott appeared for trial and the court asked him to name his attorney. Scott replied, "I don't have one, sir. I haven't tried to hire one. I ain't had the money." The

---

[2] The record confirms that bond was set at $50,000 in Scott's initial appearance of March 2003 and that the trial court again referred to bond in this amount at a pretrial hearing in March 2004. Interim proceedings such as the arraignment hearing refer to a bond of $40,000. The parties on appeal do not address this discrepancy, and its resolution is immaterial to the issue before us.

court instructed Scott that he needed to hire "somebody." The court stated that it would allow Scott some time, and a pretrial hearing was set for February 10, 2004.

At the pretrial hearing in February, Scott told the court that he had not tried to hire an attorney "besides the past." He said that he had talked to George Stephens and John Purtle but had not hired them. Responding to questions by the court, Scott answered that he was not employed and was living with his sister. The court stated:

> You need to hire an attorney. You bonded out; your bond was forty thousand dollars. That's not a small bond to make. You need to hire somebody. You're telling me, today, you've not even really attempted to hire anybody, you really haven't talked to anybody, kind of talked to George Stephens and John Purtle, but you really haven't, so be back here March 1, and we're going to set your trial sometime in March.

In the March 1 hearing Scott told the court that he had no attorney; he said that he had tried to hire George Stephens about three weeks earlier but was not able to afford him. The following dialogue occurred:

> THE COURT: Where are you working . . .?
>
> MR. SCOTT: Nowhere. I stay at home with my sister. She is feeding me. She is taking care of all the bills and everything. I walk to get around. I am looking for a job, but I mean, I'm out on a $50,000 bond. I have to pay that, too. I mean, it's hard to try to pay that and try to pay for a lawyer at the same time.
>
> THE COURT: Why is that a problem if you can afford a $50,000 bond? There's a strong presumption that you're not indigent.
>
> MR. SCOTT: I'm still paying on it.
>
> THE COURT: I understand that. I guess, Ms. Knight, what I would ask for you is to consult with Mr. Scott and see if he wants a jury trial. Review the file and see if everything's ready to go.
>
> . . . .

> THE COURT: If you'll have a seat, Mr. Scott, I'll have Ms. Knight visit with you about a jury trial/bench trial. What I'm gonna do though — you have the ability to represent yourself, and I'm gonna let you represent yourself. If we end up going to trial, I probably will appoint Ms. Knight to sit second chair and assist you, so you need to visit with her and talk about what's getting ready to happen.

Knight informed the court that she had explained to Scott the difference between jury and bench trials, and that he waived a jury trial. The prosecution informed the court that it had made an offer to reduce the charge to robbery with a twenty-year sentence, which would avoid the "seventy percent rule" associated with aggravated robbery. Scott told the court that he understood the offer, and the court noted that the offer was waived. The court ascertained Scott's ability to represent himself, asked whether he understood that he had been found not to be indigent, and further instructed him:

> I guess the easiest way I can put this is you're going to a gun fight without a gun. He's [the prosecutor] got one. You don't. There'll be certain rules and regulations you'll have to follow. I am gonna appoint Ms. Knight as second chair. She will assist you, but she will by no means be your attorney. She won't be the lead attorney. Give you some advice if you ask for it, but she is not in charge of your case. You are in charge of your case. Do you understand that?

The court set March 31 as the date for trial.

On March 31, 2004, Scott told the trial court that he still had no attorney and had talked to no one except John Purtle. The court asked if Scott was ready for trial; he responded that he was "ready to get it over with" despite not really looking over his discovery motion as well as he should have, and he told the court that he had no witnesses.

Knight addressed the court:

> Your Honor, for the record, I have been appointed to assist Mr. Scott as stand-by counsel. . . . He also informed me that his sister had helped him do this bond, and when I asked why his sister's not helped him get an attorney, he explained to me that they are still trying.

Knight informed the court that, when the public defender was relieved as counsel, its office handed Scott the discovery materials that it had received, but her only contact with him since that date had been in open court. She stated that she had presented the prosecutor's offer to him and that he had refused it.

Knight stated that Scott told her that his sister had helped him make his bond, that $1500 was paid "up front," and that the rest was paid off. Knight reminded the court that Scott had been out of jail since June, had no job, and had made no attempts to hire Mr. Purtle. She said that Scott had advised her that his sisters were attempting to help him hire an attorney. Knight concluded, "In my opinion, as the Court has ruled, he's not indigent. He has the means. He has the ability to work."

The court inquired whether the State was ready for trial, and the prosecutor responded:

> Judge, I have witnesses here. Your Honor, I by no means wish to dispute [the] Court's prior ruling. The Court has relieved the public defender, because he's made a bond. Judge, I don't know what's ultimately gonna become of that. I have serious reservations with the Court relieving him of public defender because he made a $40,000 bond. And that was the testimony. He made a $40,000 bond, and he was relieved. I think, Judge, when the Court has heard that he has not posted that bond, it's been made by his sister, I think that raises some concerns and alarms in my mind about any conviction standing any constitutional challenges.

The court observed that the State was ready for trial, but, noting Scott's concern that he had not reviewed discovery matters fully, granted a continuance until April 29 on "the defense motion."

At trial on April 29, 2004, Scott defended himself pro se and Knight sat beside him as "second-chair." Scott asked the court if he had the right to a jury trial but was informed that he had previously waived that right. At the conclusion of the bench trial, he was found guilty and was sentenced to the twenty-year term of imprisonment.

On appeal, we do not reverse the trial court's ruling as to indigency *vel non*, absent an abuse of discretion. *Hancock v. State*, 26 Ark. App. 107, 760 S.W.2d 391 (1988). A defendant's ability to post bond, although a factor that can be considered in a determination of indigency, is not conclusive evidence of non-indigency.

Id. at 109, 760 S.W.2d at 392. No showing of prejudice is necessary when a trial court erroneously denies appointment of counsel altogether because prejudice to the defendant is presumed. *Kincade v. State*, 303 Ark. 331, 796 S.W.2d 580 (1990).

In *Hill v. State*, 304 Ark. 348, 802 S.W.2d 144 (1991), the trial court declared that the defendant, formerly represented by retained counsel at trial and for filing his notice of appeal, was not indigent for purposes of appeal because he had social-security income and an interest in real property, he had made bond, and he had made no effort to raise money for the appeal. Remanding the matter to the trial court for a second evidentiary hearing and findings of fact, the supreme court wrote:

> Some weight may be given to whether appellant himself paid the cost of an appeal bond, but the state cannot force an appellant to choose between posting bond and being able to obtain counsel and pay the cost of an appeal. *See People v. Eggers*, 27 Ill.2d 85, 188 N.E.2d 30 (1963). The ability of bystanders such as friends and family members to post bond or assist with expenses is not a factor in determining the appellant's indigency since indigency of the appellant does not depend on the financial position of his family and friends. Bystanders have no obligation to the state.

Id. at 351, 802 S.W.2d at 145.[3]

Here, the public defender moved to be relieved as counsel due to Scott's lack of indigency solely on the basis of his posting

---

[3] The *Hill* court listed other factors to be considered in determinations of indigency:

> While there is no brightline test for indigency, which is a mixed question of fact and law, some of the factors to be considered are: (1) income from employment and governmental programs such as social security and unemployment benefits; (2) money on deposit; (3) ownership of real and personal property; (4) total indebtedness and expense; (5) the number of persons dependent on the appellant for support; (6) the cost of the transcript on appeal; and (7) the likely fee of retained counsel for the appeal. *See* W. LaFave and J. Israel, *2 Criminal Procedure* §§ 11.2(e) (1984). This court has also considered whether the able-bodied appellant who is educated and capable of working has made any attempt to find employment while free on bond. *Toomer* [*v. State*], 263 Ark. 595, 566 S.W.2d 393 [1978]. Ablebodiness and the level of education, however, must not be given undue weight since the ability to obtain employment after conviction may be limited. *See March v. Municipal Court*, 7 Cal. 3d 422, 102 Cal. Rptr. 597, 498 P.2d 437 (1972).

304 Ark. at 350-51, 802 S.W.2d at 145.

bond. In granting the motion, the trial court ruled that "[w]hen you make a forty thousand dollar bond, I think you have the ability to hire an attorney." The court repeated this viewpoint at later hearings, observing that Scott should hire an attorney because he had made bond of $40,000. At the final pre-trial hearing, the court observed that payment of a $50,000 bond created a strong presumption of non-indigency. And on the day of trial, the trial court rejected the prosecutor's concerns that the court relieved Scott of his public defender because he had made bond that had been paid by his sister.

Under *Hill v. State*, *supra*, an appellant cannot be forced to choose between posting bond and being able to obtain counsel, and the ability of family members to post bond or assist with expenses is not a factor in a determination of the appellant's indigency. We hold that the trial court abused its discretion in determining that Scott was not indigent merely because he or his sisters were able to make bond and obtain his release from jail before trial.

Reversed and remanded for re-trial.

HART and NEAL, JJ., agree.

Demarcus MITCHELL *v.* STATE of Arkansas

CA 05-737 229 S.W.3d 583

Court of Appeals of Arkansas
Opinion delivered February 22, 2006

Ronald L. Davis Jr. Law Firm, P.L.L.C., by: *Ronald L. Davis Jr.*, for appellant.

Mike Beebe, Ark. Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. In this judicial forfeiture appeal from the Faulkner County Circuit Court, appellant argues that the trial court lacked jurisdiction over the case and that it erred in granting the State's motion to strike. We agree with appellant; therefore, we reverse and remand.

The facts are these. On March 29, 2003, Mark Mushrush of the Conway Police Department arrested appellant Demarcus Mitchell and seized $22,543 from him. Thereafter, the prosecuting attorney for the Twentieth Judicial District filed a complaint for *in rem* forfeiture of the money in the Faulkner County Circuit Court on April 8, 2003. In June 2004, appellant entered into a plea agreement with the United States District Court, Eastern District of Arkansas, in which he pled guilty to six counts of conspiracy to possess marijuana with the intent to distribute and possession of a firearm. Subsequently, on October 1, 2004, the prosecuting attorney filed a motion to dismiss the forfeiture complaint for lack of service of process. That same day, the trial court granted the motion and dismissed the complaint without prejudice, and the prosecuting attorney filed a second *in rem* forfeiture complaint. The complaint was properly served on appellant, and he filed a motion to dismiss the action, challenging the circuit court's subject-matter jurisdiction. A hearing was held on December 17, 2004, and the court denied appellant's motion.

Appellant filed a second motion to dismiss on December 30, 2004, asserting that the prosecuting attorney's complaint for *in rem* forfeiture was filed more than sixty days after the confiscation report was received by him from the Conway Police Department. In response, the prosecuting attorney filed a motion to strike, asserting that appellant, in making a negotiated plea agreement with the federal government, agreed to waive "any and all challenges to, and appeal of, . . . sought-after forfeiture of assets and firearms that have occurred or commenced as of the date of the execution of this Plea Agreement in this investigation." The State asserted that, because the plea agreement was entered into on June 23, 2004, subsequent to the initial action for forfeiture, appellant waived any and all rights to the currency. The trial court agreed and entered an order that granted the State's motion to strike. This appeal followed.

A circuit court's findings of fact will not be set aside unless they are clearly erroneous. *In Re the Matter of One 1995 Ford*, 76 Ark. App. 522, 69 S.W.3d 442 (2002). We do not defer to a trial court's ruling on questions of law, and will simply reverse if it rules erroneously on a legal issue. *See id.*

■ As a preliminary matter, we take up the State's argument that we should not address appellant's points on appeal because he failed to challenge, at trial or on appeal, the trial court's ruling that the waiver housed within the federally-negotiated plea

agreement divested him of standing to challenge the forfeiture. We disagree with the State and the trial court that appellant waived his right to challenge the forfeiture for a couple of reasons. First, appellant challenged the trial court's determination that the plea agreement applied. In response to the State's motion to strike, appellant affirmatively argued as follows:

> 7. The plaintiff [State] was not a party in the matter of *United States v. Demarcus Andre Mitchell* and has no standing to enforce any agreement that may have been entered into by the United States and the claimant, as there is no contractual relationship between the plaintiff and the claimant.
>
> 8. That as of June 23, 2004, the date the plea agreement between the United States and Claimant was entered into, no order forfeiting the currency herein had been entered. Therefore, no forfeiture had occurred. Further, the instant matter was filed on October 1, 2004, well after June 23, 2004.
>
> 9. That, pursuant to Arkansas Rule of Civil Procedure 3, an action is commenced by the filing of a complaint with the clerk of the proper court . . . ; however, the commencement is subject to the plaintiff completing service within 120 days from the filing of the complaint, unless the time for service has been extended by the court under subsection (i) of Arkansas Rule of Civil Procedure 4. *Forrest City Machine Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993).

Appellant did not abandon these arguments at trial nor has he on appeal; at the hearing on February 22, 2005, appellant's counsel argued before the trial court as follows:

> But before the Court even considers those arguments [whether the forfeiture action had been commenced and whether it was commenced at the time the plea agreement was entered], they have — they being the State has no privity of contract. There was arguments made on the record — or a request made on the record in federal court during the sentencing provision — I mean, sentencing proceeding that there was an action that had been filed in Faulkner County Circuit Court that we were requesting in spite of that to have the money back because our client had never been served with that summons and complaint, and that the plea agreement therefore did not apply.

On appeal, appellant argues that:

> Alternatively, the [State's] motion to strike was wholly without merit. The basis for the appellee's motion to strike essentially relies upon the mistaken assertion that the appellant waived his right to contest this forfeiture action by entering into a plea agreement with the United States.
>
> The [State's] motion to strike focuses on paragraph 6, subsection C (Other stipulations) of said plea agreement. Specifically, the appellee opines that the appellant's pleadings should be struck because of the following language: . . . agree to waive "any and all challenges to, and appeal of, . . . sought-after forfeiture of assets and firearms that have ***occurred or commenced*** as of the date of the execution of this plea agreement in this investigation." Further appellee asserts that as a result of said waiver, the appellant has no standing to contest the forfeiture of U.S. Currency in this matter.
>
> . . .
>
> More importantly, in this instance, there had been no divestment of appellant's interest in the property ($22543.00) on June 23, 2004, when the plea agreement was entered by the United States and the appellant. In fact, this In Rem Complaint was not even filed until October 1, 2004, over three (3) months after the plea agreement was entered into. Further, the summons was not served until October 13, 2004, nearly four (4) months after the plea agreement was executed. Therefore, certainly, no forfeiture had ***occurred***, as of June 24, 2004, the date the plea agreement was filed in the United States District Court.

(Emphasis in original.) Accordingly, we conclude that appellant properly preserved his arguments for appeal.

Second, the State and the trial court erred in determining that the waiver found in the federal plea agreement was applicable to the state-forfeiture action. A closer look at the language of the plea agreement provides the clear answer. Paragraph 15 of that agreement provided that:

> 15. **PARTIES:** This agreement is binding only upon the United States Attorney's Office for the Eastern District of Arkansas and the defendant. It does not bind any United States Attorney outside the

> Eastern District of Arkansas, nor does it bind any other federal, *state or local prosecuting*, administrative, or regulatory authority.

(Emphasis added.) When a dispute arises over the meaning of a plea agreement, the appellate court will discern the intent of the parties as expressed in the plain language of the agreement viewed as a whole. *See Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002). We discern that the intent of the parties, as expressly provided by the plain language of the plea agreement, was that the agreement be binding only as between appellant and the United States Attorney's Office for the Eastern District of Arkansas.

We now turn to the merits. Arkansas Rule of Civil Procedure 81 provides that the Rules of Civil Procedure "apply to all civil proceedings cognizable in the circuit courts of this State except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply." The Rules of Civil Procedure do apply to judicial-forfeiture proceedings. *In Re the Matter of One 1995 Ford, supra.* Arkansas Civil Procedure Rule 3 provides that an action is commenced by filing a complaint with the clerk of the proper court. *Forrest City Mach. Works, Inc. v. Lyons*, 315 Ark. 173, 866 S.W.2d 372 (1993). However, effectiveness of the commencement date is dependent upon meeting the requirements of Rule 4(i), which provides in pertinent part:

> Time Limit for Service: If service of the summons is not made upon a defendant within 120 days after filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause.

Moreover, Rule 41(a) of the Arkansas Rules of Civil Procedure allows for a plaintiff, as a matter of right, to dismiss her cause of action without prejudice. Furthermore, Ark. Code Ann. § 16-56-126 (Repl. 2005) provides that, if any action is commenced within the time respectively prescribed, and the plaintiff suffers a nonsuit, "the plaintiff may commence a new action within one (1) year after the nonsuit suffered[.]" This savings statute, however, applies only to actions governed by a general statute of limitations and not to proceedings in which the right to file is limited to a very short period. *See McCastlain v. Elmore*, 340 Ark. 365, 10 S.W.3d 835 (2000).

The legislative intent of the Uniform Controlled Substances Act was in part to address the lack of uniformity and accountability in forfeiture proceedings across the state. *See* Act 1120 of 1999. The General Assembly determined that time limits for initiating forfeiture proceedings and stricter controls over forfeited property would help alleviate such problems while strengthening forfeiture as a vital weapon against drug trafficking. *Id.* Arkansas Code Annotated section 5-64-505 (Repl. 2005) provides the procedure for initiation of forfeiture proceedings. It provides in part as follows:

> (g) Initiation of forfeiture proceedings — Notice to claimants — Judicial proceedings.
>
> (1)(A) The prosecuting attorney shall initiate forfeiture proceedings by filing a complaint with the circuit clerk of the county in which the property was seized and by serving such complaint on all known owners and interest holders of the seized property in accordance with the Arkansas Rules of Civil Procedure.
>
> . . .
>
> (2) The complaint shall include a copy of the confiscation report and shall be filed within sixty (60) days after receiving a copy of the confiscation report from the seizing law enforcement agency. In cases involving real property, the complaint shall be filed within sixty (60) days of the defendant's conviction on the charge giving rise to the forfeiture.
>
> (3) The prosecuting attorney may file the complaint after the expiration of the time set forth in subdivision (g)(2) of this section only if the complaint is accompanied by a statement of good cause for the late filing. However, in no event shall the complaint be filed more than one hundred twenty (120) days after either the date of the seizure or, in cases involving real property, the date of the defendant's conviction. If the court determines that good cause has not been established, the court shall order that the seized property be returned to the owner or interest holder.
>
> (4) Within the time set forth in the Arkansas Rules of Civil Procedure, the owner or interest holder of the seized property shall file with the circuit clerk a verified answer to the complaint which shall include:

(A) A statement describing the property and the petitioner's interest in the property, with supporting documents to establish such interest;

(B) A certification by the owner or interest holder stating that he has read the document and that it is not filed for any improper purpose;

(C) A statement setting forth any defenses to forfeiture; and

(D) The address at which the owner or interest holder will accept mail.

(5)(A) If the owner or interest holder fails to file an answer as required by subdivision (g)(4) of this section, the prosecuting attorney may move for default judgment pursuant to the Arkansas Rules of Civil Procedure.

In the instant matter, when the original complaint for forfeiture was filed, the action was not commenced because the complaint was not properly served within 120 days nor was a motion to extend the time limit for service presented to the trial court. *See Cloud v. Regions Inv. Co.*, 81 Ark. App. 129, 98 S.W.3d 846 (2003) (because appellants failed to serve the summons within 120 days as required by Ark. R. Civ. P. 4(i), their cause of action was not "commenced" in accordance with Ark. R. Civ. P. (3). Subsequently, the action was dismissed without prejudice at the State's behest, and the action was only commenced when appellant was served on October 13, 2004.

In granting the State's motion to strike, the trial court found in part that appellant had failed to follow the provisions set out in Ark. Code Ann. § 5-64-505(4) by not filing a verified answer to the complaint. However, preliminary to determining whether appellant complied with the rule is the inquiry of whether the State complied with the rule. In this instance, it did not.

Arkansas Code Annotated section 5-64-505(2) requires that the complaint include a copy of the confiscation report and be filed within sixty days after its receipt. Although the prosecuting attorney filed the complaint within sixty days of receiving the confiscation report, the action was not properly commenced and was nonsuited. The action was properly commenced on October 13, 2004 (the date appellant received the summons), and the record

indicates that the confiscation report was received on April 1, 2003 — clearly beyond sixty days. Furthermore, Ark. Code Ann. § 5-64-505(3) provides that the prosecuting attorney may file the complaint after the expiration of sixty days *only if the complaint is accompanied by a statement of good cause for the late filing*; however, in no event shall the complaint be filed more than 120 days after the date of seizure. Here, the prosecutor did not include a statement of good cause when he commenced the suit more than sixty days after receiving the confiscation report. Moreover, the complaint was filed well beyond 120 days after the seizure. The seizure occurred on March 29, 2003, and the complaint was not re-filed until October 1, 2004. Therefore, the State neglected to toll the limitations period to invoke the one-year savings statute pursuant to Ark. Code Ann. § 16-56-126 because it did not file the forfeiture complaint within the 120-day period. *See Thomson v. Zufari*, 325 Ark. 208, 924 S.W.2d 796 (1996) (to toll the limitations period to invoke the one-year savings statute, a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant). Hence, the trial court erred as a matter of law; consequently, we reverse and remand.

Reversed and remanded.

HART and BIRD, JJ., agree.

AMERICAN UNDERWRITERS INSURANCE COMPANY *v.* Steven DRUMMOND, Judy Drummond, Kenneth Dilks, and Tina Dilks

CA 05-847 230 S.W.3d 320

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

Brazil, Adlong & Winningham, PLC, by: *William C. Brazil,* for appellant.

Daggett, Donovan, Perry & Flowers, PLLC, by: *J. Shane Baker,* for appellee.

JOSEPHINE LINKER HART, Judge. Appellant American Underwriters Insurance Company (AUIC) filed a petition for a declaratory judgment claiming it owed no duty to defend or indemnify appellee Steven Drummond as the result of an incident in which Steven, while sitting in an insured vehicle, shot and injured Bobby Dilks, a minor. The trial court dismissed the petition after ruling that the incident fell within the coverage terms of AUIC's policy. AUIC now appeals and argues that the trial court erred in dismissing its petition. We agree and reverse and remand.

The following facts are taken from a complaint filed against Steven Drummond by appellees Kenneth and Tina Dilks to recover for their son Bobby's injuries. Steven lived across the highway from the Dilks family and, on June 23, 2002, became angry when a woman who lived with him asked Tina for a ride to Palestine, Arkansas. Steven blocked Kenneth and Tina's driveway with his pickup truck and later chased them along the highway and blocked their path after they left the premises in their vehicles. When they returned home, Steven continued during the course of the day to squeal his tires and speed along the highway in front of their home.

That evening, while Kenneth and Bobby were riding a four-wheeler along the highway, Steven twice drove up behind them and attempted to hit them; at one point, Kenneth also heard

a gunshot. He headed for home and, upon arriving there, stopped and sent Bobby into the house. He then parked in the carport, after which the following occurred, as related in the complaint:

> As Kenneth Dilks approached the front of the house . . . to enter the house, the defendant pulled his vehicle in front of the plaintiffs' house and while using the pickup truck as a weapon platform the defendant continued his "road rage" by pointing a twelve gage [sic] shotgun out of the driver's side of the defendant's motor vehicle and shot at Kenneth Dilks. The projectile fired by the twelve gage [sic] pump shotgun was a slug that went through the wall of the plaintiffs' house and struck the right side of Bobby Dilks' abdomen and passed through his body and exited on the left side of his abdomen. . . .

The complaint also mentioned that, "based on newspaper accounts," Steven told the authorities that, in firing the gun, he was attempting to scare Kenneth and did not intend to shoot anyone.

After Kenneth and Tina's suit was filed, Steven's attorney forwarded the suit papers to AUIC, presumably seeking a defense and coverage. This prompted AUIC to file the present declaratory-judgment action asserting that its policy "does not cover intentional acts but rather only provides liability [coverage] for bodily injury arising out of an automobile accident." The pertinent policy provisions are as follows:

> We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible *because of an auto accident.*
>
> . . . .
>
> A. We do not provide Liability Coverage for any "insured":
>
> 1. Who *intentionally causes "bodily injury"* or "property damage."

(Emphasis added.) True and accurate copies of the policy and underlying complaint were attached to AUIC's petition.

Kenneth and Tina, who were named as defendants in the petition, responded with a motion to dismiss, claiming that the term "auto accident" was not defined in the policy and was therefore ambiguous; that there was a causal connection between Steven's use of the vehicle and Bobby's injuries; and that Steven

did not intentionally shoot Bobby. Following a hearing, the trial court adopted these arguments and dismissed AUIC's complaint. AUIC now appeals from that dismissal and relies on the above quoted policy provisions for its claim that no duty to defend or coverage is owed.

In reviewing a trial court's grant of a motion to dismiss, we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *See Martin v. Equitable Life Assur. Soc'y*, 344 Ark. 177, 40 S.W.3d 733 (2001). All reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.*

The language of an insurance policy is to be construed in its plain, ordinary, and popular sense. *Curley v. Old Reliable Cas. Co.*, 85 Ark. App. 395, 155 S.W.3d 711 (2004). If the language of the policy is unambiguous, we will give effect to the plain language of the policy without resorting to the rules of construction. *Hisaw v. State Farm Mut. Ins. Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003). On the other hand, if the language is ambiguous, we will construe the policy liberally in favor of the insured and strictly against the insurer. *Id.* Language is ambiguous if there is doubt or uncertainty as to its meaning and it is susceptible to more than one equally reasonable interpretation. *See Ison v. Southern Farm Bureau Ins. Co.*, 93 Ark. App. 502, 221 S.W.3d 373 (2006).

The first question before us is whether the shooting incident in this case was an "auto accident." Our courts have not defined that term as it is used in an insurance policy. However, our courts have decided similar cases where an insuring agreement provided coverage for injuries "arising out of" the ownership, maintenance, or use of a vehicle.

In *Hartford Fire Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 264 Ark. 743, 574 S.W.2d 265 (1978), two boys were playing inside a parked recreational vehicle. One of the boys picked up a gun and pointed it at another boy outside the vehicle. The weapon discharged, and the boy was killed. Coverage was sought under the vehicle's insurance policy. The supreme court held that no coverage was owed and that the shooter's presence inside the vehicle did not make the injury one arising out of the ownership, maintenance, or use of the vehicle.

In *Carter v. Grain Dealers Mutual Insurance Co.*, 10 Ark. App. 16, 660 S.W.2d 952 (1983), shots were fired inside a vehicle and both occupants died as a result. The administrator of one of the

decedents' estates sought coverage under a policy that provided benefits for injuries "caused by accident and arising out of the maintenance or use of a motor vehicle as a motor vehicle." This court ruled that, in order for insurance coverage to be present, "there must be a causal connection between the injury and the operation of the vehicle" and that the only connection there was that the men "happened to be in the automobile when the shooting occurred." *Carter*, 10 Ark. App. at 18, 660 S.W.2d at 953.

In the present case, as in *Hartford* and *Carter*, the victim's injuries were inflicted by a gun fired from within a vehicle. If the shooting or injuries in those cases cannot be said to have "arisen out of" the use of the vehicles, given the broad interpretation accorded to that phrase,[1] then we do not believe that the shooting and injury in this case fall within the more limited phrase "because of an auto accident." An auto accident, in its plain, ordinary, and popular sense, does not encompass a situation in which injury is caused by the intentional firing of a gun from an automobile. *See generally* 8A *Couch on Insurance 3d* § 119:5 (2005). Therefore, even if, as appellees claim, the shooting was the culmination of a series of events in which Steven used his vehicle to harass and terrorize them, only a strained construction would permit the shooting to be considered an "auto accident."

We further note that there is considerable support for refusing to interpret "auto accident" (or a similar term) to include assaults that take place from within a vehicle. *See, e.g., Allied Mut. Ins. Co. v. Patrick*, 16 Kan. App. 2d 26, 819 P.2d 1233 (1991); *Bisgard v. Johnson*, 3 Neb. App. 198, 525 N.W.2d 225 (1994); *Lebroke v. United States Fid. & Guar. Ins. Co.*, 146 N.H. 249, 769 A.2d 392 (2001); *Manhattan and Bronx Surface Transit Operating Auth. v. Gholson*, 98 Misc. 2d 657, 414 N.Y.S.2d 489 (1979); *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997); *Farmers Ins. Co. v. Grelis*, 43 Wash. App. 475, 718 P.2d 812 (1986).

Finally, we express our agreement with AUIC that the term "auto accident" is not vague or ambiguous simply because it was not defined in the policy. The lack of a policy definition does

---

[1] *See Hisaw, supra*, which recognized that the term "arising out of the use" of a motor vehicle has been interpreted broadly.

not render a term ambiguous. *See Smith v. Southern Farm Bureau Cas. Ins. Co.*, 353 Ark. 188, 114 S.W.3d 205 (2003); *Curley*, *supra*.

In light of the foregoing, we reverse the trial court's dismissal of AUIC's declaratory-judgment petition, and we remand for entry of an order consistent with this opinion. Our holding makes it unnecessary to reach the question of whether the policy's intentional-acts exclusion applies.

Reversed and remanded.

VAUGHT and ROAF, JJ., agree.

Chong Sun YU *v.*
METROPOLITAN FIRE EXTINGUISHER CO.

CA 05-856 230 S.W.3d 299

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

Laser Law Firm, by: *Brian A. Brown* and *Keith M. McPherson* for appellant.

Huckabay, Munson, Rowlett & Moore, by: *John E. Moore* and *Brenna J. Ryan* for appellee.

JOSEPHINE LINKER HART, Judge. Chong Sun Yu appeals from a judgment of the Pulaski County Circuit Court that awarded her no damages because the jury, although finding that Yu was zero percent at fault, determined that separate plaintiff J&S Hunan Palace ("Hunan") and defendant/appellee Metropolitan Fire Extinguisher Company, Incorporated ("Metropolitan"), were each fifty percent at fault. On appeal, Yu challenges the trial court's refusal to award her damages and also argues that the trial judge erred in refusing to submit special interrogatories to the jury asking it to apportion the amount of damages that it awarded among the separate plaintiffs. We reverse and remand.

Yu is the owner of a building in Cabot, which she rented to Hunan, a Chinese restaurant operated by Simon Huynh and John Nguyen. On December 8, 2001, a cook who worked for Hunan apparently left a stove unattended for several minutes, and a grease fire ignited. The restaurant was protected by a fire-suppression system, but it apparently malfunctioned and did not deploy. The fire spread and caused considerable damage to the restaurant and building.

Yu and Hunan were insured by Farmer's Insurance, and both filed as plaintiffs in a subrogation action against Metropolitan. The same trial counsel represented Yu and Hunan. The case was submitted to the jury on interrogatories that asked it to apportion fault between Yu, Hunan, and Metropolitan and to set the amount of damages. Yu and Hunan also asked for an interrogatory that asked the jury to apportion the amount of recovery between the plaintiffs. However, the trial judge, agreeing with Metropolitan, refused to submit it to the jury.

The jury returned a verdict that placed fifty percent of the fault on Metropolitan, fifty percent on Hunan, and zero percent on Yu. The jury also set the amount of damages at $50,000, without designating the amount to be recovered by each plaintiff. However, the trial judge subsequently ruled that because the jury "did not give them more than 50% of the fault . . . there are no damages."

Yu first argues on appeal that the trial court erred in concluding that a plaintiff who is free of fault cannot recover damages if the total fault of all plaintiffs equals the fault of the

defendant. She notes that the applicable statute in force at the time of the fire, Arkansas Code Annotated section 16-64-122 (Supp. 2001), states that "the fault of 'a party' (*i.e.*, plaintiff) must be compared to the fault of the 'party or parties' (*i.e.*, defendants) against whom damages are sought." Yu contends that this language was "drafted with precision to show that the fault of *each* individual plaintiff must be compared with the fault of *all* defendants, and that a plaintiff's recovery is determined by his or her individual fault vis-a-vis the defendants, without regard to the fault of the other plaintiffs." We agree with Yu's interpretation of the statute.

We review issues of statutory construction de novo, and we are not bound by the trial court's interpretation. *Simmons First Bank v. Bob Callahan Servs., Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000). When reviewing issues of statutory interpretation, the first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Yamaha Motor Corp. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001). When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997).

In pertinent part, Arkansas Code Annotated section 16-64-122 states:

> (a) In all actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.
>
> (b)(1) If the fault chargeable to a party claiming damages is of a lesser degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his damages after they have been diminished in proportion to the degree of his own fault.
>
> (2) If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages.

This case is resolved by the plain language of section 16-64-122. We agree with Yu that the legislature's use of the word "party" in its singular form has an obvious meaning — the court is to consider each plaintiff individually when comparing her fault to that of the "party or parties" that she is seeking to recover damages from. The fact that there are multiple plaintiffs is of no moment; the required analysis necessarily entails comparing the fault attributable to each individual plaintiff with that of the party against whom recovery is sought. *See Nationsbank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001) (plurality decision). In this case, Yu was found by the jury to be without fault, and the party she was seeking to recover from, Metropolitan, was fifty percent at fault for the damages caused by the fire. Therefore, according to the plain wording of subsection (b)(1) of the statute, Yu should be able to recover the full amount of the damages that she proved at trial. Ark. Code Ann. § 16-64-122. We further hold that Hunan's fault is immaterial because Yu was not attempting to recover damages from it. Accordingly, we reverse and remand for entry of judgment in favor of Yu in accordance with the jury verdicts.

Yu next argues that the trial court erred in failing to submit to the jury an interrogatory that asked the jury to apportion the damages. However, we note that Hunan has not appealed and is no longer a part of this case, and Metropolitan has not cross-appealed. Accordingly, this point will have no practical effect on this lawsuit. We do not decide issues that are moot, render advisory opinions, or answer academic questions. *Cooper Tire & Rubber Co. v. Angell*, 75 Ark. App. 325, 58 S.W.3d 396 (2001).

Reversed and remanded.

BIRD, J., agrees.

NEAL, J., concurs.

Daniel BARNES *v.* STATE of Arkansas

CA CR 05-959 230 S.W.3d 311

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

William R. Simpson, Jr., Public Defender, by: *Erin Vinett*, Deputy Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

ROBERT J. GLADWIN, Judge. Appellant Daniel Barnes was convicted of aggravated assault upon an employee of a correctional facility and misdemeanor criminal mischief, for which he was sentenced to three years' probation and a $250 fine. He raises two points on appeal, (1) that the trial court erred by allowing him to be prosecuted for aggravated assault because the information tracked language from a version of Ark. Code Ann. § 5-13-211 that was no longer in effect, and (2) that the trial court erred in denying his motion for directed verdict because the State failed to prove the elements of the offense pursuant to the version of the statute utilized by the State. We affirm.

On September 24, 2004, appellant was brought to the intake area of the Pulaski County Jail after being arrested for public intoxication. Because of his belligerent behavior, he was placed in a padded "safe cell." Appellant banged and kicked at the window of the cell, which may have already been cracked, until it eventually broke. Appellant was then placed in a restraint chair, and Thomas Tisch, an emergency medical technician from the Pulaski County Sheriff's Office, was called to check the tightness of the restraints. While Mr. Tisch was performing the check, appellant spat on him in such a manner that saliva entered his eyes, nose, and mouth. Appellant was charged with: (1) aggravated assault on a correctional-facility employee; (2) criminal mischief in the first degree; (3) impairing the operation of a vital public facility.

A bench trial was held on March 11, 2005, during which the State presented three witnesses, Deputy Brian Eslick, employee

Lily Weir, and Mr. Tisch, all of whom testified consistently as to the basic facts of the incident. At the close of the State's case, appellant moved for a directed verdict on all three counts, pursuant to which the criminal-mischief charge was reduced to a misdemeanor and the impairing-a-vital-public-facility charge was dismissed. Appellant also argued that the aggravated-assault charge should be dismissed because the information tracked language from a prior version of Ark. Code Ann. § 5-13-211(a) (Repl. 1997) that was no longer in effect at the time he allegedly committed the offense. Appellant's motion was denied as untimely. The State then moved to amend the information to clarify which version of the statute was being used, but the trial court denied the motion, claiming it was unnecessary.

Appellant was the sole witness for his case in chief, and during his testimony, he apologized to the court for his actions and explained that he was highly intoxicated at the time of the incident. At the close of the evidence, appellant renewed his motion to dismiss the aggravated-assault charge under either the old or new "theory of law," and the trial court summarily denied it. Appellant was convicted as set forth above, as evidenced by the judgment and conviction order filed on June 27, 2005. He filed a timely notice of appeal on July 14, 2005.

I. Denial of Motion for Directed Verdict

Preservation of appellant's right against double jeopardy requires that we consider his challenge to the sufficiency of the evidence first even though it was not listed as his first point on appeal. *See Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006). 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. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Appellant states that, because the trial court denied the State's motion to amend the information, and assuming that because of that ruling the prior version of the statute was utilized, the State was required to prove that he caused a potential danger of

death or serious physical injury to the victim, Mr. Tisch. He asserts that there was no such proof, and accordingly, the trial court's denial of his motion for a directed verdict was erroneous. He argues that the State offered no proof that appellant suffered from a communicable disease; moreover, not one mention was made by the State regarding any danger, serious or otherwise, caused by appellant's spitting on Mr. Tisch. Appellant maintains that the evidence presented does not meet this standard and states that presumably, this level of proof is why the Arkansas Legislature amended the statute in 2003 to considerably lessen the burden that the State must carry in proving this offense. He asserts, however, that due to the trial court's refusal to allow the State to amend the information to conform to the amended statute, the State was required to prove the more onerous version of the statute. We need not address this argument because the record supports that appellant was convicted of violating the amended statute, as more fully discussed in Point II below, and he fails to challenge the sufficiency of the evidence supporting that conviction.

II. Prosecution Under Ark. Code Ann. § 5-13-211

Aggravated assault upon an employee of a correctional facility is currently defined in Ark. Code Ann. § 5-13-211 (Supp. 2003) as:

> (a) A person commits aggravated assault upon an employee of a correctional facility if, under circumstances manifesting extreme indifference to the personal hygiene of the employee, he or she purposely engages in conduct that creates a potential danger of infection to an employee of any state or local correctional facility while the employee is engaged in the course of his or her employment by causing the employee to come into contact with saliva, blood, urine, feces, seminal fluid, or other bodily fluid by throwing, tossing, or expelling the fluid or material.
>
> (b) Aggravated assault upon an employee of a correctional facility is a Class D felony.

Act 1271 of 2003, § 1, amended subsection (a) of the 1997 replacement version of the statute in three ways: (1) the phrase "personal hygiene of the employee" was substituted for the phrase "value of human life" following the phrase "indifference to the"; (2) the term

"infection" was substituted for the phrase "death or serious physical injury" following the phrase "potential danger of"; (3) the phrase "by throwing, tossing, or expelling such fluid or material" was inserted at the end of the paragraph.

At the close of the State's case, appellant moved for the dismissal of the aggravated-assault charge, arguing that the State's information tracked the language of the prior version, which was no longer in effect at the time he committed the offense on September 24, 2004, and further claiming that it was too late in the process for the State to amend the information to conform to the amended version. He asserted that the amendments changed the nature of the charge, specifically that "what you have to do to be guilty of this charge is different." The State responded that the information could be amended at any time but also explained that the charge, offense, code section, and punishment range remained the same, despite the changes in wording. The trial court asked appellant's counsel whether there had been a request to quash the information or an allegation that it was insufficient prior to the trial, and she responded that there had not. After a brief recess, the trial court denied the motion to dismiss and found that any allegation of deficiency should have been raised prior to trial. The trial court also denied the State's motion to amend the information, determining that there was no need, and proceeded with the trial.

Appellant contends that it was the last decision by the trial court, not to allow the State to amend the information, that was the critical error in the case. He maintains that the effect of the ruling was to allow him to be convicted under language of a statute that was no longer in effect, either at the time of the commission of the alleged offense or the trial. He asserts that it is axiomatic that the legislature possesses the sole power to define crimes, *see United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997), and that the trial court was erroneous in allowing the trial to proceed under the superseded version.

The State maintains that appellant's claim is not preserved for review. The trial court correctly noted that the proper time to object to the sufficiency of the information was before the trial. *See Meny v. State*, 314 Ark. 158, 861 S.W.2d 303 (1993). Because he failed to do so, his challenges, both to the trial court and on appeal, are barred. *See McNeese v. State*, 334 Ark. 445, 976

S.W.2d 373 (1998). Furthermore, because appellant resisted the State's motion to amend the information at the trial-court level, he cannot now attack it on appeal. *Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003).

Additionally, appellant's claim cannot prevail on the merits because he has not shown that he was convicted under the language of a statute that was no longer in effect. It is clear that the statute in effect at the time the offense is committed is the proper statute under which to proceed, *see Holt v. State*, 85 Ark. App. 151, 147 S.W.3d 699 (2004); however, the record does not reveal that appellant's conviction on this count runs afoul of that proposition. If appellant was uncertain as to which version of the statute the trial court relied upon, he should have asked for clarification on the point after the trial court denied both his motion to dismiss and the State's motion to amend the information. Instead, he proceeded to move for a directed verdict under *either* version, which the trial court denied. Appellant's failure to seek such clarification should not inure to his benefit, and he bears the burden to make a record below demonstrating prejudicial error. *See Rameriz v. State*, 91 Ark. App. 271, 209 S.W.3d 457 (2005). In criminal cases, this court presumes that an appellant has been given a fair trial and that the judgment of conviction is valid; appellant bears the burden of showing either prejudicial error in the record or such inadequacy in the record that error cannot be shown. *Simms v. State*, 12 Ark. App. 254, 675 S.W.2d 643 (1984).

Under Arkansas law, an information need only allege that the defendant committed a named offense, and it is not necessary to include a statement of the act or acts constituting the offense, unless the offense cannot be charged without it. Ark. Code Ann. § 16-85-403(a)(1) (1987). Accordingly, the State did not need to track the language of the statute in order to charge appellant because merely citing it was sufficient. The trial court determined that the State did not need to amend the information because it correctly cited the statute that he was charged with violating. We regard the additional language in the information as being in the nature of explanatory text that was superfluous and did not make it fatally defective such as to warrant reversal. *See Richard v. State*, 286 Ark. 410, 691 S.W.2d 872 (1985); *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982); *Baker v. State*, 200 Ark. 688, 140 S.W.2d 1008 (1940). As our supreme court stated in *Baker*, *supra*:

> It may be true that the pleader in drafting his information had before him and in mind the language of the aforesaid statute and followed the same to some extent in the preparation of the charge upon which appellant was tried, but it certainly does not necessarily follow, as a matter of law, that because thereof, even if true, that defendant must be discharged. Certainly, if by reasonable construction the language of the information charges an offense against the laws of the State, under any other provision of the statutes, the ineptitude of the pleader's diction would not operate to nullify the proceedings.

Baker, 200 Ark. at 691, 140 S.W.2d at 1009-10. In the instant case, the factual basis of the charge remained the same, specifically that appellant spit in the face of Thomas Tisch, an employee of the Pulaski County Sheriff's Office. Appellant's defense to the charge was that his great degree of intoxication at the time precluded him from having the requisite purposeful intent under either version of the statute. While the trial judge could have simply allowed the State to amend the information as requested, or explicitly stated that he was relying upon the amended version of the statute in making his ruling, appellant has failed to meet his burden of proving that the failure to do so was reversible error. Accordingly, we affirm on this point.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

Charles HIGGINS *v.* STATE of Arkansas

CA CR 05-779 230 S.W.3d 316

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

[Rehearing denied April 5, 2006.*]

Montgomery, Adams & Wyatt, PLC, by: *Dale E. Adams*, for appellant.

Mike Beebe, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

ROBERT J. GLADWIN, Judge. Appellant Charles Higgins was convicted by a Pulaski County jury of aggravated robbery and theft of property, for which he was sentenced to 120 months in the Arkansas Department of Correction. On appeal, he argues that he was denied due process by the State's failure to disclose a tacit and implicit agreement to give his co-defendant favorable terms in a plea agreement as well as by the State's failure to correct false testimony. We affirm.

* HART, J., would grant rehearing.

Early in the morning on April 25, 2004, Frederick Eberhart was working as a clerk at a Shell Superstop in Little Rock, Arkansas. Appellant entered and exited the store several times in a short period of time, at least one time purchasing a soft drink while there. The final time he entered the store, he was accompanied by a white male, Steven Hicks, who pulled a gun, pointed it at Eberhart's head, and demanded money. Eberhart gave Hicks the money from the cash drawer, and Hicks and appellant ran out of the store together toward the interstate bridge.

Subsequent to the robbery, on April 28, 2004, Eberhart identified appellant from a photographic lineup of six photographs shown to him by law enforcement officers and stated that, during the actual robbery, appellant merely held the door open so that it would not automatically lock upon closing. One of the detectives involved in the identification process told Eberhart to take his time and close his eyes, while another detective observed that Eberhart did not make an immediate identification, taking approximately five to ten minutes before identifying appellant.

Appellant was charged, along with Hicks, with aggravated robbery and theft of property. At his jury trial held on April 12, 2005, Eberhart identified appellant, initially stating that it took him only three to five minutes to identify him in the photo lineup but admitting on cross-examination that it had taken almost twenty minutes. The two detectives also testified as to the identification process.

Co-defendant Hicks was called by the State and testified that he had not been to the Shell Superstop with appellant, either on April 25, 2004, or at any other time. Later, he changed his story, accusing appellant and another individual, Montonio Roberts, of forcing him at gunpoint to rob the store. Hicks was specifically asked whether he had entered a plea agreement or had a deal with the State in exchange for his testimony against appellant, to which he responded that he did not, and he further stated that his trial was set for May 5, 2005. Subsequently, appellant was convicted and sentenced to the minimum term of imprisonment, ten years.

On April 15, 2005, a hearing took place during which the State reduced the charges against Hicks from aggravated robbery to simple robbery. He attempted to enter a guilty plea, but the trial court refused to accept it based upon his testimony at appellant's trial that he was forced at gunpoint to commit the robbery. Appellant filed a motion for a new trial on May 6, 2005, alleging that the State did not reveal that it had a tacit or implicit agreement

with Hicks for favorable treatment in exchange for his testimony against appellant. The State responded on May 23, 2005, stating that a plea offer was extended to Hicks on April 14, 2005, and that no previous agreement had existed; and further, that the State did not fail to "correct witness testimony known to be false."

At the hearing on appellant's motion for a new trial, the only witness was Hicks's attorney, Sharon Kiel. She testified that she was present at the sole meeting between her client and the prosecutors. She explained that prior to that meeting the prosecutors had asked Hicks if he would testify for the State, and they specifically told him that they could not guarantee, promise, or discuss "any outcome" in exchange for his testimony. Kiel testified that there was no anticipation of any reward or benefit in exchange for Hicks's testimony, and she explained to her client that there was "nothing on the table." Kiel admitted that she thought it would benefit Hicks to testify for the State and that she hoped the State would help him if he did so. She explained that she expressed that "hope" to Hicks but stated that no deal had been made. She testified that if Hicks had been asked if he hoped to benefit from testifying, he could have answered questions along that line, but that is not what was asked. Finally, she expressed that she called the prosecutor's office the day after appellant's trial, and it was at that time that the State made the plea offer to Hicks to reduce the aggravated-robbery charge to simple robbery and a recommendation of twenty years' imprisonment in return for Hicks's guilty plea. The trial court summarily denied appellant's motion for a new trial in an order entered on May 25, 2005, and appellant filed his notice of appeal on June 21, 2005.

The decision on whether to grant or deny a motion for new trial lies within the sound discretion of the circuit court. *Holloway v. State*, 363 Ark. 254, 213 S.W.3d 633 (2005). We will reverse a circuit court's order granting or denying a motion for new trial only if there is a manifest abuse of discretion. *Id.* A circuit court's factual determination on a motion for new trial will not be reversed unless clearly erroneous. *Id.* This court has repeatedly held that the issue of witness credibility is for the trial judge to weigh and assess. *Id.* Accordingly, this court will defer to the superior position of the circuit court to evaluate the credibility of witnesses. *Id.*

In his motion for a new trial, appellant argued that the State withheld exculpatory evidence in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and also that the State introduced what it knew was incorrect or false testimony in contravention of cases

such as *Napue v. Illinois*, 360 U.S. 264 (1959). He first addresses the fact that the State did not believe that Hicks was forced at gunpoint to rob the store, and accordingly, the prosecutor should not have allowed Hicks to testify as to such. He contends that the State had a duty to correct the false testimony pursuant to *Napue, supra*, irrespective of how the testimony arose or who introduced it. He claims that this was a violation of due process but recognizes that it warrants relief only if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *See id.* at 271. He points out that this is a lesser standard than required in *Brady, supra*, which requires a reasonable probability of a different result if the false testimony had been corrected.

Appellant argues that Hicks's testimony undoubtedly contributed to the guilty verdict against him, despite Eberhart's identification of appellant as Hicks's accomplice. He asserts that Eberhart was not a credible witness and that his testimony regarding the identification was "shaky." Additionally, Hicks contradicted himself during his testimony by alleging that appellant forced him at gunpoint to rob the store. Appellant maintains that this false testimony from Hicks, which was specifically allowed by the State, along with the State's failure to disclose the tacit agreement with Hicks regarding his testimony against appellant, was material and warrants a reversal of his conviction.

As to appellant's argument regarding Hicks's tacit agreement in exchange for testimony against him, it is true that any agreement of leniency for testimony must be disclosed to the defense prior to trial; otherwise, a defendant's due-process rights are violated. *See Giglio v. United States*, 405 U.S. 150 (1972); *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000). In *Giglio*, the government failed to disclose an alleged promise to its key witness that he would not be prosecuted if he testified for the government. The key witness was Giglio's alleged co-conspirator and the only witness linking Giglio with the crime. In holding that Giglio was entitled to a new trial, the Supreme Court wrote:

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within [the *Brady* rule]. . . . We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ." A finding of materiality of the evidence is required under *Brady*. . . . A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ."

Giglio, 405 U.S. at 154 (citations omitted). The Supreme Court went on to note that the government's case "depended almost entirely on [the witness's] testimony; *without it there could have been no indictment and no evidence to carry the case to the jury.*" *Id.* (emphasis added). The State asserts that such is not the situation in this case. The State's case was not entirely dependent on Hicks's testimony, as the review of the record, and specifically the testimony from Eberhart described above, plainly reveals.

Appellant also cites *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005), regarding the non-disclosure of the mental competence of a co-defendant to the defense team prior to trial. The co-defendant and prosecutors had agreed that the co-defendant would not undergo a psychiatric examination before trial, and further agreed that charges against him would be reduced in exchange for his testimony. The suppression of that agreement was held to be in violation of *Brady*, and appellant claims the suppression of the tacit agreement in his case is the same situation. The co-defendant in *Silva* agreed to forego his motion for a psychiatric examination before he testified against Silva, just as Hicks agreed to forego his formal plea agreement before testifying against appellant. This case is distinguishable because in *Silva*, there was an express agreement that had previously been reached between the testifying co-defendant and the prosecutors that is not present here.

More closely on point is *Haire*, *supra*, where there was no proof that such an agreement was made by the prosecutors. The witness in question testified that there was no agreement, and nothing was offered by Haire to counter that testimony. Our supreme court held that:

> The mere fact, standing alone, that the charges were dropped [against Polk] after the trial does not establish a *Giglio* violation. *See, e.g., United States v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979) (fact that witness for government pled guilty to lesser offense three days after trial not enough to establish a prior agreement). Furthermore, as the trial court noted, the fact that Polk had charges pending against her at the time of her testimony was explored by both the State and the defense in questions before the jury. Haire has failed to exhibit reversible error on this point.

Haire, 340 Ark. at 17, 8 S.W.3d at 472.

[redacted] There are no cases that have held that a mere "hope" of leniency is equivalent to an actual agreement or express promise of leniency. As the State pointed out, if that was the standard, there

would be no reason for evidence of such an agreement to be produced at trial. The trial courts would simply instruct juries, as a matter of law, that leniency would be granted in exchange for such testimony. Hicks's testimony did not violate the mandates of *Giglio* and *Brady*, as no deal had been offered by the State at the time he testified. Appellant's counsel failed to inquire as to whether Hicks expected, thought, or even hoped for leniency in exchange for his testimony. If counsel had, Hicks could have answered differently. As asked, he could not explain an agreement that had not yet been reached, or even discussed. As in *Haire*, *supra*, the fact that Hicks's attorney subsequently called the prosecutor's office and a plea agreement was reached has no bearing on the credibility of the previous testimony at the time of appellant's trial.

Affirmed.

GRIFFEN and NEAL, JJ., agree.

Flavio Rios GUERRERO *v.* OK FOODS, INC.

CA 05-865 230 S.W.3d 296

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

Stricker Law Firm, PLLC, by: *R. Theodor Stricker*, for appellant.

Friday, Eldredge & Clark, by: *James M. Simpson* and *Kristopher B. Knox*, for appellee.

SAM BIRD, Judge. Appellant Flavio Rios Guerrero appeals the trial court's decision to grant summary judgment in favor of appellee OK Foods, Inc., after Guerrero brought a tort action against OK Foods in the Sebastian County Circuit Court. On appeal, Guerrero asks this court to expand the intentional-tort exception to the exclusive-remedy doctrine under Arkansas workers' compensation law. We decline to do so; thus, we affirm.

On March 25, 2004, Guerrero was working at an OK Foods facility in Fort Smith, Arkansas, when his arm became entangled in a "kill line conveyor system" and was torn off. Guerrero subsequently received workers' compensation benefits, and on June 8, 2004, he filed a tort action against OK Foods in the Sebastian County Circuit Court. In his complaint, Guerrero alleged that, prior to his injury, he was ordered to wash a conveyer line with a trigger gun and nozzle hose system that was larger and exerted more pressure than the system he had previously used. He claimed that, as a result, he lost control of the gun and hose system, and the gun, hose, and his shirt became caught in the conveyor. Guerrero also alleged that he reported this incident to his supervisor, but the supervisor ignored him and ordered him to continue the practice of cleaning the conveyor with the larger hose.

According to Guerrero's complaint, on March 25, 2004, Guerrero was cleaning the conveyor as ordered when the belt caught his arm and pulled him onto the conveyor. Guerrero claimed that he "screamed for help" but no one responded, and that the system "lacked appropriate emergency stops." Guerrero alleged that the conveyor belt "ripped off" his arm, and he was eventually able to free himself. Guerrero asserted that the acts of OK Foods constituted an intentional tort for which he was entitled to damages.

On January 13, 2005, OK Foods filed a motion for summary judgment, asserting that Guerrero had received workers' compensation benefits as a result of the accident and that his sole avenue for recovery was under Arkansas workers' compensation law. OK Foods argued that Guerrero was therefore barred by the exclusive-remedy doctrine from asserting a claim against OK Foods for negligence. The trial court granted the motion for summary judgment, finding that Guerrero's claims were precluded by the exclusive-remedy doctrine of Arkansas workers' compensation law.

On appeal, Guerrero asks this court to expand the existing intentional-tort exception to the exclusive-remedy doctrine under Arkansas workers' compensation law. A trial court's conclusion on a question of law is reviewed de novo and is given no deference on appeal. *Indus. Elec. Supply, Inc. v. Lytle Mfg., L.L.C.*, 94 Ark. App. 81, 226 S.W.3d 1 (2006).

Arkansas Code Annotated section 11-9-105 (Repl. 2002) provides that the rights and remedies granted to employees under the Arkansas Workers' Compensation Act are exclusive of all other rights and remedies that an employee has against an employer. In *Brown v. Finney*, 326 Ark. 691, 694, 932 S.W.2d 769, 771 (1996), our supreme court explained that "the reason for the exclusivity provision in [section 11-9-105] mirrors the general purpose behind our Workers' Compensation Act, which was to change the common law by shifting the burden of all work-related injuries from individual employers and employees to the consuming public with the concept of fault being virtually immaterial."

Our supreme court has fashioned an exception to the exclusive-remedy doctrine in cases where an employer intentionally inflicts an injury upon an employee. In *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 356, 230 S.W.2d 28, 32 (1950), the court held that a "vicious, unprovoked, intentional and violent assault and battery upon appellant during the course of the employment" entitled the appellant to either "claim compensation under the compensation act" or to "treat the wilful assault as a severance of the employer-employee relationship and seek full damages in a common law action." This "intentional-tort exception" to the exclusive-remedy doctrine under our workers' compensation law has been narrowly construed. For example, in *Griffin v. George's, Inc.*, 267 Ark. 91, 96, 589 S.W.2d 24, 27 (1979), our supreme court recognized that the exception only applies to acts "committed with an actual, specific, and deliberate intent on the

part of the employer to injure the employee," and that the employee's complaint must be "based upon allegations of an intentional or deliberate act by the employer with a desire to bring about the consequences of the act." *See also Miller v. Ensco*, 286 Ark. 458, 692 S.W.2d 615 (1985).

Here, appellant makes a public policy argument that we should expand our intentional-tort exception "to embrace patterns of fact such as the one at bar, thereby overturning a series of cases to the contrary." He cites cases from other jurisdictions that have allowed an exception in situations where the employer had knowledge that there was a substantial certainty of harm to the employee, and he urges us to adopt this standard or a similar standard. Furthermore, he claims that our current law does not guarantee an employee the right to a safe workplace, and he argues that precluding him from pursuing a tort action against OK Foods is contrary to the purposes of our workers' compensation law and to fundamental notions of justice.

Guerrero's arguments are policy arguments that are for the legislature, not the courts, to consider. Our supreme court has repeatedly held that the determination of public policy lies almost exclusively with the legislature, and the courts will not interfere with that determination in the absence of palpable errors. *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 150 S.W.3d 276 (2004) (citations omitted). Therefore, Guerrero's arguments are more appropriately addressed to the legislature, not the appellate court. *See id.*

We also note that, even were we to agree with Guerrero, and if we had the ability to expand the intentional-tort exception, Guerrero is barred from pursuing a tort claim against OK Foods because he has already accepted workers' compensation benefits. *See Gourley v. Crossett Pub. Sch.*, 333 Ark. 178, 968 S.W.2d 56 (1998) (recognizing that an appellant's tort claim was barred by the doctrine of election of remedies where the appellant had previously pursued and recovered workers' compensation benefits for the same injury). We therefore affirm.

Affirmed.

GLOVER and CRABTREE, JJ., agree.

Jimmie OSBORNE *v.* STATE of Arkansas

CA CR 05-267 230 S.W.3d 290

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

C. Scott Nance, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Jimmie D. Osborne appeals from various drug-related convictions, raising two points of appeal. He asserts that the trial court erred in not declaring Arkansas Code Annotated § 5-64-403 (Supp. 2003)[1] unconstitutionally vague and in denying his request to provide additional jury instructions. We are not persuaded by appellant's arguments, and affirm his convictions.

Appellant was charged with Class B felony possession of drug paraphernalia with intent to manufacture methamphetamine under § 5-64-403(c)(5). At the beginning of appellant's jury trial, he asserted that § 5-64-403 was unconstitutionally vague because possession of drug paraphernalia with intent to manufacture methamphetamine under that statute may be punished as a Class A misdemeanor, a Class B felony, or a Class C felony. The trial court denied appellant's motion. Appellant also requested jury instructions regarding the possession of drug paraphernalia with the intent to manufacture a controlled substance, a Class A misdemeanor under § 5-64-403(c)(1)(A)(i) and (ii), and regarding the violation

[1] This statute was subsequently amended by Act No. 1994 of 2005. The amendments were mostly stylistic and would not have changed the disposition of this case. *See* Ark. Code Ann. § 5-64-403 (Repl. 2005).

of § 5-64-403 in the course of and in furtherance of a felony violation of the Controlled Substances Act, a Class C felony under § 5-64-403(c)(1)(B). The trial court refused to instruct the jury as appellant requested and instructed the jury only with regard to the Class B felony drug-paraphernalia possession charge. The jury found appellant guilty of the above charges and sentenced him to serve twenty-five years in the Arkansas Department of Correction.

I. Standing

The first issue we must address is whether appellant has standing to challenge the constitutionality of the pertinent provisions of § 5-64-403. However, before making that determination it is instructive to set out appellant's constitutional argument. He specifically challenges the constitutionality of the following subdivisions of Ark. Code Ann. § 5-64-403 that pertain to possession of drug paraphernalia with the intent to manufacture methamphetamine:

> (c) Drug Paraphernalia.
>
> (1)(A)(i) It is unlawful for any person to use, or *to possess with intent to use, drug paraphernalia to* plant, propagate, cultivate, grow, harvest, *manufacture*, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body *a controlled substance in violation of this chapter.*
>
> (ii) A violation of this subdivision (c)(1)(A)(i) is a Class A misdemeanor.
>
> (B) Any person who violates this section in the course of and in furtherance of a felony violation of this chapter is guilty of a Class C felony.
>
> . . .
>
> (5) *It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine in violation of this chapter.* Any person who pleads guilty nolo contendere to or is found guilty of violating the provisions of this subdivision (c)(5) shall be guilty of a Class B felony. (Emphasis added.)

Appellant was convicted of Class B felony possession of drug paraphernalia under § 5-64-403(c)(5). He argues that § 5-64-403

is unconstitutionally vague because it contains two *additional* punishments for the *same* conduct: a Class C felony, pursuant to subdivision 5-64-403(c)(1)(B), and a Class A misdemeanor, pursuant to subdivisions 5-64-403(c)(1)(A)(i) and (ii).

The State asserts that appellant has no standing to argue that subdivision (c)(1)(A)(i) and (ii) and subdivision (c)(1)(B) are unconstitutionally vague because he was not convicted under those subdivisions. For support, the State cites to *Garrigus v. State*, 321 Ark. 222, 901 S.W.2d 12 (1995) (holding the defendant lacked standing to raise a double-jeopardy challenge to a statute authorizing additional penalties for underage driving while under the influence, where there was no finding that he was punished under that statute), and to *Greer v. State*, 310 Ark. 522, 837 S.W.2d 884 (1992) (holding the defendant lacked standing to challenge as unconstitutionally vague two provisions of the DUI statute creating presumptions based on blood-alcohol content, where the defendant asserted that those provisions conflicted with the subsection in the same statute setting the minimum blood-alcohol content, but where he was not convicted under the provisions concerning the presumptions).

We disagree that appellant lacks standing to challenge the constitutionality of subdivisions (c)(1)(A)(i) and (ii) and (c)(1)(B) simply because he was charged and convicted under subdivision (c)(5). The cases cited by the State are distinguishable because the challenges in those cases involved either portions of the statute under which the defendant had not been convicted or a separate statute under which he had not been convicted.

■ While appellant in the instant case was not charged or convicted under subdivision (c)(1)(A)(i) and (ii) or (c)(1)(B), his argument is that subdivision (c)(5), under which he *was* convicted, *when taken with the other two subdivisions,* violates due process because the subdivisions are so inconsistent as to fail to provide notice of how the conduct will be punished. Thus, unlike the defendant in the cases cited by the State, appellant here clearly challenged the constitutionality of the subdivision of the statute under which he was convicted. Further, unlike the *Greer* defendant, appellant here does not assert that the provisions under which he was not convicted conflict with subdivision (c)(5). To the contrary, he asserts that his conduct could have supported a charge under any of the provisions.

If appellant has no standing here, we cannot determine how a defendant could *ever* successfully challenge the constitutionality of conflicting or inconsistent subdivisions of the same statute. Accordingly, we hold that appellant has standing to challenge the constitutionality of the above-noted subdivisions of § 5-64-403.

II. Constitutionality of Arkansas Code Annotated Section 5-64-403

On the merits, however, we are not persuaded by appellant's argument that § 5-64-403 is unconstitutionally vague. The guidelines governing statutory interpretation where the constitutionality of a statute is challenged were explained in *Bowker v. State*, 363 Ark. 345, 214 S.W.3d. 243 (2005), as follows:

> Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. If it is possible to construe a statute as constitutional, we must do so. Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance there to unless such conflict is clear and unmistakable. We have said that a law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement. As a general rule, the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the facts at issue. When challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute must be one of the "entrapped innocent," who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. [Citations omitted.]

Statutes relating to the same subject should be read in a harmonious manner if possible. *L.H. v. State*, 333 Ark. 613, 973 S.W.2d 477 (1998). All legislative acts relating to the same subject are said to be *in pari materia* and must be construed together and made to stand if they are capable of being reconciled. *Id.* The basic rule of statutory construction is to give effect to the intent of the legislature, making use of common sense and giving the words their usual and ordinary meaning. *Id.* In attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be

served, the remedy provided, legislative history, and other appropriate matters that throw light on the subject. *Id.* Additionally, it is fundamental that a general statute does not apply and must yield when there is a specific statute addressing a particular subject matter. *Id.*

Appellant's argument is that § 5-64-403 is unconstitutionally vague because it authorizes different penalties for the same conduct: possession of drug paraphernalia with intent to manufacture methamphetamine. However, the legislature may authorize different maximum penalties for the same conduct if the law clearly defines the conduct prohibited. Further, the punishment authorized is not unconstitutional merely because a statute contains overlapping provisions authorizing different maximum penalties. *United States v. Batchelder*, 442 U.S. 114 (1979) (holding the statutory scheme of two federal laws was not void for vagueness and did not violate equal protection or due process even though the defendant's conduct violated both laws).

Here, the Arkansas General Assembly has expressly authorized the State to seek the *greatest* penalty, the Class B felony, under subdivision § 5-64-403(c)(5), where, as in the instant case, drug paraphernalia is possessed with the intent to manufacture methamphetamine *as opposed to any other controlled substance.* Arkansas Act 1268 of 1999, which enacted § 5-64-403(c)(5), contained a general repealer clause as well as an emergency clause. The emergency clause stated that the Act "was immediately necessary to *increase the penalties* for drug paraphernalia used to manufacture methamphetamine." (Emphasis added.) However, because subdivisions (c)(1)(A)(i) and (ii) and subdivision (c)(1)(B) do not "conflict" with subdivision (c)(5), we are not convinced those provisions were repealed. In any event, § 5-64-403 is not so vague and standardless that it allows for arbitrary and discriminatory enforcement; nor does the fact that the prosecutor exercised discretion in seeking the maximum penalty give rise to a constitutional infringement. *Simpson v. State*, 310 Ark. 493, 837 S.W.2d 475 (1992).

The Arkansas Supreme Court has twice upheld the constitutionality of § 5-64-403(c) against void-for-vagueness challenges, but on different grounds from those asserted by appellant here. *See Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992) (rejecting the defendant's void-for-vagueness claim where he asserted that he knew that the penalty for possession of a small quantity of marijuana was minor (a misdemeanor) but did not

know the penalty for possession of the pipe used to smoke the marijuana under § 5-64-403 was more serious (a felony)); *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988) (holding that the statute defining "drug paraphernalia" and § 5-64-403(c)(1) were not unconstitutionally vague for want of certainty and definiteness because they give a person of ordinary intelligence notice that his contemplated conduct is forbidden). Pursuant to these authorities, it cannot be said that § 5-64-403 does not provide a person of ordinary intelligence fair notice that it is illegal to possess drug paraphernalia with the intent to manufacture methamphetamine. To the contrary, § 5-64-403 penalizes possession of drug paraphernalia with the intent to manufacture methamphetamine in *three* ways.

Further, the terms "knowingly," "possess," "drug paraphernalia," and "manufacture," in turn, are specifically defined elsewhere in the Code. Ark. Code Ann. § 5-2-202(2) (Repl. 2006) (defining "knowingly"); Ark. Code Ann. § 5-1-102(15) (Repl. 2006) (defining "possess"); Ark. Code Ann. § 5-64-101(14)(A) (Repl. 2005) (defining "drug paraphernalia"); Ark. Code Ann. § 5-64-101(16)(A) (Repl. 2005) (defining "manufacture").

■ It is true that a person of ordinary intelligence might not know beforehand whether he would be charged under § 5-64-403 with a Class A misdemeanor, a Class B felony, or a Class C felony if he possessed drug paraphernalia with the intent to manufacture methamphetamine. However, the fact that a person might not know how severely he might be punished for possessing drug paraphernalia in violation of § 5-64-403 is not a sufficient reason for a court to declare the statute unconstitutional. *Crail, supra.*

The *Crail* defendant argued that the law prohibiting the possession of marijuana was unconstitutionally void because it penalized the possession of a small quantity of marijuana as a misdemeanor, but the law governing the possession and use of drug paraphernalia under § 5-64-403(c)(1) made possession of the pipe used to smoke marijuana a felony. Like appellant, the *Crail* defendant argued that the inconsistency regarding the seriousness of the penalties imposed made the statutes unconstitutionally vague. The *Crail* court rejected that argument and held that the statutes were not unconstitutionally vague. Likewise, here the different penalties imposed by § 5-64-403 for possessing drug paraphernalia with the intent to manufacture methamphetamine

do not make those subdivisions imposing the different penalties unconstitutionally vague because the statute clearly provides fair notice of the prohibited conduct.

For these reasons, we hold that the trial court did not err in determining that the subdivisions of § 5-64-403 relating to the possession of drug paraphernalia with the intent to manufacture methamphetamine are not unconstitutional.

III. Jury Instructions

The jury in this case received Arkansas Model Criminal Instruction 2d 6418.2, which governs the possession of drug paraphernalia with intent to manufacture methamphetamine. Appellant also assigns error in the trial court's refusal to additionally instruct the jury to allow it to consider convicting him of the lesser offense of a Class A misdemeanor or a Class C felony under § 5-64-403. We hold that the trial court did not err in denying appellant's request to provide additional jury instructions.

First, although appellant argued at length below regarding his reasons for requesting alternate jury instructions, he did not formally proffer any written instructions; none appear in the record or the abstract. We will not find error in a trial court's denial of a defendant's requested instruction where the text of the proposed instruction does not appear in the abstract or in the transcript. *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990).

Second, 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). Further, it is well-settled that in cases in which a defendant makes a claim of innocence, no rational basis exists to instruct the jury on a lesser-included offense because the jury need only determine whether the defendant is guilty of the crime charged. *Id.*

Appellant's defense, as articulated by his trial counsel during opening arguments, was that "he's innocent of these charges and he is not going to enter a plea . . . [h]e wants a trial because he's innocent." Counsel further stated that none of the items confiscated by police belonged to appellant. Thus, because appellant claimed innocence, there was no rational basis for issuing

instructions on any lesser-included offenses. *Atkinson, supra.* Accordingly, the trial court did not err in refusing to provide additional jury instructions.[2]

Affirmed.

GLADWIN and NEAL, JJ., agree.

James L. ROBERTS and Cynthia A. Roberts *v.*
Robert Dale BOYD; Kennie Mae Boyd
and Donald Winningham

CA 05-568 230 S.W.3d 301

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

[2] We note the State's alternate argument that the trial court did not err in refusing to provide lesser-included instructions because it determined that the enactment of § 5-64-403(c)(5), which imposes the Class B felony, repealed §§ 5-64-401(a)(1)(A) and (B) in methamphetamine-manufacture cases. However, because we affirm the trial court's denial of the lesser-included instructions for other reasons, we do not address the State's "repealer" argument.

Hodson, Woods & Snively, LLP, by: *Bryan Sexton*, for appellants.

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., by: *Curtis E. Hogue*, for appellees.

WENDELL L. GRIFFEN, Judge. James and Cynthia Roberts appeal from the denial of their request for a new trial after the trial court denied their request to quiet title in them to certain property owned by appellee Donald Winningham, whose predecessors-in-title were appellees Robert and Kennie Mae Boyd. The Robertses argue that the trial court erred in determining that they could not establish adverse possession because the land they claimed was not contiguous to their own property. We reverse and remand for further proceedings because the trial court misinterpreted the "contiguous" requirement under the adverse-possession statute.

The Boyds purchased their property in 1981. At that time, a barbed-wire fence ran between the Boyds' property and the property to the east, which was purchased by the Robertses in 1990 via a land commissioner's sale. It is undisputed that the parties treated the fence line as the property line and that the Robertses performed various acts of ownership of the disputed area, such as sporadic maintenance of the fence and continually using the property as a pasture for horses. While the presence of a ditch on the east side of the fence made it impossible for the Robertses to mow up to the fence line, they mowed and bushhogged the ditch area as close to the fence as they could. Finally, it is undisputed that the Robertses had color of title to their property and paid the requisite ad valorem taxes on their property.

The Boyds had a survey performed in 2002, referred to in the record as the "Jorgensen survey," which revealed that the true property line, according to the parties' deeds, ran from seventy-five to ninety-six feet on the Robertses' side of the barbed-wire fence. Pursuant to this survey, new boundary lines were marked and staked. During the summer of 2004, after seeing the markers,

Mr. Roberts contacted Mr. Boyd and was informed that the Boyds were claiming the property according to the new markers. Mr. Roberts was further informed of the Boyds' intention to sell the property to appellee Winningham.

The Robertses filed suit against both the Boyds and Winningham to quiet title to the disputed portion of the property. The Boyds subsequently issued Winningham a deed to the property (Winningham deed).[1] Winningham began removing the old fence and built a new fence based on the boundaries as determined by Doug Hemmingway, a surveyor who relied on the Jorgensen survey. The Robertses obtained an injunction to prevent further removal of the fence, pending the outcome of this case. Appellees counterclaimed, requesting that the court declare the boundary between the property established by the new barbed-wire fence constructed by Winningham pursuant to the Jorgensen survey.

The trial court granted appellees' request declaring Winningham to be the owner of the property, which is described as:

> A part of the Southeast Quarter (SE 1/4) and a part of the Southwest Quarter (SW1/4) of Section 3, Township 16 North, Range 31 West in Washington County, Arkansas and being more particularly described as follows: Beginning at the center of Section 3, thence N 88° 21'42" E, 328.75 feet; thence S 00°57'25" W, 2038.91 feet to the North right-of-way of Double Springs Road; thence along said right-of-way S 72°06'57" W, 196.64 feet; thence S 69°46'59" W, 30.15 feet; thence leaving said right-of-way, N 13°05'35" W, 381.89 feet; thence S 83° 57'47" W, 50.15 feet; thence N 00°04'29" E, 180.26 feet; thence S 85°53'37" W, 356.80 feet; N 00°55'41" E, 567.62 feet; thence N 82°47' 17" W, 255.98 feet; thence N 64°59'19" W, 173.49 feet; thence N 01°00'13" E, 882.86 feet; thence N 88°21'42" E, 800.23 feet to the Point of Beginning. Containing 38.17 acres more or less and subject to easements and rights-of-way of record.

In so doing, the court did not find that the Robertses failed to demonstrate sufficient acts of ownership to claim title to the land by adverse possession. Rather, based on Hemmingway's testimony, the court found that the Robertses' westernmost boundary was "at least 50 feet short of" the Boyds' easternmost

[1] We were unable to ascertain why the Boyds did not move to be dismissed from the case after the sale of the property.

boundary, and determined that the Robertses failed to prove that the property to which they claimed title by adverse possession was contiguous to their own property.

The trial court thereafter denied the motion for a new trial filed by the Robertses, pursuant to Arkansas Rule of Civil Procedure 59(a)(8). This rule allows a trial court to grant a new trial based on an error of law occurring at the trial that was objected to by the party making the application and which affected the substantial rights of the party. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995). The decision to grant or deny a new trial under Rule 59(a)(8) is within the discretion of the trial court, and that decision is not reversed absent a manifest abuse of discretion, that is, discretion exercised thoughtlessly and without due consideration. *Montgomery Ward & Co., Inc. v. Anderson*, 334 Ark. 561, 976 S.W.2d 382 (1998). We reverse and remand because the trial court erred in denying the Robertses' request for a new trial.

The Robertses claim title by adverse possession pursuant to Ark. Code Ann. § 18-11-106(a)(2) (Supp. 2005), which provides that the person claiming title to property by adverse possession must have had actual or constructive possession of the property being claimed and must have had color of title to the real property contiguous to the real property being claimed by adverse possession for at least seven years, and during that time must have paid ad valorem taxes on the contiguous real property to which the person has color of title. Additionally, the person claiming the property must demonstrate that his possession of the property met the common law elements of establishing adverse possession: possession of the land for at least seven years that was visible, continuous, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. Ark. Code Ann. § 18-11-106(c); *Dillard v. Pickler*, 68 Ark. App. 256, 6 S.W.3d 128 (1999).

The case upon which the trial court relied was *Patrick v. McSperritt*, 64 Ark. App. 310, 983 S.W.2d 455 (1998). In that case, the property claimed was across the street from the property owned by the parties claiming adverse possession. The *McSperritt* court determined that "contiguous" for purposes of the adverse-possession statute means in actual contact or touching. Thus, pursuant to *McSperrit*, the actual property claimed by adverse possession must be in contact with or must touch the property to which the adverse possessors own color of title and on which they have paid ad valorem taxes.

McSperritt does not compel affirmance here. The property gap in this case is a "manufactured" gap based on the property descriptions in the parties' deeds, as recognized by the Jorgensen survey. According to the Jorgensen survey, the Robertses' property never touches Winningham's property because it "misses" his property by a distance of six to fifty feet along Winningham's eastern border. Thus, the property described in the Robertses' deed is not contiguous to the property described in Winningham's deed, hence producing the "gap property."

However, unlike the street that disrupted the contiguous nature of the property in the *McSperritt* case, here there are no physical boundaries to disrupt the contiguous nature of the property that lies between Robertses' western border and Winningham's eastern border, which includes the gap property. Winningham's property is contiguous to the gap property on the west and the Robertses' property is contiguous to the gap property on the east. Because the Robertses clearly claim title to all of the property from their western border to Winningham's eastern border, including all of the gap property, there is no gap between the property owned by the Robertses and the land they claim by adverse possession (in other words, the property owned by the Robertses *is contiguous* to the property they claim by adverse possession).

Thus, the fact that the Robertses' property and Winningham's property as described in their respective deeds is not contiguous did not warrant a finding that the Robertses did not adversely possess all of the gap property that lies between their respective properties because § 18-11-106(a)(2) requires only that the real property owned by the party claiming adverse possession be *contiguous to the property claimed by adverse possession.* Here, as previously noted, it is clear that the Robertses' property *is* contiguous to the property that they claim by adverse possession.

Presumably because the trial court misinterpreted the "contiguous" requirement of the adverse-possession statute, it dismissed with prejudice the Robertses' claim against Winningham without making any findings regarding the sufficiency of the Robertses' acts of ownership over any property owned by Winningham that is contiguous to the Robertses' property. It may be that Winningham is the true owner of some or all of the gap property and possesses an incorrect deed. It may be that the Robertses are the true owners of some or all of the gap property

and possess an incorrect deed. It may be that an inaccurate survey created the gap. However, there is no evidence or even a suggestion in the record that a third parcel is involved or that a third party is involved. What is clear is that we have no findings regarding the sufficiency of the Robertses' acts of ownership regarding any property that is contiguous to their property that is owned by Winningham.

Only if the trial court determines that neither Winningham nor the Robertses can be the true owner of any gap property that is contiguous to the Robertses' property, can it then determine that the contiguous requirement of § 18-11-106(a)(2) defeats the Robertses' claim. Thus, it is necessary to reverse and remand for the trial court to make such additional determinations as are necessary.

Reversed and remanded.

BIRD, CRABTREE, BAKER, and ROAF, JJ., agree.

ROBBINS, J., dissents.

JOHN B. ROBBINS, Judge, dissenting. I would affirm the trial court's decision because it did not err in finding that the contiguous requirement of Ark. Code Ann. § 18-11-106(a)(2) (Supp. 2005) defeated the appellants' adverse possession claim. I cannot agree with the majority's conclusion that the Robertses' property is contiguous to the property that they claimed by adverse possession. From the Robertses' complaint, it is evident that they were claiming adverse possession to Mr. Winningham's property as identified by the Jorgenson survey and, as the majority points out, this survey showed that the properties described in the parties' deeds are not contiguous. It is not apparent that the Robertses were claiming ownership of the gap property, but even if they were, they were pursuing something that the trial court lacked the authority to do, given that the record title holder was unknown and notice of the quiet-title action had not been published pursuant to Ark. Code Ann. § 18-60-503 (Repl. 2003). *See Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000).

Moreover, I disagree with the majority's decision to remand for additional findings regarding ownership of the gap property. The appellants were required to establish that their property was contiguous to Mr. Winningham's, and the trial court concluded that this was not proved. There was no evidence whatsoever that Mr. Winningham or the Robertses held record title to the gap

property, and I see no reason for the trial court to reconsider a finding that it has already made on the evidence presented.

For these reasons, I respectfully dissent.

Jerome Mark SHIPP *v.* Toni P. SHIPP

CA 05-469 230 S.W.3d 305

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

The Mathis Law Firm, by: *Winston C. Mathis*, for appellant.

Walthall Law Firm, P.A., by: *G. Christopher Walthall*, for appellee.

OLLY NEAL, Judge. Appellant Jerome Mark Shipp appeals from an order of the Clark County Circuit Court that found he was in arrears on his child-support obligation. On appeal, appellant asserts that the trial court committed reversible error by modifying his child-support obligation retroactively to the date of the last child-support order rather than to the date of the petition to modify child support. In the alternative, appellant alleges that "there was insufficient evidence to support the retroactive modification of his child support." We find merit to his arguments and reverse and remand.

On August 14, 2002, the parties were divorced. At the time of their divorce, the parties had two minor children, Olen Marcus Shipp born August 10, 1987, and Robert Charles Shipp born August 11, 1992. Appellee Toni Shipp received custody of the children, and appellant agreed to pay child support. Thereafter, appellant became unemployed, and a hearing on appellant's future child-support obligations was held on February 10, 2003. At the hearing, the following colloquy occurred between appellant and the trial court:

> TRIAL COURT: Well, I'm going to order that you pay $35 a week until such time as you become re-employed and your income change. [sic]
>
> APPELLANT: All right, sir. At that time, what do I need to do? Do we have to come up here again?
>
> TRIAL COURT: Well, you need to notify the clerk of your employment, and then we'll set it on the chart. And if

> you all can't agree to what your take home pay is on the chart, then I'll have it and I'll decide, based upon the proof.

However this requirement was not included in the order. The trial court's February 10 order only provided that, due to appellant's unemployment, his child-support obligation was being set at $35 per week.

Two days after the February 10 hearing, appellant obtained new employment. He informed the clerk of his employment and, instead of filing a motion to increase his child-support obligation, appellant adjusted his support payment himself. Appellant paid child support up until he lost his job in September 2003. At that time, appellant informed the clerk that his only income was the $200 per week that he earned as a self-employed minister. Appellant did not file a motion to reduce his child-support obligation; instead, he again made the adjustment himself.

In December 2003, Olen moved in with appellant. On April 12, 2004, appellant filed a petition for change of custody and asked the trial court to reassess his child-support obligation. In response, appellee filed a counterpetition alleging that appellant had failed to pay his child-support obligation and should therefore be held in contempt.

A hearing on the matter was held October 12, 2004. At the hearing, appellee asked the trial court to modify appellant's child-support obligation retroactively to the February 10 order because he was told from the bench to report when he obtained employment and any changes in his income. Appellant argued that, since the February 10 order set his child-support obligation at a sum certain and failed to include any provisions for future modification, his child-support obligation could only be modified from the date of the last motion filed.

The trial court granted appellant custody of the parties' oldest son. As to the parties' child-support obligations, the trial court found that:

> Based upon the [appellant's] current earnings of $494.32 per week he should be obligated to pay child support on one child in the amount of $94.00 per week. Based upon the [appellee's] average weekly wage of $249.00 per week she will be responsible to pay the sum of $56.00 per week as support for one child. The difference

> between the two parties obligations of support is $38.00 per week and the [appellant] is ordered and directed to pay the sum of $38.00 per week through the Registry of this Court along with the Clerk's annual fee for handling such.

The trial court further found that, based upon its February 10 ruling from the bench that ordered appellant to report when he obtained new employment and any changes to his income so that his child-support obligation could be set according to the child-support chart, appellant had an arrearage of $7,100.31. The trial court ordered appellant to pay an additional sum of $18.80 per week toward his arrearage.

Appellant filed a motion for a new trial alleging that the trial court erred when it used its February 10 declarations from the bench to find that he had an arrearage and that, absent a motion to modify child support, he was only obligated to pay $35 per week. The trial court failed to rule on appellant's motion and, pursuant to Rule 59(b) of the Arkansas Rules of Civil Procedure,[1] after thirty days the motion was deemed denied. Appellant now brings this appeal.

We review child-support awards de novo on the record. *McKinney v. McKinney*, 94 Ark. App. 100, 226 S.W.3d 37 (2006); *Paschal v. Paschal*, 82 Ark. App. 455, 117 S.W.3d 650 (2003). In de novo review cases, we will not reverse a finding of fact by the trial judge unless it is clearly erroneous. *McKinney*, *supra*; *Paschal*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *McKinney*, *supra*; *Paschal*, *supra*. Further, we give due deference to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *McKinney*, *supra*; *Paschal*, *supra*.

Appellant first argues that the trial court committed reversible error when it retroactively modified his support obligation back to the date of the last support order instead of the date of his petition for change of custody. Arkansas Code Annotated sections 9-14-234(b) and (c) (Repl. 2002) provide:

---

[1] Rule 59(b) provides in pertinent part that "[i]f the court neither grants nor denies the motion [for new trial] within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day."

> (b) Any decree, judgment, or order which contains a provision for the payment of money for the support and care of any child or children through the registry of the court or the Arkansas child support clearinghouse shall be final judgment subject to writ of garnishment or execution as to any installment or payment of money which has accrued *until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order.*
>
> (c) *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.* However, the court may offset against future support to be paid those amounts accruing during time periods other than reasonable visitation in which the noncustodial parent had physical custody of the child with the knowledge and consent of the custodial parent.

(Emphasis added.)

According to section 9-14-234, child-support orders from a court of competent jurisdiction remain in force until modified by a subsequent decree, or in limited situations by operation of law. *See Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002); *Yell v. Yell*, 56 Ark. App. 176, 939 S.W.2d 860 (1997). Absent a specific finding of fraud in procuring an existing support decree, however, it is an abuse of discretion to impose retroactive modification of a support order beyond the filing date of a petition to modify. *Yell, supra.* An exception to this rule is where a child-support order fails to recite the amount of support; an order that fails to state a sum certain is capable of modification. *See Paschal, supra.*

Moreover, it is well settled that a trial court has the authority to clarify its orders. *See Paschal, supra*; *McGibbony v. McGibbony*, 12 Ark. App. 141, 671 S.W.2d 212 (1984). Appellee suggests that the trial court was merely clarifying its February 10 order. We disagree. A trial court's ability to clarify its orders is governed by Rule 60 of the Arkansas Rules of Civil Procedure. Rule 60 provides in pertinent part:

> (a) Ninety-Day Limitation. To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.

> (b) Exception; Clerical Errors. Notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Here, by applying its February 10 directives from the bench to find an arrearage, the trial court added something to the February 10 order. A trial court is not permitted to change an order to provide something that in retrospect should have been done but was not done. *McGibbony*, *supra*. The trial court was also acting without prior notice to the party. We, therefore, find appellee's argument unavailing.

The trial court's February 10 order provides that appellant is to pay $35 per week in child support. This amount is a sum certain. Thus, any changes to appellant's support obligation must be preceded by a motion to modify his child-support obligation, which brings us to the question of whether there was a motion to modify before the trial court.

Appellant did not specifically file a petition for modification; instead, in his April 12 petition for change of custody, appellant asked the trial court to reassess his child-support obligation. In *Martin v. Martin*, 79 Ark. App. 309, 87 S.W.3d 817 (2002), we held that section 9-14-234 requires a "proper motion" as a prerequisite to modification of support. Under the basic rules of statutory construction, we give effect to the intent of the legislature. *See Gonzales v. City of DeWitt*, 357 Ark. 10, 159 S.W.3d 298 (2004). We construe the statute just as it reads, giving the words their ordinary and usually accepted meaning. *Id.* The statute must be construed so that no word is left void or superfluous and in such a way that meaning and effect are given to every word therein, if possible. *See Monday v. Canal Ins. Co.*, 348 Ark. 435, 73 S.W.3d 594 (2002). If the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no reason to resort to rules of statutory interpretation. *See id.* If, however, the meaning of a statute is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *See id.*

Statutes relating to the same subject are said to be in pari materia and should be read in a harmonious manner, if possible. *See id.*

Technically, appellant's petition for change of custody is not a "proper motion." However, it is inconceivable that the trial court would change custody without making some modification to the support obligation. Therefore, we construe appellant's petition for change of custody as containing a "proper motion" for modification. When the trial court retroactively modified appellant's support obligation back to the February 10 order, the trial court abused its discretion and, accordingly, we reverse and remand this issue.

In his alternative point on appeal, appellant alleges that "there was insufficient evidence to support the retroactive modification of his child support." Because we are reversing and remanding appellant's first point on appeal, we do not need to address the merits of his alternative argument. However, if we were to address the merits , we would also reverse and remand this issue. The trial court could only calculate any resulting arrearage from the date that appellant filed his motion for change of custody, and based on the evidence that the trial court had before it, there could be no arrearage.

Accordingly, we reverse and remand to the trial court for an order consistent with this opinion.

Reversed and remanded.

GLADWIN and GRIFFEN, JJ., agree.

Shirley BAILEY *v.* Emile MAXWELL
and Christine Maxwell

CA 05-700 230 S.W.3d 282

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

Hubert W. Alexander, for appellant.

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

TERRY CRABTREE, Judge. Appellant Shirley Bailey appeals the trial court's decision denying her petition for guardianship but granting the guardianship petition of appellees Christine and Emile "Pete" Maxwell. For reversal of that decision, appellant argues that the trial court erred in finding that she was neither qualified nor suitable to serve as a guardian and in ruling that it was thus not necessary to consider the best interests of the child. We affirm.

Though they never married, Melinda Maxwell and Mark Bailey were the parents of two children, a son D.B. and a daughter B.J.B. Melinda was killed in an automobile accident in August 1999 when D.B. was five years old and B.J.B. was nine months old. At the time of Melinda's death, D.B. had been living with the appellees, while B.J.B. had resided with Melinda and Mark. In January 2000, Mark and B.J.B. moved into the home of appellant and Bill Bailey, Mark's parents.

Litigation ensued between Mark and appellees over the custody of the children. By an order entered in January 2001, Mark was granted custody of B.J.B., while appellees were awarded custody of D.B. No appeal was taken from that order.

Tragedy struck again in January 2004 when Mark died in an automobile accident. After Mark's death, appellant and Bill Bailey promptly filed a petition for guardianship over B.J.B., and an order of guardianship was entered without a hearing. Appellees objected to the order of guardianship on several procedural grounds, and they filed a counterpetition seeking guardianship of both children, as well as a petition for a change of custody of B.J.B. All issues were joined in a hearing held on November 17, 2004.

There is no need to set out in detail the testimony presented at the hearing. Suffice to say, despite the loss of their parents, the children are fortunate to have two sets of grandparents who care a great deal about them. The record shows that D.B. had always lived with the appellees, that B.J.B. had lived with appellant and Bill Bailey most of her young life, and that appellant was the only mother B.J.B. had ever known. The testimony revealed that both children were happy and well cared for in their respective homes. Appellant explained that guardianship over D.B. had not been sought because she did not feel that it was right to take him from the appellees and the only home he had ever known. Appellees felt just as strongly that it was desirable for the siblings to grow up together under one roof.

At the request of their ad litem, the children testified at the hearing. B.J.B., then age five, said that she loved the appellees and her brother but that she wished to stay with appellant and Bill Bailey, her "nanny" and "poppy." D.B., who was ten years old, also wanted to remain in his home with the appellees, his "grandma" and "grandpa," and he wanted his sister to come live with them.

The testimony also revealed that there was longstanding friction between the families. Appellees testified that they had little difficulty with appellant, but they placed blame on Bill Bailey as being the source of the tension. It was said that Bill Bailey spoke unkindly about them and their family in the presence of D.B. and that he was abrupt and rude to them on the telephone.

There was further testimony that appellees' forty-one-year-old daughter, Shirley, lived with them and that she was currently facing methamphetamine-related drug charges. There was also testimony that Shirley had been severely burned in an accident and that her stay with appellees was only temporary.

The testimony that the trial court deemed pivotal to its decision came from appellant. In her direct testimony, she stated that she and Bill Bailey were married and that they had been married for fifty years. On cross-examination, it was exposed that she and Bill Bailey had been divorced since 1980. Appellant said that they had continued to live together despite the divorce, that it was "like it never happened," and that "we don't ever think about it." As a result of this revelation, Bill Bailey withdrew his request for guardianship, leaving appellant as the sole petitioner for guardianship of B.J.B.[1]

The trial court issued its decision in a lengthy order entered on January 25, 2005. The trial court found that appellant had failed to establish that she was qualified to serve as guardian because she had presented no testimony that she was not a convicted and unpardoned felon. The trial court further found that appellant was not suitable to be the child's guardian because she had twice committed perjury, once in her verified petition for guardianship wherein she stated that she and Bill Bailey were husband and wife, and then again in her testimony before the court when she stated

[1] Arkansas Code Annotated section 28-65-214(b) (Repl. 2004) provides that more than one person cannot be appointed as guardian of the person unless they are husband and wife.

that she was married to Bill Bailey. In finding that appellant's misrepresentation rendered her unsuitable, the trial court reasoned that "[i]t is imperative to the judicial system and the administration of justice that courts require witnesses to testify truthfully and to hold accountable those witnesses who do not." The trial court did acknowledge that the primary consideration was the child's best interest, but it ruled that "best interest does not override procedure, nor does it obviate statutory requirements." The court thus granted the appellees' petition for guardianship finding that they had presented satisfactory evidence that they were both qualified and suitable to serve. Appellant was granted visitation with both children on alternate weekends, half the summer break from school, half the Christmas break from school, and spring break during odd-numbered years.

Appellant argues that the trial court erred in finding that she was not qualified or suitable to be the child's guardian. We review such proceedings do novo, but we will not reverse the decision of the trial court unless it is clearly erroneous. *Moore v. Sipes,* 85 Ark. App. 15, 146 S.W.3d 903 (2004). When reviewing the proceedings, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Id.*

Pursuant to Ark. Code Ann. § 28-65-210 (Repl. 2004), three things must be proved before a guardian may be appointed: (1) the person for whom the guardianship is sought is a minor or otherwise incapacitated; (2) a guardianship is desirable to protect the needs of that person; and (3) the person to be appointed guardian is qualified and suitable to act as such. *Blunt v. Cartwright,* 342 Ark. 662, 30 S.W.3d 737 (2000). Arkansas Code Annotated section 28-65-203(a) (Repl. 2004) sets out the qualifications the petitioner must possess in order to be a guardian, providing that "a natural person who is a resident of this state, eighteen years or older, of sound mind, not a convicted and unpardoned felon is qualified to be appointed as guardian of the person and estate of an incapacitated person." This statute further provides that "no person whom the court finds to be unsuitable to perform the duties incident to the appointment shall be appointed guardian of the person or estate of an incapacitated person." Ark. Code Ann. § 28-65-203(f).

The probate code contains no definition of "unsuitable"; however, the supreme court has adopted the following definition:

> The statutory word "unsuitable" gives wide discretion to a probate judge. . . . Such a finding may also be based upon the existence of

> an interest in conflict with his duty, or a mental attitude toward his duty or toward some person interested in the estate that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently, promptly, fairly, and dispassionately in his trust.

In re Guardianship of Vesa, 319 Ark. 574, 581, 892 S.W.2d 491, 495 (1995); *see also Robinson v. Winston,* 64 Ark. App. 170, 984 S.W.2d 38 (1998); *Guess v. Going,* 62 Ark. App. 19, 966 S.W.2d 930 (1998). Our courts have also equated suitability with fitness. *See Blunt v. Cartwright, supra; Marsh v. Hoff,* 15 Ark. App. 272, 692 S.W.2d 270 (1985).

The trial court found in the instant case that appellant had not shown that she was qualified to serve as guardian because she offered no testimony stating that she was not a convicted and unpardoned felon. By statute, our law provides that a person must be qualified to serve as a guardian, and one of the qualifications is that a person may not be a convicted and unpardoned felon. Ark. Code Ann. §§ 28-65-210(3) & 28-65-203(a). The record in this case is barren of evidence that appellant meets this qualification. Therefore, we are unable to say that the trial court's finding is clearly erroneous. Also, our statutory law requires a person to be suitable in order to be appointed as a guardian. Ark. Code Ann. §§ 28-65-210(3) & 28-65-203(f). Appellant was not truthful when she represented to the court that she and Bill Bailey were still husband and wife. That she perjured herself on such a fundamental matter was sufficient reason for the trial court to doubt whether appellant would act honorably in discharging her trust. We simply cannot say that the trial court's finding is clearly erroneous.

As her final point, appellant contends that the trial court erred by not considering the best interest of the child. We cannot agree. Appellant failed to establish that she was either qualified or suitable to act as the child's guardian. As a consequence, appellant could not become the child's guardian; thus it was not necessary for the court to decide whether it was in the child's best interest for appellant to be appointed as guardian.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Kendra Katrise DeSHAZER *v.* STATE of Arkansas

CA CR 05-903 230 S.W.3d 285

Court of Appeals of Arkansas
Opinion delivered March 1, 2006

Stacy D. Fletcher, for appellant.

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

KAREN R. BAKER, Judge. After a bench trial, the Pulaski County Circuit Court convicted appellant Kendra Katrise DeShazer of class-B-felony theft of property and seven counts of second-degree forgery and sentenced her to thirty years in the Arkansas Department of Correction. Appellant appeals her convictions challenging the sufficiency of the evidence.[1] We find no merit to her argument and affirm.

Testimony at trial established that on October 30, 2003, appellant entered a USA Check Casher's store and presented a cashier's check from Arvest Bank in the amount of $9,900. The check purportedly was remitted by an Anne Jablorski and made payable to appellant.

[1] By agreement of the parties, the trial court simultaneously considered a petition to revoke appellant's probation in case number CR-2002-2641. That petition was granted, and appellant received a concurrent, twenty-year sentence. Appellant's argument on appeal challenges her convictions, not the revocation of her probation; however, her addendum contained the judgment entered following the revocation rather than the judgment from which the appeal was taken. The State supplied the judgment for the appealed convictions in its supplemental addendum.

Tiffany Young was the employee of USA Check Casher who conducted the transaction upon which the charges against appellant were based. She testified, that when appellant presented the check that she informed appellant that the store did not have enough cash on hand to cash it. She explained that in response to that information, appellant requested that Young issue her six money orders (five in the amount of $1,000 each and one in the amount of $575) and the remainder in cash. Young telephoned Arvest Bank to verify the check and received verification from the bank. Young conversed with appellant during the transaction, discussing appellant's proposed use of the money orders to pay for cosmetic surgery. Young also testified that nothing seemed out of the ordinary at all during the transaction and that appellant provided all of the information requested of her. Young became aware of problems with the cashier's check when she was contacted by a police detective and shown a photo array. At that time, she identified appellant's photo as the person who came into the store, presented the cashier's check, and received the cash and money orders for it.

Toni Sandall, who works in the risk-and-operations department at Arvest Bank, examined the check, which had been admitted as State's Exhibit 1, and testified that it was not issued by an Arvest Bank. She explained the details that supported her conclusion, including the fact that the printed dollar amount on the check reading "pay exactly $9900.00 dol cts," was in a different typeface than that used by machines that Arvest uses for cashier's checks. Sandall also explained that she was familiar with Amanda Carter, whose signature purportedly appeared on the cashier's check and that the signature was not Carter's. Moreover, Sandall described the bank's procedure for issuing a cashier's check, specifically that when a cashier's check is made, there must be a corresponding remitter to someone's account, but she found no such remitter in her examination of the bank's records. She further testified that the check had disappeared from the Breckenridge branch located on Rodney Parham Road in Little Rock, but Carter did not work at that branch. She also confirmed that appellant was not an employee of the bank.

Amanda Carter similarly reviewed the check and testified that the signature reading "Amanda Carter" was not hers. She verified that she did not issue that check, nor did she work at the Breckenridge branch. She also described the discrepancies between the typeface on the check and the typeface used by the bank

when a check is issued through them. She confirmed that only employees of the bank should have access to the cashier's checks, that the cashier's check had all of the information required for a check of that type, and that an average individual would think it looked like a normal check.

Mike Rushin, appellant's landlord, testified that appellant used the $575 money order to pay him rent. Detective Christian Sterka of the Little Rock Police Department testified that in addition to the money order given to Rushin for rent, four of the other $1000 money orders were signed by Kendra DeShazer made payable to a "Gene Sloan, aesthetic plastic surgeon."

A person commits the crime of second-degree forgery if, with purpose to defraud, he alters any written instrument that was purported to be or calculated to represent if completed the act of a person who did not authorize that act and that instrument is a "contract, assignment, . . . commercial instrument, . . . or other written instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status." Ark. Code Ann. § 5-37-201(a), (c)(1) (Repl.1997). Further, "[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).

The purpose of the statute against forgery is to protect society against the fabrication, falsification, and the uttering of instruments which might be acted upon as being genuine. *Mayes v. State*, 264 Ark. 283, 294, 571 S.W.2d 420, 427 (1978). The law should protect, in this respect, the members of the community who may be ignorant or gullible as well as those who are cautious and aware of the legal requirements of a genuine instrument. *Id.* An instrument is not the subject matter of forgery only where it is so defective on its face that, as a matter of law, it is not capable of defrauding anyone. *Id.*

Our theft-of-property statute provides in part that a person commits the crime of theft of property if he "[k]nowingly obtains the property of another person, by deception . . ., with the purpose of depriving the owner thereof." Ark. Code Ann. § 5-36-103(a)(2) (Supp.2003). And "[a] person acts knowingly with respect to his conduct . . . when he is aware that his conduct is of that nature. . . ." Ark. Code Ann. § 5-2-202(2) (Repl.1997).

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State,

considering only the evidence that supports the verdict, and we affirm if substantial evidence exists to support it. *Watson v. State,* 358 Ark. 212, 188 S.W.3d 921 (2004). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Further, a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime, and because intent cannot be proven by direct evidence, the fact finder is allowed to draw upon common knowledge and experience to infer it from the circumstances. *Id.* Because of the difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

Appellant claims on appeal, as she did in her timely motion to dismiss at trial, that there was no evidence that her actions were unauthorized. She emphasizes that the witnesses testified that the average person would not know from looking at the cashier's check that the check was not issued by Arvest Bank. Appellant urges us to accept that testimony establishing the check as a forgery focused on details that were uniquely known to the bank, such as the lack of offsetting credits in the bank's accounting and the typeface of the bank's printer. She also emphasizes the fact that she was never an employee of the bank which negated an inference that she had access to a blank cashier's check or could have recognized the check as a forgery. She concludes that because there was no evidence that she took the check from the bank, and that the only way to tell the check was invalid was to have knowledge that was not available to the average person, that there was insufficient proof to support a finding of intent on either crime. Appellant argues that nothing connected her to the check except her possession of it.

The only way that we could find merit to appellant's argument is to find that the circumstances of the crime could not support an inference that appellant knew the cashier's check was a forgery.[2] Our supreme court's precedents prohibit our reaching that conclusion. The drawing of reasonable inferences from the testimony is for the trial judge as fact-finder, not this court. *Core v.*

---

[2] Appellant does not argue that the State impermissibly divided the forgery charges into each money order and cash disbursement, even though the forgery was complete when she presented the single cashier's check.

State, 265 Ark. 409, 578 S.W.2d 581 (1979). Possession of a forged instrument by one who offers it, without any reasonable explanation of the manner in which she acquired it, warrants an inference that the possessor committed the forgery or was an accessory to its commission. *McGirt v. State,* 289 Ark. 7, 708 S.W.2d 620 (1986) (holding that "the crime of forgery was complete upon his being in possession of the forged instrument, or upon his attempt to pass the check, or upon his passing of the check"); *Mayes, supra* (holding that "possession of a forged instrument by one who offers or seeks to utter it without any reasonable explanation of the manner in which he acquired it warrants an inference that the possessor committed the forgery or was a guilty accessory to its commission); *see also Faulkner v. State,* 16 Ark. App. 128, 697 S.W.2d 537 (1985).

Appellant testified during the revocation portion of the trial for the limited purpose of addressing specific issues related to the revocation proceeding. She did not testify during the portion of the trial addressing the forgery and theft-of-property charges, nor offer a reasonable explanation of the manner in which she acquired the forged check through other evidence. The State relies solely upon the permissible inference of her guilt. Because the lack of any reasonable explanation of the manner in which appellant acquired the forged check warrants an inference that the possessor committed the forgery or was an accessory to its commission, we cannot say the trial court erred in inferring appellant's intent.

Accordingly, we affirm.

PITTMAN, C.J., and ROBBINS, J., agree.

Eugene NEWTON *v.* Catherine D. TIDD

CA 05-982 231 S.W.3d 84

Court of Appeals of Arkansas
Opinion delivered March 8, 2006

Joseph Churchwell, for appellant.

JOHN MAUZY PITTMAN, Chief Judge. Appellee, Catherine D. Tidd, petitioned the Circuit Court of Polk County, Arkansas, for an order of protection on behalf of her mother, Jessie L. Tidd, alleging that appellant committed acts of domestic abuse against Jessie L. Tidd. An ex parte order of protection was entered. After a hearing, the trial court found that there was sufficient evidence to establish the existence of domestic abuse and entered an order of protection. Appellant argues that the evidence is insufficient to establish that he committed domestic abuse. We agree, and we reverse.

The standard of review on appeal from a bench trial is whether the judge's findings are clearly erroneous or clearly against the preponderance of the evidence. *Farmers Home Mutual Fire v. Bank of Pocahontas*, 355 Ark. 19, 129 S.W.3d 832 (2003). Disputed facts and determinations of the credibility of witnesses are within the province of the fact finder. *Id.* As pertinent to the facts of this case, "domestic abuse" is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family, household members, or persons who have been in a dating relationship with one another. Ark. Code Ann. § 9-15-103(2)(a) and (3) (Supp. 2005).

The evidence admitted at trial showed that appellant is a gentleman approximately seventy years of age who had for many years been a neighbor of Jessie L. Tidd, a seventy-four-year-old widow. Appellant had been a friend of Mrs. Tidd's deceased husband. Both of the men, having experienced several heart attacks and strokes, agreed to watch over and take care of each other's families in the event of their death. Mr. Tidd did not survive his fourth heart attack. Appellant, who survived his fifth and sixth heart attacks, did what he could to help Mrs. Tidd after her husband's death by performing chores such as mowing her lawn and helping with her financial affairs. Mrs. Tidd, who had been ill and depressed, misconstrued appellant's intentions and fell in love with him, as evidenced by several letters. On one occasion, she became suspicious that appellant was seeing another woman and forced her way into his home. After that event, appellant no longer permitted Mrs. Tidd into his home, and he did not visit her home other than to bring food to the door. Appellant did, however, continue to talk to Mrs. Tidd on the telephone and to socialize with her at dances held by the Elks' club.

Appellee Catherine Tidd, Mrs. Tidd's daughter, had for several years objected to her mother's association with appellant. Appellant testified that Catherine Tidd had cursed and threatened him on several occasions. In August 2003, Mrs. Tidd's attorney sent Catherine Tidd a letter stating that, if she continued to harass Mrs. Tidd and appellant, Mrs. Tidd intended to alter her estate plan to give Denise Thomas that share of Mrs. Tidd's property that Catherine Tidd would otherwise have received. In May 2005, Catherine Tidd obtained a guardianship over her mother, placed her in a nursing home, and filed the petition alleging domestic abuse that was the basis for the protective order that is the subject of this appeal.

■ However, with the exception of hearsay, the objection to the introduction of which was sustained by the trial court, there was no evidence that appellant committed domestic abuse. At most, all that can be said is that Mrs. Tidd had some bruising that was not inconsistent with fingerprints, and that appellant escorted Mrs. Tidd by the arm on occasion. Catherine Tidd herself stated at the hearing that she had not seen appellant do anything to her mother other than being "verbally controlling." This does not constitute "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault," as required by Ark. Code Ann. § 9-15-103(2)(a) (Supp. 2005), and

we hold that the trial court clearly erred in finding that appellant had committed domestic abuse.

Appellant stated that, in light of these proceedings, he had no further desire to maintain contact with Mrs. Tidd and was seeking only to clear his name. It appears from his remarks from the bench after the hearing that the trial judge himself recognized that the evidence was insufficient, and he entered the order simply to do what was best for Mrs. Tidd given her attraction to and strong feelings for appellant. While we laud the trial judge's desire to protect Mrs. Tidd, we disagree with his statement that appellant should not be concerned because the proceedings were not criminal and would not go on appellant's otherwise sterling record: criminal or not, there is and should be a degree of opprobrium attached to a finding that a person has committed acts of domestic abuse. We are confident that any orders necessary to protect Mrs. Tidd from harm stemming from her irrational behavior can be entered in the context of the guardianship proceeding.

Reversed and remanded for further proceedings consistent with this opinion.

ROBBINS and BAKER, JJ., agree.

Ronny DEAVER, Administrator of the Estate of Faye Deaver *v.* FAUCON PROPERTIES, INC. d/b/a St. Andrews Place; St. Andrews Place, Inc. d/b/a St. Andrews Place; and William Mainord

CA 05-1019 231 S.W.3d 100

Court of Appeals of Arkansas
Opinion delivered March 8, 2006

[Rehearing denied April 19, 2006.*]

* CRABTREE, J., would grant rehearing. GLOVER, J., not participating.

David A. Couch, PLLC, by: *David A. Couch*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Stuart P. Miller* and *Jeffrey W. Hatfield*; and *Barber, McCaskill, Jones & Hale, P.A.*, by: *G. Spence Fricke*, for appellees.

JOSEPHINE LINKER HART, Judge. Ronny Deaver, as administrator for the Estate of Faye Deaver, appeals from an order of the Faulkner County Circuit Court striking and dismissing with prejudice a complaint for failure to properly revive the action after the death of Faye Deaver. On appeal, Deaver argues that the circuit court erred in dismissing his case because: 1) the lawsuit was properly revived by the entry of an order substituting him as a party for his mother, who died during the pendency of the action; 2) his filing of an amended complaint that raised a new cause of action either revived his lawsuit or created a new claim; and 3) the appellees waived the right to challenge the revivor because twenty-two months elapsed since he filed the "suggestion of death" and motion for substitution of parties in accordance with Rule 25 of the Arkansas Rules of Civil Procedure. We agree with Deaver's first point and reverse and remand without reaching his second and third points.

On November 1, 2002, Faye Deaver and her son, Ronny Deaver, filed a lawsuit against the appellees, the administrator and various business entities that owned the nursing home where Faye had resided since March 24, 2000. The complaint alleged breach of contract, negligence, and "*res ipsa loquitur*" as theories for recovering damages. On May 3, 2003, Faye died. On October 28, 2003, Ronny filed a pleading styled: "PLAINTIFFS' SUGGESTION OF DEATH UPON THE RECORD, MOTION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR, AND REQUEST FOR ORDER OF SUBSTITUTING PARTIES." The

pleading cited and apparently relied on the requirements of Rule 25 of the Arkansas Rules of Civil Procedure, but made no mention of Arkansas's revivor statutes, § 16-62-101 *et seq.* (Repl. 2005). On November 5, 2003, the circuit court entered an order that stated:

> Pursuant to Ark. R. Civ. P. 25, the Court should, and hereby does, appoint Ronny Deaver as the Special Administrator for his mother, Faye Deaver, with the power to prosecute this case on behalf of the Estate of Faye Deaver and its beneficiaries, and orders a substitution of the Special Administrator as the proper party to pursue this case on behalf of the Estate of Faye Deaver and its beneficiaries.

On March 7, 2005, Ronny, this time acting both individually and as administrator of his mother's estate, filed an amended complaint. The new complaint reasserted the breach of contract and negligence claims, deleted all references to "*res ipsa loquitur,*" and asserted a claim under the Arkansas Long Term Care Facility Residents' Rights Statute. The appellees moved to strike on March 16, 2005, asserting that Ronny had never petitioned for nor received an order of revival as required by Arkansas Code Annotated section 16-62-108, and that because more than one year had passed, the complaint must be dismissed with prejudice. The trial court granted the motion and dismissed with prejudice.

On appeal, Deaver argues that the circuit court erred in dismissing his lawsuit because it was properly revived through the entry of an order substituting him as a party. He concedes that his petition and the order that he caused to be entered did not use the term "revive," but he contends that it was "implicit in the Court's order" that the litigation "could and should" continue, and to hold otherwise "would be to put form over substance." We agree.

This case requires us to construe the requirements of the Arkansas revivor statute. Our review of issues of statutory construction is de novo. *Simmons First Bank v. Bob Callahan Servs., Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000). In this respect, we are not bound by the trial court's decision. *Id.*

[redacted] We agree with Deaver that the lawsuit was properly revived through the entry of an order substituting him as a party despite the fact that his petition and the order that he submitted to the trial court did not strictly comply with the requirements of the revivor statute. It is obvious that Deaver relied entirely upon the requirements of Rule 25 of the Arkansas Rules of Civil Procedure to address the effect of his mother's death on the lawsuit against the

appellees. Commentators have noted that "[t]here is a close relationship between the subject of revivor of actions and substitution of parties." David Newbern and John Watkins, *Arkansas Civil Practice and Procedure* § 5-12 (3d ed. 2002). However, they have also stated that "revivor is technically a different phenomenon from substitution," and that "the statute contemplates an order of revivor of the action in the name of the personal representative or successor to the decedent." *Id.* Therefore, the question is whether the November 5, 2003, order fulfilled the requirements of our revivor statute. We believe that it does.

At common law, actions abated upon the death of either party. *See generally Miller v. Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905). The purpose of our revivor statute is to remediate the harshness of this doctrine. *Id.* In more than a century and a half of dealing with revivor actions, our supreme court has allowed substantial compliance as the standard in determining whether the requirements of the revivor statutes were met. *See Keffer v. Stuart*, 127 Ark. 498, 193 S.W.83 (1917); *Vandiever v. Conditt*, 110 Ark. 311, 162 S.W. 47 (1913); *Noland v. Leech*, 10 Ark. 504, 5 Eng. 504 (1850). Here, the order that Deaver obtained clearly substituted him as a party and recited that he was the "proper party to pursue this case on behalf of the Estate of Faye Deaver." In our view, we cannot subscribe to the conclusion that the mere failure to use the word "revivor" in the order meant that the trial court did not contemplate that the cause of action should be allowed to continue. Accordingly, we hold that the trial court erred in dismissing Deaver's lawsuit.

Reversed and remanded.

ROAF and VAUGHT, JJ., agree.

James E. MOREHOUSE *v.* Lori Morehouse LAWSON

CA 05-581 231 S.W.3d 86

Court of Appeals of Arkansas
Opinion delivered March 8, 2006

Mary Lile Broadaway, for appellant.

Carla Rogers Nadzam, for appellee.

JOHN B. ROBBINS, Judge. Appellant James E. Morehouse and appellee Lori Morehouse Lawson were married on July 1, 1996, and divorced on December 20, 1999. On July 2, 1996, Lawson gave birth to a daughter, A.M. A son, C.M., was born to Lawson on September 9, 1998. By agreement of the parties, the divorce decree awarded Lawson custody and set Morehouse's monthly child support at $8333.

On August 31, 2001, Morehouse filed a motion seeking to modify his child-support obligation on the basis that he had suffered a reduction in income resulting in a material change of circumstances. However, that petition was subsequently voluntarily withdrawn by Morehouse and dismissed by the trial court. On July 3, 2002, Morehouse filed a motion to set aside the divorce decree alleging that Lawson fraudulently procured the decree by lying to him about his being the biological father of the children. Notwithstanding the fact that Morehouse is not the biological father, the trial court entered an order refusing to set aside the decree on November 4, 2003. Morehouse appealed from that order, and in *Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005), we affirmed the trial court's award of child support.

On February 4, 2004, while the first appeal was pending, Morehouse filed a petition to modify the decree, again asserting that there had been a material change in circumstances warranting a reduction in child support. After a hearing, the trial court found that Morehouse's income had decreased since entry of the divorce decree and that Morehouse proved a material change in circumstances. The trial court entered an order on February 11, 2005, which reduced Morehouse's monthly obligation from $8333 to $7607.75. The order also relieved Morehouse of paying additional expenditures incorporated into the decree that included school tuition and reasonable expenses for extracurricular activities.

Morehouse now appeals from the February 11, 2005, order, arguing that the trial court erred in failing to further reduce his child-support obligation. Specifically, he contends that the trial court should have deviated from the child-support chart to correspond with the reasonable needs of the children. Lawson has cross-appealed, arguing that the original award should be reinstated because the modified award is inconsistent with the chart amount. We affirm on direct appeal, and we reverse on cross-appeal.

A party seeking modification of a child-support obligation has the burden of showing a material change of circumstances sufficient to warrant the modification. *Weir v. Phillips*, 75 Ark. App. 298, 55 S.W.3d 804 (2000). A trial court's determination as to whether there are sufficient changed circumstances to warrant a modification in child support is a finding of fact, and this finding will not be reversed unless clearly erroneous. *Ritchey v. Frazier*, 57 Ark. App. 92, 940 S.W.2d 892 (1997). Arkansas Code Annotated section 9-12-312(2) (Repl. 2002) provides:

> 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.

A trial court may deviate from the chart amount if it exceeds or fails to meet the needs of the children. *Ceola v. Burnham*, 84 Ark. App. 269, 139 S.W.3d 150 (2003). As a rule, when the amount of child support is at issue, the appellate court will not reverse the trial court absent an abuse of discretion. *Delacey v. Delacey*, 85 Ark. App. 419, 155 S.W.3d 701 (2004).

Brent Stidman, a certified public accountant, testified for Morehouse. Stidman conducted an analysis of Morehouse's income from 1998 through the date of the hearing, and testified that Morehouse's income had decreased. Upon analyzing the tax returns, Stidman determined that Morehouse's net income in 1998

was $540,217, as compared to $491,187 in 2003. Stidman further testified that Morehouse's stock portfolio had significantly decreased since the divorce.

Dr. Ralph Scott, an economist, was employed by Morehouse to perform an analysis on the cost of raising children in Arkansas. In conducting his analysis, Dr. Scott utilized a consumer expenditure survey published by the United States Department of Labor. According to Dr. Scott, the cost of raising A.M. and C.M. from 2004 until the time that A.M. reaches majority will range between $18,000 and $22,000 per year.

Morehouse testified on his own behalf, and stated that he has been employed since the time of divorce as a management consultant for A.T. Kearney & Company. However, he indicated that his annual income has been decreasing and that his assets have been reduced from $5 million to about $700,000. Morehouse is paying mortgages on his various properties, including property in Maui, and indicated that his debt is extensive. Morehouse characterized his financial situation as "dire" and maintained that he cannot continue to provide for the children as set forth in the divorce decree.

Lawson testified that she is not presently working and that her husband earns about $30,000 per year. She stated that she stays at home with the children and is a full-time mother. Lawson stated that she continues to need support to raise her children, and maintained that the support payments were being used for that purpose.

In calculating Morehouse's modified support obligation, the trial court noted that the parties' original agreement incorporated into the divorce decree provided monthly support of $8333, and the agreement stated, "said amount is a downward deviation from the Family Support Chart in the amount of $4534 [annually] in consideration of the other expenses being paid by the husband for the benefit of the children." The trial court relied on the figures provided by Stidman, and determined that Morehouse's decrease in annual net income as reflected by the 1998 and 2003 tax returns was $49,030. The trial court further reduced Morehouse's income by his increase in non-cash benefits received in 2003 as compared to 1998, which was $10,811, on the basis that these amounts were included on Morehouse's tax returns but did not constitute disposable income. Finally, the trial court reduced Morehouse's income by the $3237 he was paying for medical insurance for the

children. The aggregate of these figures amounted to a $63,078 reduction in income for child-support purposes.

Section III(b) of Supreme Court Administrative Order number 10 provides that when the payor's income exceeds that shown on the chart, he shall pay child support in the amount of twenty-one percent of his income where there are two dependents. Accordingly, the trial court found that Morehouse's annual child-support obligation should be reduced by twenty-one percent of $63,078, which equals $13,246. Because the trial court relieved Morehouse of his obligations for other expenses contemplated by the original agreement of the parties, which totaled $4543 annually, the trial court offset this figure against $13,246 to arrive at $8703. Dividing $8703 by twelve, the trial court reduced Morehouse's monthly obligation by $725.25, which resulted in monthly support of $7607.75.

Morehouse argues on appeal that the trial court erred in failing to set his child support in accordance with the needs of the children. Section I of Administrative Order number 10, titled "Deviation considerations," provides in pertinent part:

> a. *Relevant factors.* Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:
>
> 1. Food
>
> 2. Shelter and utilities;
>
> 3. Clothing;
>
> 4. Medical expenses;
>
> 5. Educational expenses;
>
> 6. Dental expenses;
>
> 7. Child care (includes nursery, baby sitting, daycare or other expenses for supervision of children necessary for the custodial parent to work);
>
> 8. Accustomed standard of living;

9. Recreation;

10. Insurance;

11. Transportation expenses; and

12. Other income or assets available to support the child from whatever source.

Morehouse submits that, based on the foregoing factors and the needs of the children, he rebutted the child-support-chart presumption. He notes that he has been ordered to pay $91,293 in annual child support despite testimony by Dr. Scott that the annual cost of raising the children will only be somewhere between $18,000 to $22,000. Morehouse further directs us to Lawson's affidavit of financial means, wherein she estimates the children's monthly expenses at about $3500. He cites us to various cases from other jurisdictions where deviation from a mechanical formula was deemed proper for high-income payors on the basis that such amount exceeded the children's needs and would have resulted in an economic windfall or amount to a distribution of the obligor parent's estate. Under the circumstances of this case, Morehouse contends that the trial court abused its discretion in failing to deviate from the chart to correspond with the children's needs.

We hold that the trial court committed no abuse of discretion in finding that Morehouse failed to rebut the presumption that the chart amount was proper. While Morehouse suggests that the issue before us has not been addressed in Arkansas, this is incorrect. *See Ceola v. Burnham, supra* (chart amount upheld where appellant's monthly net income was $17,659.65); *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003) (chart amount upheld where appellant's monthly net income was $64,875). The above cases demonstrate that under the proper circumstances the chart should apply to high-income payors.

In the case at bar, there was evidence that Morehouse lived extravagantly and had sufficient assets to buy a $70,000 ring for his fiancee and donate $4000 per month to charity. While Lawson's affidavit of financial means estimated the children's monthly expenses at only about $3500, this did not include common family expenses such as the mortgage payment and utilities, from which the children benefit. Moreover, there was no

evidence that the children's needs were any less in 2003 than at the time of the divorce. Because the only material change in circumstances pertained to Morehouse's decrease in income, the trial court modified child support on that basis and refused to further decrease the support on a basis that could have been, but was not, raised prior to entry of the divorce decree. The trial court did not err in so doing.

On cross-appeal, Lawson argues that the trial court erred in reducing the monthly child support because the amount awarded is inconsistent with the support chart, and the trial court made no written findings to justify deviation from the chart. We agree. The trial court's order recites that it is reducing monthly support from $8333 to $7607.75 "in compliance with the Family Support Chart." However, the $7607.75 awarded is not in compliance with the chart when considering Morehouse's net income as determined by the trial court.[1] While the original agreement by the parties recites that they referenced the support chart in agreeing on $8333, this amount is less than what the chart amount would have dictated when applied to Morehouse's 1998 net income of $540,217, taking into account the $4534 annual reduction for other expenses. In actuality, monthly payments of $8333 would correspond to an annual salary of $476,171. The trial court found that Morehouse sustained an annual loss of income of $63,078, which still leaves his annual income ($477,139) slightly above that which would correspond to a monthly payment of $8333 when multiplied by a factor of .21 and divided by twelve. In this case the trial court deviated downward from the family support chart, which is permissible only if the trial court makes express written findings or specific findings on the record that application of the support chart is unjust or inappropriate. *See Woodson v. Johnson*, 63 Ark. App. 192, 975 S.W.2d 880 (1998). Because the trial court misapplied the support chart and failed to make specific findings supporting a deviation, we reverse and remand for further action consistent with this opinion.

Affirmed on appeal; reversed and remanded on cross-appeal.

PITTMAN, C.J., and BAKER, J., agree.

---

[1] We note that neither party has challenged the trial court's calculation of Mr. Morehouse's net income.

Andre D. WEST *v.* DIRECTOR, Employment Security Department and Department of Workforce Services and Rehabilitation Center, Inc., d/b/a Millcreek of Arkansas

E 05-227 231 S.W.3d 96

Court of Appeals of Arkansas
Opinion delivered March 8, 2006

[redacted]

Appellant, *pro se.*

Allan Franklin Pruitt, for appellee.

SAM BIRD, Judge. This is an unbriefed, pro se appeal from a decision by the Board of Review that denied unemployment security benefits to Andre West because of misconduct related to his job. West contends on appeal that there was no misconduct. We agree, holding that no substantial evidence supports the Board's finding of misconduct under Arkansas unemployment compensation law. Therefore, this case is reversed and remanded for an award of benefits.

Pursuant to Ark. Code Ann. § 11-10-514(a) (Repl. 2002), an individual shall be disqualified for employment benefits if he is discharged from his last work for misconduct in connection with

the work. "Misconduct" includes disregard of the employer's interests, violation of the employer's rules, disregard of the standards of behavior that the employer has the right to expect of his employees, and disregard of the employee's duties and obligations to his employer. *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981). It requires more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. *Id.* There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. *Id.* The intentional or deliberate failure to furnish information in which an employer has a legitimate interest is a willful disregard of the employer's interest and of the standards of behavior that it has a right to expect of its employees. *Id.*

West was employed as an aide who provided care in patients' cottages at Millcreek of Arkansas, a residential facility for the psychiatric care of children. He was discharged from his job when his employer discovered his name on a central registry during a mandatory biannual background check.[1] West initially was awarded unemployment benefits by the Employment Security Department.

The employer appealed the award to the Appeal Tribunal. West and Terri Riggs, Millcreek's director of human resources, testified at a telephone hearing conducted by the hearing officer on July 13, 2005. After the hearing, the Tribunal issued a decision reversing the award of unemployment benefits. West appealed to the Board of Review, which on September 14, 2005, affirmed the denial of benefits and adopted the decision of the Appeal Tribunal. The Board, finding that West was discharged for misconduct in connection with his work, reasoned as follows:

> The claimant's own action resulted in his being placed on the child abuse registry. Being on the registry prevented him from continuing his employment with the listed employer. Compare *Washington Regional Medical Center v. Director*, 64 Ark. App. 41 (1998),

[1] The background check of the "central registry" apparently refers to checking the state child maltreatment central registry. *See* Ark. Code Ann. § 9-28-409(a)(1) & (4) (Supp. 2005) (requiring that certain persons in child welfare agencies shall be checked with the child maltreatment registry and that the check shall be repeated every two years).

> where the Arkansas Court of Appeals held that a claimant's inability to obtain a license to perform her job duties was not misconduct.

We do not conduct de novo reviews in appeals from the Board of Review; instead, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings of fact. *Brooks v. Director*, 62 Ark. App. 85, 966 S.W.2d 941 (1998). The Board's findings are conclusive if supported by substantial evidence, which is such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether it could have reasonably reached its decision based upon the evidence before it. *Bennett v. Director*, 73 Ark. App. 281, 42 S.W.3d 588 (2001).

Riggs testified at the hearing that Millcreek was required by law to conduct a biannual check for child maltreatment on every employee and that the checks had been performed on West every two years since his employment began in 1992. She said that the check that came back on May 20, 2005, had "a true report . . . of child maltreatment," making West ineligible for employment. She said that the employer received no details of the incident that led to West's name being placed on the registry, that West was approached about the incident, that he indicated his awareness of the true report, and that he understood that his employer had to act because of the law's prohibition against employing him. Riggs said that, although West had violated the employer's policy requiring an employee who had a reportable incident to advise his employer of it, he was not discharged on that basis. She explained the reason for his discharge:

> We terminated him because he had a prohibiting offense on his record, that's the bottom line. We didn't terminate him because he didn't report it. We terminated him because of the prohibiting offense, because state law will not allow us to hire him, continue employment. We could not risk shutting, having our whole facility shut down.

The hearing officer asked West if he had any questions of Riggs in regard to her testimony. West responded that he had no questions and that Riggs's testimony "sounded about right." The hearing officer then further questioned West:

> H. Officer: Okay. And could you tell us what caused your separation?

[WEST]: Well, it was an incident that happened and they put me on the registry and uh, according to their policies, while my name is on the registry, I cannot be employed at their facility, and I understood that so I just went with everything that was going on, you know.

H. OFFICER: Okay. And you were aware when they did put on [sic] the registry?

[WEST]: See, what happened was, I wasn't aware that I was on the registry, because I wasn't explained [sic] that they were going to put me on the registry and uh, I got a letter when they did the background check, I got that on a Saturday, and my off days is on a Monday and Tuesday, so I think they probably received their letter that Monday. I was off work, you know before I got the chance to, you know, they had notified me, on my off day, which was that Monday, that they had gotten the letter from, you know, the registry, that my name was on there.

H. OFFICER: Can you remember the incident that caused you to be on the registry?

[WEST]: Yes, I do but, uh, I don't know if I need to disclose all of that, you know, but I can if I have to.

H. OFFICER: Well, let me just ask you, when the incident happened, were you aware that it was a registered incident, that you knew would be registered?

[WEST]: No, I didn't.

H. OFFICER: Was there any arrest involved in the incident?

[WEST]: No, huh-uh.

H. OFFICER: Okay, but it had to do with the treatment of children?

[WEST]: Yes.

H. OFFICER: Okay. And so, did you request a hearing or do you consider yourself guilty of what you were accused of?

> [WEST]: Well, the way the situation went, I consider myself guilty because it was like a drug-related situation, and you know, so, you know, I admitted to it, and I guess they put it on the registry. I wasn't aware they were going to do all of that though. I went through rehabilitation and everything and, you know, matter of fact, the job, Millcreek, they sent me to rehabilitation, and I went and I, you know, I passed that and everything and I've been working ever since then, and then the next thing I knew, my name was on the registry, which I was unaware of.
>
> H. OFFICER: All right, so you attended a rehabilitation center because of drug use?
>
> [WEST]: Yes, I did.

The Board's decision, adopting that of the Appeals Tribunal, set forth the following basis for its finding that West was discharged for misconduct in connection with his work:

> The claimant was discharged due to the results of a background check showing a reportable incident that prohibited his continued employment. The claimant admitted to the offense. The employer is required by state law to remove anyone with a prohibited incident. *The claimant's actions were within his control and were a willful disregard of the employer's interest.*

(Emphasis added.) The Board reiterated that West's "own action resulted in his being placed on the child abuse registry," seemingly to distinguish this case from *Washington Regional Medical Center v. Director*, 64 Ark. App. 41, 979 S.W.2d 94 (1998), where a respiratory therapist was entitled to unemployment compensation benefits after being discharged because she was unable to pass new licensing requirements despite studying. We do not think the present case turns on the distinction drawn in *Washington* between inability and misconduct.

West was discharged when a biannual check of the central registry showed a true report of child maltreatment, a prohibited offense that did not allow his employment to continue. Well before his name was discovered on the registry, West admitted to the incident that resulted in placement of his name on the registry and said that he considered himself guilty because it was a drug-

related situation. He was not arrested. His employer sent him to drug rehabilitation, he passed his tests, and he was not terminated from his employment. He testified that he was not aware that his name would be put on the registry after the incident occurred, nor was he aware of the placement of his name there until his employer ran the check. There was no evidence to the contrary, and there was no determination by the Board that his testimony was not credible. The employer's representative testified that he was discharged because "he had a prohibiting offense on his record," and not because he failed to report it. There was no testimony that he was discharged because of the offense itself.

Substantial evidence supports the Board's finding that West's own actions resulted in a reportable incident and, ultimately, in his name being placed on the central registry. However, we hold that there is no substantial evidence to support a finding that his actions constituted a willful disregard of his employer's interest. West was unaware that the incident would result in placement of his name on the registry, and it was only when the mandated check was run that he became aware of the listing. His employer was justified, and even statutorily mandated to discharge West upon discovery of his name on the registry, but it cannot be said that the listing demonstrated wrongful intent or evil design such as would constitute misconduct under our unemployment security law.

Reversed and remanded.

HART and NEAL, JJ., agree.

Blake BRYANT *v.* STATE of Arkansas

CA CR 05-405 231 S.W.3d 91

Court of Appeals of Arkansas
Opinion delivered March 8, 2006

Patrick J. Benca and *John Wesley Hall, Jr.*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Blake Bryant appeals from several drug convictions, for which he a received a total of twenty-five years in the Arkansas Department of Correction. He argues that the trial court erred by denying his request for a mental evaluation. We determine that this case is guided by our supreme court's opinion in *Hudson v. State*, 303 Ark. 640-A, 801 S.W.2d 48 (1991) (supplemental opinion on denial of rehearing), and affirm appellant's convictions.

The State filed a criminal information on December 18, 2003, charging appellant with six offenses: possession of crystal methamphetamine with intent to deliver, simultaneous possession of drugs and firearms, possession of marijuana with intent to deliver, possession of drug paraphernalia, maintaining a drug premises, and felon in possession of a firearm. The State sought an enhanced sentence because appellant had a prior felony convic-

tion. On June 30, 2004, appellant's counsel filed a motion to withdraw as counsel, stating that appellant wanted him to pursue a defense that was not in appellant's best interest and that appellant had accused him of being "in bed with the prosecutor" and part of "the good old boy network." In paragraph three of the motion, counsel stated:

> That current counsel verily believes that defendant suffers from a mental disease or defect and fails to comprehend both the evidence the State has against him and the consequences of that evidence when presented to a jury. Specifically, the defendant initially accepted a plea agreement and suddenly advised current counsel on the day the plea was to be given that he was rejecting it. As current counsel explained the effect of the evidence for at least the third time to defendant, Mr. Bryant seemed confused, disoriented, repeated the same scenario of questions, and the same accusations that current counsel was part of a conspiracy against him. Counsel requests that the defendant undergo a mental evaluation to determine whether or not he suffers from a mental disease or defect that compromises his ability to appreciate the evidence the State has against him and the possible penalties in the event he is convicted.

The State responded to this allegation by denying that appellant suffered from a mental disease or defect or that he failed to comprehend the evidence against him or the consequences of said evidence. It further contended that the motion was filed to delay the trial.

At a pre-trial hearing on June 21, 2004, appellant's counsel remarked that appellant was offered a plea agreement. Appellant rejected the offer, and his counsel sought to make a record regarding what appellant had been advised regarding the evidence the State had against him and the potential sentence for each charge. Upon inquiry by the court, appellant stated that he understood the potential sentence he could receive on each charge (up to eighty years on two of the charges, twenty years on two of the charges, and twelve years on two of the charges). He acknowledged that the State had offered him fifteen years with an additional five years suspended imposition of sentence on the Y felonies, with the remaining counts *nol prossed*. Appellant indicated his desire to reject the plea "at this time." When reminded that the State intended to withdraw the offer if not accepted that day, appellant rejected the offer.

Another hearing was held on July 1, 2004. Appellant's counsel told the court that he had suggested a certain defense to appellant but that the appellant's preference regarding the proposed defense changed every time he conferred with appellant. He stated that appellant disagreed with his advice and challenged his abilities and knowledge. Counsel continued to assert that appellant did not comprehend the proceedings against him. The State argued that appellant presented no basis for believing that he had a mental disease or defect and reasserted its belief that the motion was merely for the purposes of delay. Regarding appellant's motion for a mental examination, the court stated that appellant understood everything during the previous hearing and indicated "in a very lucid manner" that he understood the proceedings against him and that he was exercising his right to a jury trial. The court agreed with the State that appellant was merely attempting to delay trial.[1]

The court questioned appellant under oath. Appellant acknowledged that the State offered him the same deal that he previously rejected, plus forfeiture of the items seized. Again, he rejected the offer. The court noted that appellant was prepared to accept the State's offer at one time; however, appellant testified that he initially agreed to accept the offer "because [counsel] scared me. I don't know, he, he was talking they going to hang me, they going to fry me and all this[.]" Appellant stated that he also understood that his counsel could not control whether the State offered him a reduced sentence. He testified that he asked his counsel to file several suppression motions and that counsel never did so. Appellant believed that his counsel was attempting to force him to take a plea.[2]

---

[1] A docket entry dated July 1, 2004, states in part, "Motions denied — Court finds the motion filed only for delay, no diligent effort to find evid showing need for mental examination, Def lucidly disc evid, witnesses. . . ."

[2] Appellant also made an additional comment about why he rejected the plea:

> One reason being that Mr. Womack instructed me that you hate his guts as an, as an attorney. And I felt like he was trying to, I didn't know if he was trying to tell me to hire another attorney. If he was going to get it took out of this court in Judge Keaton's court when he done just the opposite. He got it took out of Keaton's and put it in your court.

The trial judge stated for the record that she did not hate counsel's guts.

The next day, counsel filed a supplemental motion to withdraw, alleging that appellant verbally assaulted him after the previous day's hearing. Counsel further alleged that ten minutes after the hearing, appellant was in his automobile when counsel attempted to discuss the trial. Appellant "with his window rolled down, red faced, with his teeth clenched and a look of rage in his eyes, cursed and swore at undersigned counsel, verbally threatened counsel, revved the engine of his vehicle, and spun gravel several yards[.]" Counsel believed that appellant wanted to run him over with the vehicle.

Trial was originally scheduled for July 6, 2004; however, it was rescheduled because appellant underwent surgery. Another hearing was held on July 26, 2004. Counsel remained, but he announced that appellant wanted to wait until he was off medication and evaluated by his cardiologist before making any decisions. Counsel indicated his willingness to remain as appellant's counsel, and the court denied his motion to withdraw. However, appellant later retained new counsel, and the court granted appellant's motion to substitute counsel.

Trial was held September 7 and 9, 2004. Appellant's mental state was not made an issue during the trial. The jury found that appellant had been in possession of marijuana but not with intent to deliver; otherwise, the jury found appellant guilty as charged. Appellant was subsequently sentenced to a total of twenty-five years in the Arkansas Department of Correction. This appeal followed. For his sole point on appeal, appellant argues that the trial court erred in finding him fit to proceed at trial based upon its own observations. He contends that he was entitled to a suspension of the proceedings and a mental evaluation, pursuant to Ark. Code Ann. § 5-2-305 (Repl. 2006).

It is well settled that the conviction of a defendant while he is legally incompetent to stand trial violates due process. *Lawrence v. State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992). Arkansas Code Annotated section 5-2-302 (Repl. 2006) expressly prohibits trying a person who lacks the capacity to understand the proceedings against him or to assist effectively in his own defense because of mental disease or defect. A criminal defendant is ordinarily presumed to be mentally competent to stand trial, and the burden to prove otherwise is on the defendant. *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993). The test of competency to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and

whether he has a rational and factual understanding of the proceedings against him. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001); *Lawrence v. State, supra.*

Arkansas Code Annotated section 5-2-305(a)(1) states that the trial court *shall* immediately suspend proceedings if the defendant files notice that he will put his fitness to proceed in issue or if there is otherwise reason to doubt the defendant's fitness to proceed. Use of the word "shall" makes compliance with a statute mandatory. *See Smith v. State*, 347 Ark. 277, 61 S.W.3d 168 (2001); *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001). Upon suspension of the proceedings, the trial court is required to enter an order directing a mental examination of the defendant under one of the means outlined in the statute. *See* Ark. Code Ann. § 5-2-305(b)(1).[3] This statute is intended to prevent the trial of anyone who is legally incompetent. *Lawrence v. State, supra.* The trial court's determination of the issue is reviewed under the "clearly erroneous" standard. *Hardaway v. State*, 321 Ark. 576, 906 S.W.2d 288 (1995); *Hudson v. State, supra.*

Appellant cites *Kelly v. State*, 80 Ark. App. 126, 91 S.W.3d 526 (2002), for his proposition, "Once a defendant properly invokes the right to a mental examination, the court has no choice." In *Kelly*, the appellant argued that the trial court should have suspended the proceedings after his attorney filed a motion requesting a psychiatric examination.[4] The trial court explicitly found that the appellant provided timely notice of his motion; however, rather than suspending the proceedings, the court pro-

---

[3] Specifically, Ark. Code Ann. § 5-2-305(b)(1) provides:

Upon suspension of further proceedings in the prosecution, the court shall enter an order:

(A) Directing that the defendant undergo examination and observation by one (1) or more qualified psychiatrists or qualified psychologists; or

(B) Appointing one (1) or more qualified psychiatrists not practicing within the Arkansas State Hospital to make an examination and report on the mental condition of the defendant; or

(C) Directing the Director of the Division of Mental Health Services of the Department of Health and Human Services to determine who shall examine and report upon the mental condition of the defendant.

[4] *Kelly* operated under a predecessor of the current statute, which read:

Whenever a defendant charged in circuit court . . . (2) Files notice that he will put in issue his fitness to proceed, or there is reason to doubt his fitness to proceed, the

ceeded with a competency hearing. At the hearing, the appellant testified to his prior treatment and receipt of benefits for his mental condition or defect. We observed that the hearing mandated by the statute was required to resolve any contest made regarding the mental evaluation; however, the trial court erred by not giving the appellant an opportunity for an evaluation or to present a report. Appellant received a new trial due to the trial court's failure to suspend the proceedings and order an evaluation.

In arguing that *Kelly* is distinguishable, the State emphasizes the statutory language under subparagraph (a)(1)(D) requiring a "reason to doubt" appellant's competency. It relies heavily on *Lawrence v. State*, *supra*, where this court found no error in the trial court's refusal to suspend the proceedings and order a mental evaluation. In *Lawrence*, the appellant filed a notice of lack of fitness to proceed five days before trial and requested that he be mentally evaluated based upon his assertion that he could not provide assistance in preparing for trial. Appellant based his assertion on lack of memory of the events surrounding the allegations. The trial court denied the appellant's request for a mental examination, stating that the notice, which spoke only of memory loss as the basis of the incapacity, failed to put the appellant's mental capacity at issue. We affirmed the trial court, noting that amnesia or lack of memory was not a proper basis for finding a defendant incompetent to stand trial. *Id.* (citing *Rector v. State*, 277 Ark. 17, 638 S.W.2d 672 (1982); *Deason v. State*, 263 Ark. 56, 562 S.W.2d 79 (1978)). We further noted that there was nothing else in the record that gave the trial court "reason to doubt" the appellant's fitness so as to trigger the provisions of the statute.

The State also relies on *Hudson v. State*, *supra*, where the appellant argued that his motion for a psychiatric examination should have been granted. In its original opinion, *Hudson v. State*, 303 Ark. 637, 799 S.W.2d 529 (1990), our supreme court affirmed the trial court's denial of the motion, noting that appellant had failed to file the notice that he intended to rely upon the defense of mental disease or defect. In its supplemental opinion, the court acknowledged that it failed to address the appellant's argument concerning the provision of section 5-2-305 that requires the trial

---

court, subject to the provisions of §§ 5-2-304 and 5-2-311, shall immediately suspend all further proceedings in the prosecution.

See Kelly, 80 Ark. App. at 129-30, 91 S.W.3d at 528.

court to suspend proceedings if there is reason to believe mental disease or defect will become an issue. The supreme court denied appellant's petition for rehearing, noting that it found nothing in the record, outside of comments made by defense counsel, that appellant did not appreciate the seriousness of the charges against him.

Similar to the appellant in *Hudson*, appellant put forth no evidence (independent of his former counsel's allegations) to suggest that he lacked an appreciation for the seriousness of the charges against him or an ability to assist his attorney in his defense. Further, the trial court interviewed appellant twice and had the opportunity to assess his lucidity and his familiarity with the potential range of punishment, plea agreement offered by the state, risk that he was running by going to trial, and advice he had been given by counsel. The trial court found that appellant was fit to proceed, and nothing in the record, outside of the comments by former counsel, indicates otherwise. In light of *Hudson v. State*, *supra*, we affirm.

Affirmed.

GLADWIN and NEAL, JJ., agree.

David ROBBINS and Debra Kay Steenblock *v.*
STATE of Arkansas

CA CR 05-717 231 S.W.3d 79

Court of Appeals of Arkansas
Opinion delivered March 8, 2006

[Rehearing denied April 12, 2006.]

Robert R. White, for appellants.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. In accordance with Rule 24.3 of the Arkansas Rules of Criminal Procedure, David Robbins and Debra Kay Steenblock entered conditional pleas of guilty to charges of possession of methamphetamine and possession of drug

paraphernalia. The Benton County Circuit Court sentenced them each to two years' imprisonment and a $1000 fine. Appellants now challenge the denial of their motion to suppress, arguing that (1) "the initial warrantless nighttime intrusion into [appellants'] home violated the Fourth and Fourteenth Amendments of the U.S. Constitution, as well as Article 2, § 15 of the Arkansas Constitution, and was not a valid 'exigent circumstances' search pursuant to Arkansas Rule of Criminal Procedure 14.3"; (2) the affidavit in support of the search warrant failed to set forth specific facts bearing upon the informants' reliability and therefore failed to meet the mandatory requirements of the Fourth and Fourteenth Amendments to the U.S. Constitution and Rule 13.1 of the Arkansas Rules of Criminal Procedure; and (3) the State's argument below that exigent circumstances justified a warrantless, forced entry into appellants' home in the middle of the night has no basis in fact or law. We agree with appellants' first and third points, and we reverse and remand.

At the suppression hearing, Jesse Ray, a narcotics officer with the Rogers Police Department, testified that, on October 11, 2003, he received a call between 8:30 and 8:50 p.m. from a United States Forestry Service officer who had just arrested Ted Harp and Randall Ardemagni. The men had information regarding a residence located at 6306 Southgate Road. Harp informed Officer Ray that he was at the home on October 10 and saw several items used to manufacture methamphetamine, including a blue air tank filled with anhydrous ammonia, cold and allergy pills, denatured alcohol, lithium batteries, hoses, muriatic acid, a glass jar, Pyrex dishes, and an unknown quantity of methamphetamine. Ardemagni told Officer Ray that he had been to the residence two weeks before Harp was there, and Ardemagni had seen muriatic acid, Heet, tubing, blenders, glass jars, Pyrex dishes, and an unknown quantity of methamphetamine. Ardemagni also notified Ray that there were several individuals that lived in the home, including a young child.

Officer Ray testified that the Rogers police had, less than a year prior, recovered a mobile methamphetamine lab from the driveway of the residence for which another man, Clayton Early Hart, was charged. Officer Ray also testified that they had received numerous calls on the house throughout the year, and that he was concerned about getting the child out of the home. He stated:

> I did not type up my affidavit for a search warrant because I was told there was a nine-year-old in the house and that was a concern of

> mine. In order to prepare the search warrant it was going to take probably a couple of hours and I wanted to get the child out of the house. We did not go to the house for three, 3 ½ hours, something like — had to get all the guys that are going out with me to secure the house. Anytime you do a search warrant or clear a house for search warrant it[']s usually pretty dangerous, or could be, so I wanted to make sure I had enough guys to help me.

He acknowledged, however, that he did not call emergency services to meet him at the site nor did he call the Arkansas Department of Human Services until after the search warrant was executed because, when he arrived at the home, "the boy looked healthy" and because they had not searched the home.

Officer Ray and his fellow officers arrived at the residence at around 12:28 a.m. on October 12. Once there, the officers knocked on the door; when they received no response, they forced entry into the home and were confronted by David Robbins standing near the front door with his young son, Troy. Another man, Kevin Taylor, was found hiding around a corner in the living room. Officer Ray stated that, once they identified everyone, they released them and secured the home so that a search warrant could be issued. The judge signed the search warrant at 6:00 a.m.; it was executed shortly after 7:00 a.m. and yielded methamphetamine and numerous items used in the manufacturing of methamphetamine.

In a standard bench order filed May 25, 2004, the trial court denied the motion to suppress. Appellants subsequently entered conditional pleas pursuant to Ark. R. Crim. P. 24.3, and this appeal followed.

Our review of a denial of a motion to suppress evidence is de novo, and we make an independent determination based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. *Marshall v. State*, 92 Ark. App. 188, 211 S.W.3d 597 (2005); *Mann v. State*, 357 Ark. 159, 161 S.W.3d 826 (2004).

Appellants assert first and third that there were no "exigent circumstances" pursuant to Ark. R. of Crim. P. 14.3 that necessitated a warrantless nighttime intrusion into their home. They also

argue that their federal and state constitutional rights were violated by the impermissible seizure resulting from the knock-and-talk procedure. We agree.

A warrantless entry into a private residence is presumptively unreasonable under the Fourth Amendment, and the burden is on the State to prove that the warrantless activity was reasonable. *Mann v. State, supra.* However, an officer may enter a home without a warrant if the State establishes an exception to the warrant requirement. *Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004). An exception to the warrant requirement exists where, at the time of entry, there are probable cause and exigent circumstances. *Id.* Probable cause is determined by applying a totality-of-the-circumstances test, and exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Id.* Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect. *Mann v. State, supra*; *see also* Ark. R. Crim. P. 14.3. In evaluating whether exigent circumstances exist, we are to consider the extent to which the police had an opportunity to obtain a warrant, and whether it was foreseeable that the chosen police tactics might precipitate the kind of circumstances contemplated by Rule 14.3. *Mann v. State, supra.*

In denying appellants' motion to suppress, the trial court ruled as follows:

> This is the case where the officers involved established or determined or obtained probable cause to search the premises that were involved here about nine o'clock one night and about three and a half hours later, without a search warrant, entered the premises by force, removed the residents and sent them on their way to go stay somewhere else, and subsequently, about 5:30 or six o'clock in the morning, they got their search warrant.
>
> The — the contention was that exigent circumstances existed because there was probable cause to believe that the premises contained a methamphetamine lab and that a small child, a child, was in the premises.

> There is no question that the officers had probable cause for the — to obtain a search warrant. However, there were no exigent circumstances. There [are] just no exigent circumstances that would justify breaking into the — forcibly entering the home at 12:30 in the morning without a warrant.
>
> Exigent means an emergency, and three hours later is not — that doesn't sound like an emergency to me, especially since — and the justification given was they need time to assemble a crew. Well, this was in Rogers, wasn't like it was in the boondocks. So — and when the officers arrived at the premises, they didn't smell any chemicals and saw nothing that would indicate that there was any immediate danger to anyone.
>
> I have found that — that if there is any poison flowing from that improper entry it doesn't taint the eventual seizure, and I'm going to deny the motion to suppress. And I'm denying — denying it because, one, the — based on the testimony I'm satisfied these officers were operating in good faith; and more particularly, is that they didn't see — they didn't search the residence when they entered, and — and nothing contained — and there was nothing from that entry that was included in the affidavit for the search warrant.
>
> So the motion to suppress is denied, but I want to say that these officers ought not to be going out three hours later without more than what was present here and entering someone's house, because frankly, if they had — if they had encountered something that had been used to justify a search I would have suppressed it.

In this instance, the trial court determined that no exigent circumstances existed, and we agree with that finding. Officer Ray testified that he was concerned with the welfare of the minor located inside the home; however, he took no actions that were tantamount to a response to those exigent circumstances he thought existed. We note that Officer Ray testified that he did not type up his affidavit for a search warrant, which he estimated would have taken him "a couple of hours," due to his concern for the child located in the home; nevertheless, Officer Ray took approximately three and one-half hours to notify other officers and secure back-up. Under these circumstances, ample opportunity existed for the police to obtain a warrant. Furthermore, it was entirely foreseeable that appellants would not answer their door at

12:28 a.m., which would necessitate intrusion into the residence. Forced entry into the residence is not a tactic that comports with the Fourth Amendment and Article 2, Section 15 of the Arkansas Constitution. Accordingly, we hold that the trial court's determination that no exigent circumstances existed was proper.

The problem, however, lies with the trial court's determination that the officers acted in good faith in that they did not search the residence when they entered and included nothing from that entry in the affidavit for the search warrant. Based on the totality of the circumstances, we hold that the warrantless entry into appellants' home was illegal. Thus, the question becomes whether the evidence seized after appellants' seizure was obtained by exploitation of the illegal warrantless entry into the home or whether there was some intervening or attenuating event "sufficiently distinguishable to be purged of the primary taint." *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *Johnson v. State*, 363 Ark. 463, 215 S.W.3d 668 (2005); *Keenom v. State*, 349 Ark. 381, 80 S.W.3d 743 (2002).

Here, after the officers received no answer at the door of the residence, they forced entry and seized its occupants. The occupants were thereby forced to leave the residence. Two officers stayed at the residence to secure its premises until the search warrant was obtained some five hours later. A seizure occurred because a reasonable person would not have felt free to go about their way when the officers kicked in the door. This illegality continued even after the occupants were required to vacate their premises and did not end until execution of the search warrant that yielded narcotics because there was no break in time nor were there any other intervening events between the illegal warrantless entry into appellants' home and the execution of the search warrant. Therefore, the primary taint of the unlawful warrantless entry into the home had not been sufficiently attenuated or purged. *See Dendy v. State*, 93 Ark. App. 281, 218 S.W.3d 322 (2005). Therefore, we think it is clear that, although no evidence was seized during the illegal warrantless entry, the subsequent finding of evidence was the result of the exploitation of the initial illegal seizure. Under these circumstances, the fruits of the illegal seizure were poisoned by the officers' unlawful warrantless entry. *See id.* Accordingly, we reverse and remand the trial court's denial of the motion to suppress.

In light of our resolution of the suppression issue, we need not address appellants' remaining argument concerning the reliability of the confidential informants.

Reversed and remanded.

GLADWIN and GRIFFEN, JJ., agree.

Rolinda KIGHT *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 05-522 231 S.W.3d 103

Court of Appeals of Arkansas
Opinion delivered March 8, 2006

[Rehearing denied August 30, 2006.*]

* PITTMAN, C.J., concurs. BIRD and HART, JJ., would grant rehearing.

Glen Hoggard, for appellant.

Gray Allen Turner, for appellee.

Jennifer Hill Kendrick, Attorney Ad Litem, for minor children.

ANDREE LAYTON ROAF, Judge. Appellant Rolinda Kight appeals from the Faulkner County Circuit Court's order terminating her parental rights to her two minor children, A.W. and L.M. This is the second time this case has been before this court. In *Kight v. Ark. Dep't of Human Servs.*, 87 Ark. App. 230, 189 S.W.3d 498 (2004) (*Kight I*), this court reversed and remanded this case and directed that reunification services be continued. Appellee Arkansas Department of Human Services (ADHS) filed another petition to terminate Kight's parental rights, which the trial court granted. For reversal, Kight argues that the trial court erred in terminating her

parental rights (1) by not following the mandate of this court from the prior appeal and (2) by violating her due-process rights. We affirm.

After reversal of the prior termination order, ADHS sought rehearing and also sought review by the supreme court. ADHS learned that the supreme court had denied review on September 24, 2004. At a review hearing on November 23, 2004, the trial court inquired into the status of the case. ADHS informed the court that the only order affected by this court's reversal was the order that terminated Kight's parental rights and that all other prior orders remained in effect, including the order for no reunification services. At this hearing, ADHS also announced its intention to file a second petition to terminate Kight's parental rights, and it did so the same day. The trial court stated that it would have a hearing on January 18, 2005, to determine whether there should be reunification services offered in this case. This hearing was subsequently continued until February 3, 2005. The February 3, 2005, hearing was thus for the purpose of deciding whether to terminate Kight's parental rights. At this hearing, Kight objected to the termination petition, arguing that reunification services had not been offered to her in compliance with this court's mandate.

Linda Wallace, a social worker assistant, testified at the hearing that the first meeting she had with Kight since this case had been re-opened was at McDonald's, Kight's place of employment at the time. Wallace drove Kight home to take a drug test that came back negative. Kight subsequently refused several drug tests, telling Wallace that her attorney had told her to refuse any drug tests administered by ADHS because of their unreliability. Wallace saw Raymond Morgan, a convicted drug dealer, at Kight's home on two occasions in the early morning hours, although Wallace never saw any evidence that he was living with Kight. Wallace, on at least one occasion, went to Kight's home at 4:50 a.m. to administer a drug test. According to Wallace, that was a good way to "catch some people" at home. Wallace found out from a neighbor that Kight had changed jobs and was working for Burger King. Wallace testified that sometimes she would have trouble getting in touch with Kight. Wallace had contact with Kight on at least nine different occasions between November 3, 2004, and January 26, 2005. She testified that some of these contacts were for drug tests and some of them were "just to see how [Kight] was doing." Wallace found out through Kight's neighbor and then from Kight, that Kight had found a job through a temporary agency working at the Peabody Hotel.

According to Wallace, there were no recent drug problems or problems with Kight's environment. The only problem Wallace identified was that Kight had changed jobs frequently. She had had three different jobs and two residences over the past three months. Wallace testified that she thought Kight was trying and that she was doing a good job. She also stated that she had no complaints about Kight.

There was testimony at the hearing that A.W. and L.M. were thriving in the care of the foster parents. They had been in the same foster home for at least two years and five months.

Laura Rogers, a family services worker, testified that she was concerned about Kight's association with Raymond Morgan. She stated that Kight had tested positive for THC at the time of the first review hearing in November 2004. Kight had refused all other drug tests ADHS had attempted to do since October 2004, explaining to Rogers that her former attorney had told her not to submit to any drug tests administered by ADHS because they resulted in false positives. Rogers stated that she could not "really tell [Kight] what reunification services [ADHS] could even offer since the goal of the case [was still adoption]." Rogers testified that, during her meetings with Kight, Kight never asked about the welfare of her children. Kight did not have a car, and Rogers drove her to one hearing, and Wallace drove her to another hearing. According to Rogers, the trial court did not allow visitation to Kight, and Kight and her attorney had not asked for any service except transportation. Rogers testified that, at the time of the hearing, A.W. had been in foster care for two years and five months and that L.M. had been in foster care for a little over two years. According to Rogers, offering additional services to Kight would not result in a successful reunification. As far as the services that were offered to her after her case was remanded, Rogers stated that those services began in mid-October with home visits and drug testing.

Kight testified about her employment history since July 2003. She worked at American Plastics until September 2003, when she had to resign because she lacked transportation. She then went to work for Jackson Cookie Company. When this company went out of business early in 2004, she began working for the Peabody Hotel, where she worked part-time from March 2003 in addition to working at McDonald's and Burger King. The Pea-

body had hired her for full-time employment, while she worked banquets for different employers and did housekeeping for other hotels on the weekends.

Kight testified about a short period of unemployment around October 2003 when she fell down some stairs and broke her ankle. However, after being confronted by ADHS with faxed hospital records, Kight admitted on cross-examination that she had not broken her ankle falling down stairs but that she had jumped off the top of a moving vehicle when she had tried to prevent a male guest from leaving her apartment.

In July 2003, Kight lived at Chance Sobriety. When she completed that program, she lived with her uncle, different friends, and with her mother. In November 2003, she lived in her own apartment, with an apartment mate. She began living in an apartment by herself in August 2004, where she stayed until she moved into a house in North Little Rock. She testified that she allowed Raymond Morgan to help her move some heavy furniture into the house because she could not move it by herself. According to Kight, she had seen Morgan approximately five times since July 2003 but had not been romantically involved with him since June 2003. She testified that she could not explain the one positive drug screen in November 2004 and that she had been clean and sober for two years. ADHS was successful in preventing Kight from introducing the negative results of a hair-follicle drug test she had had done at her own expense in January 2005 after the positive test occurred in November 2004.

After hearing the testimony, the trial court terminated Kight's parental rights, finding that it was in the children's best interests; that there was little likelihood that services to the family would result in successful reunification; that the children had been adjudicated dependent-neglected, had been out of the home for more than twelve months, and that despite a meaningful effort by ADHS to rehabilitate the mother and correct the conditions that caused removal, the mother had failed to remedy the conditions.

The standard of review in termination-of-parental rights cases is well-settled. In *Johnson v. Arkansas Department of Human Services,* 78 Ark. App. 112, 119, 82 S.W.3d 183, 187 (2002), the court held:

> When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party to terminate

> the relationship. Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. The facts warranting termination of parental rights must be proven by clear and convincing evidence, and in reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. In resolving the clearly erroneous questions, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations.
>
> An order forever terminating parental rights must be based upon clear and convincing evidence that the termination is in the best interests of the child, taking into consideration the likelihood that the child will be adopted and the potential harm caused by continuing contact with the parent. In addition to determining the best interests of the child, the court must find clear and convincing evidence that the circumstances exist that, according to the statute, justify terminating parental rights. One such set of circumstances that may support the termination of parental rights is that the child 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. It is not necessary that the twelve-month period out of home be consecutive. (Citations omitted.)

Arkansas Code Annotated section 9-27-341 (Supp. 2003) states:

> (b)(1)(A) The circuit court may consider a petition to terminate parental rights if the court finds that there is an appropriate permanency placement plan for the juvenile.
>
> . . . .
>
> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents, and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

. . . .

(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

For her first point on appeal, Kight argues that the trial court erred by not following this court's mandate to continue reunification services. A lower court is bound to follow the mandate of a superior court, and jurisdiction conferred on the trial court upon remand is bounded by the mandate and decision of the superior court. *City of Dover v. A.G. Barton*, 342 Ark. 521, 29 S.W.3d 698 (2000). When an appellate court remands a case with specific instructions, those instructions must be followed. *Id.* A lower court is bound to follow both the letter and spirit of the opinion and mandate. *Id.* The trial court should look beyond the words of reversal and look to the effect of the opinion in proceeding upon remand. *Glover v. Woodhaven Homes, Inc.*, 346 Ark. 397, 57 S.W.3d 211 (2001) (quoting *Kneeland v. Am. Loan & Trust Co.*, 138 U.S. 509 (1891)).

Kight asserts that the trial court did not follow the remand's specific instructions. This court stated in its opinion, "We reverse and remand this case with instructions to the trial court to continue reunification services." *Kight I, supra.* However, ADHS took the position that the no-reunification order was still in effect because this court only reversed the termination order. Kight argues that it is clear from the record that ADHS never intended to offer meaningful reunification services. We must agree with Kight. When the trial court inquired as to ADHS's plan for the case at the November 23, 2004 review hearing, ADHS stated that it anticipated filing another termination petition, and it did so the same day. This occurred only two months after our supreme court denied ADHS's petition for review and only six days after counsel had been appointed to Kight in the present case.

Moreover, the trial court specifically forbade visitation between Kight and her children and never conducted a separate hearing to determine whether reunification should have still been the goal of the case. Instead, it held a termination hearing on February 3, 2005. The court never required ADHS to continue reunification services, and, in fact, ordered that Kight not visit her children.

ADHS again contends on appeal that it did provide reunification services to Kight. This argument contradicts its assertions to the trial court at the November 2004 hearing. At the February 2005 termination hearing, however, ADHS took the position that reunification services had been offered from the time the case came back from the supreme court, which was September 24, 2004. ADHS characterized the home visits, drug test, ten attempted drug tests, and transportation to the two hearings as reunification services.

ADHS clearly did not continue reunification services, despite its argument to the contrary. This court found in *Kight I, supra*, that Kight was committed to remaining clean and sober and that she was not given a reasonable time to demonstrate that the children could safely be returned to her home.

Nevertheless, it must be noted that Kight does not challenge the sufficiency of the evidence to terminate her parental rights or the finding that it was in her children's best interests to terminate her rights. She only argues that the trial court erred by not following this court's mandate and that the trial court's decision violated her due-process rights. The children in this case have now

been out of the home since January 8, 2003, which means that they have been out of the home for approximately three years, and L.M. has been out of the home since she was born. Although the delay in this case is primarily attributable to ADHS and the trial court in erroneously terminating Kight's rights in the first place, from the children's perspective, they clearly cannot now be returned to the home in a reasonable amount of time. *See* Ark. Code Ann. § 9-27-341(a)(3) (Supp. 2003). Moreover, it is significant that the problem that caused the removal of Kight's children involved her drug usage both prior to and during the pendency of the earlier proceedings. Kight had tested positive for cocaine and THC, and at the time she gave birth to L.M. in January 2003, both she and L.M. testified positive for cocaine. Subsequent to remand of this case, although she denied any drug use, Kight tested positive for THC when tested at the time of her first review hearing after remand, and she refused all subsequent drug tests. The trial court additionally found Kight not credible after she lied under oath about the circumstances of her ankle injury.

We remanded this case with the specific instruction to continue reunification services. It is very clear that ADHS did not follow the spirit or letter of this court's opinion or its mandate in offering what it now deems the "reunification services" of drug tests, two rides to hearings, and investigatory home visits. Kight was employed full-time and had her own home that she had furnished at the time of the termination hearing, so it is unclear what additional services she would have been seeking, other than visitation with the children. However, we cannot say that, under the evidence presented at the termination hearing, it was reversible error to terminate Kight's rights without ordering further services to her at that time, despite the outrageous and contemptuous conduct of ADHS in this case.

Kight also argues that the trial court's decision violated the due-process rights provided by the Fourteenth Amendment of the United States Constitution by (1) denying her a meaningful opportunity to be heard on the issue of the mandate's requirement of continued reunification services and (2) requiring her to observe a standard of conduct during the pendency of her appeal that is without precedent or statutory authority. ADHS argues that this argument is not preserved, because Kight failed to raise it at the trial level. Kight's attorney, however, did ask the trial court to strike all testimony in the record regarding Kight's behavior from July 15, 2003, the day her rights were first terminated, until

November 23, 2004, the date of the first review hearing after remand, because Kight had no notice that she was to comply with any code of conduct during this period. Kight's attorney argued that this violated her due-process rights. The trial court overruled Kight's motion to strike the record.

Kight argues also that no meaningful hearing was provided to consider the issue of reunification services. In *Mayberry v. Flowers*, 347 Ark. 476, 65 S.W.3d 418 (2002), the supreme court held that due process requires, at a minimum, notice reasonably calculated to afford a natural parent the opportunity to be heard prior to parental rights being terminated. Here, Kight does not suggest that she did not have notice of the hearing; she only argues that she did not have an opportunity to be heard regarding the continuation of reunification services. At the termination hearing, however, Kight was given the opportunity to voice her objection to the fact that the trial court failed to order a continuation of reunification services and that those services were not provided to her. Moreover, Kight cites no convincing authority for her argument that she was denied due process because there was no separate hearing held specifically to address the fact that the trial court did not order the continuation of reunification services as mandated by this court.

Kight further asserts that the trial court applied a standard of conduct to her without giving her any notice of the standard. Kight's parental rights were suspended from July 15, 2003, when the first termination order was entered, until this court reversed the termination order in June 2004. Kight argues that even though she possessed no parental rights during this time, the trial court gave much weight to her conduct during this period. It is important to note, however, that Kight was aware that her case was in the appeal process. There is no evidence that the trial court imposed a particular standard of conduct on Kight. Kight's employment history and stability and her ability to maintain stable housing were proper factors for the trial court to consider in the termination hearing. Kight was given the opportunity to be heard at this hearing. We therefore cannot say that the trial court deprived Kight of her parental rights without due process.

In sum, these children have now been out of Kight's care and custody and with a foster family for three years. L.M. has been

with the foster family since she was released from the hospital after her birth. Neither child has seen Kight in over two years. The supreme court recently noted in *Linker-Flores v. DHS*, 364 Ark. 224, 217 S.W.3d 107 (2005), involving a case that had gone on for over four years:

> Such a delay goes against the clear legislative intent of the termination-of-parental-rights statute, which specifically states:
>
> > The intent of this section is to provide permanency in a juvenile's life in all instances where the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective. Ark. Code Ann. § 9-27-341(a)(3).

Unfortunately, the delay in this case was in large measure caused by ADHS. Nevertheless, under the circumstances and evidence presented at the termination hearing, we cannot say the trial court erred in terminating Kight's parental rights based on either of the arguments she has raised in this appeal.

Affirmed.

GLOVER, J., agrees.

PITTMAN, C.J., concurs.

JOHN MAUZY PITTMAN, Chief Judge, concurring. I agree that the trial court's decision should be affirmed. However, I cannot agree with the majority's statement that the termination of parental rights must be affirmed because the trial court "erroneously [terminated] Kight's rights in the first place" and therefore caused irremediable delay. It is true that matters decided on our prior appeal are the law of the case and govern our actions on the present appeal to the extent that we would be bound by them even if we were now inclined to say that we were wrong in those decisions. *Lunsford v. Rich Mountain Electric Coop*, 38 Ark. App. 188, 832 S.W.2d 291 (1992). However, if blame is to be placed on a court for the delay caused in this case, we should place a good deal of it on ourselves. Our prior opinion in this case was largely based on *Trout v. Arkansas Department*

of Human Services, 84 Ark. App. 446, 146 S.W.3d 895 (2004), where we held that the trial court erred by disregarding appellant's eleventh-hour progress made toward reunification. That case, however, was reversed by the Arkansas Supreme Court in an opinion that expressly held that the trial court was not bound to attach significant weight to such tardy improvements, and which restated the fundamental principle that we give great deference to the superior position of the trial court, through observation and extended experience with the parties, to determine whether last-minute efforts are sincere, or instead merely a ruse to prevent imminent termination of parental rights. *Trout v. Arkansas Department of Human Services*, 359 Ark. 283, 197 S.W.3d 486 (2004).

In our prior opinion in this case, we erred by giving more weight to our hopes regarding appellant's sincerity than we did to the trial judge's experience and ability to see, hear, and judge first-hand whether or not her efforts to maintain sobriety were made in good faith. Insofar as we ourselves erred in our prior opinion by eschewing the principles enunciated by the supreme court in *Trout,* I believe that we bear a measure of responsibility for the resulting delay.

Nor do I agree with the majority's statement that the conduct of the Arkansas Department of Human Services in this case following remand was "outrageous and contemptuous." It is true that the ADHS attorneys had no reasonable basis for arguing that our mandate did not require ADHS to provide additional reunification services. Nevertheless, the fact remains that ADHS agents in the field did attempt to provide reunification services by re-instituting drug testing of appellant as a prerequisite to visitation. Insofar as the removal in this case was occasioned by appellant's inability to provide proper parenting because of her illegal drug use, the resumption of drug tests was the essential first step on the road to reunification. Appellant, by her refusal to submit to these tests, precluded any meaningful attempts at reunification. I submit that appellant, too, has responsibilities as well as rights, and that her outright refusal to cooperate with the additional reunification efforts ordered by this court in our prior opinion was far and away the most "outrageous and contemptuous" behavior exhibited by any of the parties to this case.

I concur in the result reached by the majority.

SUPPLEMENTAL CONCURRING OPINION ON DENIAL OF REHEARING AUGUST 30, 2006

JOHN MAUZY PITTMAN, Chief Judge, concurring. I agree that the decision to affirm this case was correct, but I do so for the reasons set out in my concurrence to the opinion delivered on March 8, 2006 (*Kight II*), and not for the reasons stated by the majority. It is true that the ADHS attorneys had no reasonable basis for arguing that our mandate did not require ADHS to provide additional reunification services. Nevertheless, the fact remains that ADHS agents in the field did attempt to provide reunification services, and were stymied in their attempts to do so by appellant's own refusal to cooperate. These new circumstances resulted in a second petition to terminate appellant's parental rights based on events that occurred subsequent to the prior termination hearing. Given that the termination order under review was based on subsequent events, it was not barred by our initial mandate.

The initial removal of the children in this case was occasioned by appellant's inability to provide proper parenting because of her illegal drug use. This court's original opinion held, erroneously,[1] that appellant had corrected her drug-abuse issues; that a

[1] This is not to suggest that this court's initial order is not binding because it was erroneous. It is axiomatic that a decision of an appellate court establishes the law of the case for trial upon remand and for the appellate court itself upon subsequent review; on the second appeal, the decision of the first appeal becomes the law of the case and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). This court's decision in the first appeal ordered that appellant be provided with services designed to remedy her inadequacies and permit her children to be returned to her custody. Implementation of this order, however, was made impossible by appellant's subsequent refusal of services. For over one hundred and fifty years, it has been the law in the State of Arkansas that the doctrine of law of the case does not bind the inferior court with respect to matters arising subsequent to the decision of the appellate court. *Cunningham v. Ashley*, 13 Ark. 653 (1853). One hundred years ago, the Arkansas Supreme Court held that an appellate court's judgment is not controlling on retrial where the evidence on the issue presented is materially different. *Hartford Fire Insurance Co. v. Enoch*, 79 Ark. 475, 96 S.W. 393 (1906). This rule was repeated in 1923 in *Carter v. Bates*, 158 Ark. 640, 249 S.W. 355 (1923), and again in 1986 in *Potter v. Easley*, 288 Ark. 133, 703 S.W.2d 442 (1986).

Without a doubt, the trial court was required by our mandate in *Kight I* to provide reunification services. However, it is a familiar maxim of the law that *lex non cogit ad*

relapse into drug use while services were being offered was insufficient to terminate parental rights; and that it was speculative to believe appellant would continue a relationship with her cocaine supplier, Raymond Morgan. *See Kight v. Arkansas Department of Human Services*, 87 Ark. App. 230, 189 S.W.3d 498 (2004) (*Kight I*). As it happened, after this court's erroneous holding it came to pass that appellant did in fact resume her relationship with Raymond Morgan, who was seen at her home on two occasions in the early morning hours.

Clearly, whether the trial court expressly ordered it or not, appellant's case *was* reopened by ADHS after this court's mandate issued. Even before our mandate issued, ADHS began attempting to locate appellant in July 2004 as soon as it became aware of our decision in *Kight I*. At a review hearing on August 31, 2004, ADHS advised the trial court that, although appellant was aware of the reversal and had been in contact with her attorney, she could not be located and had not contacted ADHS. Appellant finally contacted her caseworker on October 20, 2004. The Department was ready and willing to resume visitation between the appellant and the child. However, because drug use had been the major cause of the termination of appellant's parental rights, drug testing was a prerequisite to visitation. At a meeting arranged by her caseworker shortly thereafter, appellant was informed that drug testing services would be resumed. This offer was angrily rejected by appellant, who refused to take any drug test given by ADHS, stating that such tests were a nuisance that "interrupt[ed] her plans." Although appellant had not seen her children for approximately eighteen months at the time of the meeting, appellant did not mention or inquire about them at the meeting. Appellant was offered, and refused, drug tests on November 3, 6, 9, 17, and 21. Appellant attended a staffing meeting conducted by ADHS on November 17.

---

impossibilia, and appellant's refusal to accept those services made it impossible for the trial court to comply with our mandate. This refusal constituted a change in the circumstances presented in *Kight I*, where appellant presented herself as a recovered drug-abuser who had been guilty only of minor backsliding and who earnestly desired more time to comply with the case plan. To characterize appellant's conduct as the same allegations concerning appellant's drug abuse that were the subject of *Kight I* is to refuse to acknowledge the elementary difference between a mother asking for more time to recover from drug abuse, as opposed to a mother who, on remand, utterly refuses to cooperate in that recovery.

A family services worker with the Division of Child and Family Services testified that appellant was intoxicated at that meeting, exhibiting slurred speech and a smell of alcohol on her breath and her clothing. Although she was, as a result, directed to report to the police department to take a breathalyser test, appellant failed to do so. Appellant refused all voluntary drug testing, but was required to submit to a drug test by the trial judge when she appeared at a hearing on November 23, 2004. Although appellant flatly denied any drug use when she testified at the hearing, the results of that drug test were positive. Home visits, necessary for the resumption of visitation with the children, were also offered by ADHS, but appellant at times refused to come to the door of her home even though she could be heard inside. Appellant did not respond to notes left on her door or to messages left on her cell phone.

Appellant, by her refusal to submit to drug testing or cooperate in other necessary services, precluded any meaningful attempts at reunification. The law does not require a vain and useless act, *Noble v. State*, 326 Ark. 462, 932 S.W.2d 752 (1996), and, as I noted in my concurrence in *Kight II*, I believe appellant's refusal to cooperate with the reunification services ordered by our mandate made reunification impossible and supported the trial court's grant of the second petition to terminate her parental rights.

SUPPLEMENTAL DISSENTING OPINION ON DENIAL OF REHEARING AUGUST 30, 2006

SAM BIRD, Judge, dissenting. I respectfully disagree with the majority's decision to deny appellant's petition for rehearing. A review of the pertinent history of this case is necessary for a full understanding of this dissent. On July 31, 2003, the Circuit Court of Faulkner County entered orders terminating the parental rights of Rolinda Kight to her two children. Kight appealed those orders to this court. In *Kight v. Arkansas Department of Human Services*, 87 Ark. App. 230, 189 S.W.3d 498 (2004) (*Kight I*), after concluding that we were "left with a firm conviction that a mistake has been made" by the trial court in terminating Kight's parental rights, we reversed the trial court

On November 23, 2004, the trial court convened a review hearing to consider the status of the case. At that hearing, DHS argued that our reversal of the July 31, 2003, orders terminating Kight's parental rights had no effect on an earlier order of the court that had suspended reunification services. DHS's argument is reflected in the following colloquy between the court, DHS's attorney (Finkenbinder), the attorney ad litem (Kendrick), and Kight's attorney (Heimbaugh):

> THE COURT: What is your position, Mr. Finkenbinder, about reunification services? What are you asking for?
>
> MR. FINKENBINDER: Your Honor, the last order of the court suspended reunification — suspended reunification services. The order of the Court of Appeals only reversed the termination order. What that means is, and the Department's view is, that all orders prior to the termination order remain in effect.
>
> THE COURT: You're going to have to break that down into simple language. Which means what?
>
> MR. FINKENBINDER: Which means that all the orders prior to the termination remain in effect. The case didn't go away. All the Court of Appeals did was say that the termination is reversed, so all the previous orders about drug testing and things of that nature remain in effect. The Court had already ordered no reunification.
>
> Ms. KENDRICK: Your Honor, the no-reunification order was not appealed, at all, or even addressed, so I would assume that it is still in effect. I mean, with her given the chance, you know, she can do what she can do now and she has a new attorney. But until — I don't know it doesn't make a lot of sense.

THE COURT: I tell you what, I'm going to give Ms. Heimbaugh a chance to look into this. All of those briefs are in my office and you can have them all.

MS. HEIMBAUGH: All right. Because I need to see why the TPR was overturned. If it was overturned for something like no reunification services, then that argument's moot.

THE COURT: Well, let's put this out for three or four weeks and let Ms. Heimbaugh have an opportunity to go over all the documents and I'll give her all the briefs that I have in my office, as well as the mandate from the Court of Appeals.

The court continued the hearing until January 18, 2005, and announced that the hearing on that date would "be a hearing on whether or not there would be reunification." Before the hearing was adjourned, DHS advised the court that it would be filing a petition for no-reunification services or another petition for termination of parental rights, or both. The court announced that there would be no visitation between Kight and her children until after the January 18 hearing "because I think, depending on the outcome of that hearing, we'll either start fresh or we'll not start fresh. . . ." Six days later, on November 29, 2004, DHS filed another petition to terminate Kight's parental rights.

On February 3, 2005,[1] the court again convened to consider this matter. DHS announced that the purpose of the hearing was for the court to hear evidence on DHS's November 29, 2004, petition to terminate Kight's parental rights, while Kight argued that DHS's new termination petition should not be considered because reunification services had not been resumed as directed by this court's mandate, and that the termination petition should be dismissed. The court denied Kight's motion to dismiss the termination petition filed on November 29, 2004, and proceeded to hear evidence on it.

[1] The January 18, 2005, hearing was continued at Kight's request because her mother was having surgery.

By orders signed February 10 and entered February 14, 2005, the Faulkner County Circuit Court granted DHS's November 29, 2004, petition, again ordering that Kight's parental rights to her two children be terminated. Kight appealed from those orders, arguing principally that the trial court had not followed the mandate of this court's June 30, 2004, opinion that reversed the trial court's termination of Kight's parental rights and directed that reunification services be continued. In *Kight v. Arkansas Department of Human Services*, 94 Ark. App. 400, 231 S.W.3d 103 (2006) (*Kight II*), a three-judge panel of this court affirmed the trial court's second termination of Kight's parental rights. By a vote of four to two, this court has now decided to deny Kight's petition for rehearing. It is our denial of rehearing from which I dissent.

The reason for my dissent is quite simple: On June 30, 2004, we held that the trial court's decision to terminate Kight's parental rights to her two children was "clearly erroneous," and we remanded the case with specific instructions to the trial court to "continue reunification services." Instead of doing what we unambiguously directed it to do, the trial court held a hearing to examine the meaning of our decision. At that hearing, DHS's attorney made the absurd argument that our June 30, 2004, reversal of the termination of Kight's parental rights and our express direction to "continue reunification services" *did not* have the effect of reversing a pre-termination order of the trial court that had suspended reunification services to Kight.[2] Instead of ordering that reunification services be resumed pursuant to our mandate, the trial court decided that it should hold a hearing to decide "whether or not there should be reunification." Then, on the date scheduled for the "reunification" hearing, the court, instead of considering the issue of reunification services, proceeded to hear evidence, over Kight's objection, on DHS's second parental termination petition filed November 29, 2004. Following that hearing, the trial court again terminated Kight's parental rights to her two children.

The majority of this court acknowledges that the trial court is bound by our decision in *Kight I* as the law of the case.

[2] I have searched the record of both *Kight I* and *Kight II* but do not find an order of the trial court that suspended reunification services by DHS to Kight's children.

Nonetheless, even while expressly recognizing that the trial court declined to order the continuation of reunification services as required by our mandate, the majority has decided to affirm the trial court's second termination of Kight's parental rights.

The majority justifies its decision to disregard the law of the case by pointing out that Kight does not now challenge the sufficiency of the evidence upon which the trial court based its second decision to terminate her parental rights. I disagree that Kight was obligated to challenge the sufficiency of the evidence that resulted in the second termination of her parental rights in order to obtain a reversal of the trial court's decision. In *Wal-Mart Stores, Inc. v. Regions Bank Trust Department*, 356 Ark. 494, 497, 156 S.W.3d 249, 252 (2004), our supreme court, quoting from *Fortenberry v. Frazier*, 5 Ark. 200, 202 (1843), stated:

> The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court, even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated, by the Supreme Court.

Furthermore, in *Dolphin v. Wilson*, 335 Ark. 113, 119, 983 S.W.2d 113, 116 (1998), our supreme court also cited with approval from 5 Am. Jur. 2d § 791 where it is stated that "[a]ny proceedings on remand which are contrary to the directions contained in the mandate from the appellate court may be considered null and void."

Even more troubling is the majority's attempt to rationalize its decision by noting that Kight's children have been out of her home for more than three years and, therefore, "cannot be returned to the home in a reasonable amount of time," even though the majority observes that "the delay in this case is primarily attributable to ADHS and the trial court in erroneously terminating Kight's rights in the first place . . . ." The result of this reasoning by our court is that, simply by virtue of the lapse of time, DHS will ultimately prevail in every case in which the trial court commits error that is reversed on appeal and DHS chooses to ignore our mandate on remand.

Simply put, upon our remand of this case to the trial court with directions to "continue reunification services," the trial court was without jurisdiction to do anything but to order the continuation of services by DHS with the goal of reuniting Kight with her children. The court was not empowered to examine "whether" reunification services should be provided, and clearly the court lacked jurisdiction to consider a new petition by DHS seeking to terminate Kight's parental rights. Under *Dolphin, supra,* any proceedings conducted by the trial court that were contrary to the mandate were null and void. Kight's appeal challenging the trial court's jurisdiction under the doctrine of the law of the case was sufficient to also challenge the validity of the court's orders that terminated her parental rights contrary to this court's June 30, 2004, mandate, without having to also challenge whether there was sufficient evidence to support the trial court's unauthorized action.

With this court's opinion in *Kight II,* coupled with our denial of Kight's petition for rehearing, the trial courts are now at liberty to ignore this court's mandates in parental-termination cases, the rule of the law of the case is dead, and trial courts are free to take whatever action they may deem appropriate, notwithstanding our mandates' specific directives to the contrary.

I would grant the petition for rehearing and again remand this case to the trial court with instructions to comply with the mandate in *Kight I,* pursuant to the law of the case. I am authorized to say that Judge Hart joins in this dissenting opinion.

Tori Romeo BENEDIX *v.* Richard Randall ROMEO

CA 05-418 232 S.W.3d 493

Court of Appeals of Arkansas
Opinion delivered March 15, 2006

Law Office of Odette Woods, PLLC, by: *Odette B. Woods*, for appellant.

Helen Rice Grinder, for appellee.

SAM BIRD, Judge. Appellant, Tori Romeo Benedix, mother and custodian of Bailey Michelle Romeo, her eleven-year-old daughter, appeals the trial court's denial of her motion to move out of state with Bailey. Appellee is Bailey's father, Richard Randall Romeo, from whom appellant was divorced in 1996. On appeal, appellant contends (1) that the trial court erred by relying upon and incorporating into its order the report and findings of the attorney/guardian ad litem, even though they were never introduced into evidence and were not part of the record, and (2) that the trial court erred in finding that appellee overcame the presumption in favor of allowing a custodial parent with primary physical custody to relocate with the child. We reverse and remand.

Appellant and appellee were married in 1989; one child, Bailey, was born of the marriage. Appellant, who resides in Conway, Arkansas, is the custodian of Bailey and is married to Danny Benedix.

On March 3, 2004, appellant filed a motion to move with her daughter to appellant's hometown of Harrah, Oklahoma. In the motion, she stated that her plans were not meant to "in any way interfere with [appellee's] relationship with his daughter." Furthermore, she averred that appellee's visitation would continue, with the parties meeting halfway between Conway and Harrah to accomplish the exchange. Appellee subsequently petitioned the court to appoint an attorney/guardian ad litem to represent Bailey, and on June 21, 2004, the court did so.

At the hearing on the motion to move out of Arkansas, appellant testified that her family and her husband's family were from Harrah, Oklahoma. She said that she had lived in Harrah for twenty-nine years before she married appellee, and that all of Bailey's aunts, uncles, cousins, and grandparents on her side lived in Harrah. She testified that Harrah had "schools accredited with the State" and that it was a small town of "about five thousand" near Oklahoma City. She said that it took four-and-a-half hours to drive from Conway, Arkansas, to Harrah, and that Sallisaw, Oklahoma, was the halfway point. She explained that relocation would allow her to "be able to spend time and be part of our family again" and said that she was not related to anyone in Conway. She said that she came to Conway when she married appellee in 1989 and that appellee's parents were in Conway.

Appellant opined that Bailey would benefit by relocating to Oklahoma because she would be able to spend time with extended family. She said that she wanted to see Bailey grow up with her cousins and be able to bond with them. She also said that she had "hoped to move home for years" and that there were recent events in her family suggesting that she needed to move home. She acknowledged that appellee had played an active role in Bailey's life and she testified that her desire to move was not an attempt to thwart appellee's visitation with Bailey. She said that she would comply with "whatever visitation schedule [was] promulgated by the Court" to allow Bailey to have time with appellee and his family in Conway.

Appellant explained that, pursuant to the divorce decree, appellee had visitation with Bailey every other weekend and every Wednesday. She said that appellee took Bailey to school on Thursday mornings and that major holidays were divided. According to the appellant, appellee received visitation for seven weeks during the summer months — from the time school was out until it started again. Appellant said that she was willing to continue the seven weeks of summer visitation, in addition to every other weekend and half of the major holidays. She proposed Sallisaw as the exchange point. She said that she was aware that appellee's father was ill with cancer and she recognized that this could call for additional time to be spent by Bailey with appellee's family.

On cross-examination, appellant said that appellee coached Bailey in extra-curricular activities and that he had done so for six years. According to appellant, this required two or three days a week of contact between appellee and Bailey. She said that appellee attended Bailey's softball games and admitted that Bailey was "very close" to her paternal grandparents. She said that she had not been aware that appellee's father was sick at the time she had filed the motion to move out of state.

Appellant also testified that, before she decided to move, she assessed the schools in Harrah to see how they compared to those in Conway. She conceded that she did not know that Harrah's test scores were lower on a national average than those of schools in Conway. After introducing evidence of statistics showing that test scores in the Conway School District were higher than those in Harrah, appellee's counsel questioned appellant about the difference. Appellant responded that the differences in test results at the

two school districts did not concern her, and she thought that with a smaller school district Bailey would have "more advantages" and "more personalized schooling."

Appellant said that Bailey had two older brothers in Conway and that "she is bonded to them and has had contact with them her whole life." She also said that Bailey did not have contact with her paternal grandparents on a daily basis, but she (Bailey) saw them every other weekend, and Bailey's grandfather picked her up from school sometimes on Wednesdays.

Appellant further testified that she was unemployed, but she felt that it would be "easy" to find a job in Oklahoma. She said that two hair salons had offered her work. She also said that, during visits to Oklahoma, she stayed overnight with her husband's family but also visited her family. After appellee introduced evidence purporting to show that appellant's sister Katherine was a convicted felon, appellant said that she did not know where Katherine was and had not had contact with her for several months. She admitted that her sister had drug problems, and said that she would classify her sister as an "addict," but claimed not to know that her sister was a felon. Appellant said that her sister had moved back in with their mother about two years ago and that she lived there "on and off." She explained that her sister was allowed to stay at their mother's house provided that she was in by ten o'clock, that she held a steady job, and that she was clean from drugs and alcohol. She said that her sister had not followed the rules and was no longer living with their mother. She stated that their mother had custody of Katherine's daughter, Kristyn, and that she wanted to help take care of Kristyn because her mother worked "full time."

Appellant said that she did not anticipate having to work evening hours in Harrah and that she thought she would be able to "pick and choose" what she would do. She said that her husband had two "very good" job offers that would not require her to work as much so she could stay home "much more." She stated that she would work "part time" in Oklahoma. She also said that she thought her two older sons, who lived in the Conway area, would follow her to Oklahoma, but she was not sure of this.

Appellee also testified. He said that he was an agriculture teacher at Conway High School and that he had been there for nineteen years. He also said that he was the "FFA" advisor and that Bailey had participated with him in conventions and leadership camps, and that she went to contests and showed animals at the fair.

Appellee said that he had coached Bailey in almost everything she had done. He said that he coached her in tee ball when she was five years old, and that he had been coaching her ever since. According to appellee, these activities would occur two or three days a week. He said that, when Bailey was in grade school, he would have lunch with her. Appellee also said that Bailey went duck hunting with him, that he watched Bailey dance, and that he had been to Bailey's orchestra activities.

Appellee stated that his parents picked Bailey up from school almost every Wednesday and took her to get something to eat, helped her with homework, and so forth. He said that Bailey was very close to his parents. He also testified that his father had inoperable bladder cancer and heart problems and that Bailey was the only grandchild in the family.

Appellee opined that, if Bailey moved, she would not have the same opportunities to participate in the activities that she enjoyed in Conway. He said that Harrah did not have a school-based orchestra or a middle school volleyball team. He also said that "the every other weekend type deal" was "just not the same." He conceded that Bailey could get into an FFA chapter in Harrah, but explained that most activities took place during the school days or school weeks and that he could not necessarily participate. He said that he thought it would be "very detrimental" if Bailey was not in Conway and able to share these activities with him. He also said that he helped Bailey "to be a good person" and that he provided "stability" for her.

Appellee testified that if Bailey moved, weekend visits would involve about ten hours of travel time for Bailey, to and from Harrah. He said that this would mean that "a lot" of visitation time with Bailey would be "on the road." He expressed concern about the education that Bailey would receive in Harrah, stating that the Harrah School District was below poverty level and that the Conway School District was better as far as test results. He said that his new wife taught at Bob Courtway Middle School in Conway and that she "keeps an eye" on Bailey. He also said that he was concerned about Bailey's aunt being a convicted felon. In appellee's opinion, Bailey and her cousin Kristyn did not get along. Appellee also testified that Bailey's other cousins in Harrah were a few years older than Bailey. Appellee opined that the move was not in Bailey's best interest.

Appellee testified that, according to his internet research, approximately thirty-three percent of Harrah high school gradu-

ates went on to a four-year college, while almost double that number of graduates from Conway High School went on to a four-year college. Appellee also testified that he was not sure how often Bailey saw her older brothers, but that, to the best of his understanding, Bailey's brothers were not planning to move to Oklahoma. He said that he felt that the move to Oklahoma would disrupt his relationship with Bailey very much.

On cross-examination, appellee said that Bailey's lack of opportunity to participate in activities was a big reason for his objection to the move. He said that the opportunities were "not there" for Bailey to receive a better education in Harrah than in Conway. He also said that the situation with Bailey and Kristyn concerned him, explaining that Bailey seemed "agitated" after the two were together. He opined that the impact of the relocation would be that Bailey would not feel as close to his side of the family anymore, and that she would feel "alienated."

According to the attorney/guardian ad litem, Bailey refused to state any preference about the move. Neither the appellant nor the appellee chose to call Bailey as a witness.

Following the hearing, the trial court engaged in a lengthy recitation of the factors upon which it relied in reaching its decision to deny appellant's motion to relocate. During this recitation, the court made the following comments:

> Schools became an issue. There are schools in both locations. One may test a little better than the other, but I'm not necessarily a big believer that, just because one school has five thousand people and the other has four hundred, the five thousand is better. . . . Now, that being said, there are certain things obviously, that bigger school districts can offer that smaller ones can't. . . . Obviously, there are things that [Harrah schools] can't do that . . . a middle school here can do, or a high school can do here, because of population, and taxes, and all the other things we know about. That being said, the school here seems to be a little bit better — marginally better, as far as testing, and marginally better for some things that are offered to her that may or may not be offered in Harrah.
>
> . . . .
>
> I think, in the end . . . Bailey is better suited to stay here, at this point in time. I'm not going to allow . . . the motion to relocate. I thinks she's in a stable situation in the school here. She has family here that

> she has [a] relationship with. All the other is prospective; she has something here that . . . by all testimony, has benefitted her. I think, to pull her out of a stable, well-adjusted situation and put her in another situation to be with some folks she may or may not know . . . some of the testimony was [that appellant] has not even had any contact with her own sister since February, didn't even know where she was. Her mom works full time and is not an invalid, takes care of housework, yard work, and those types of things, and is trying to raise another child, another — her grandchild; has a full-time job there.
>
> I just think all things being equal, I don't think they're all equal. I think it's more equal here. I just — I just can't say they're equal. I think we know what we have here; we don't know what they have there. . . .
>
> . . . .
>
> I — I just — I keep going back to Bailey. And, we didn't talk or hear from her, but I have an ad litem's report. I do have both parents here. I just go back to her. She's in volleyball. She could be in volleyball there, but she's made a team here. She has relationships with schoolmates, with family. She's in an orchestra. She may or may not be able to be in a band there. She's in things here that I think would be detrimental if she's pulled out. . . .

On December 17, 2004, the court entered a written order echoing some of its oral recitations, denying appellant's motion to move out of state, and stating in part as follows:

> 1. That the Court carefully reviewed all exhibits, listened carefully and weighed all testimony, assessed credibility of witnesses, considered Guardian Ad Litem's report and findings, and counsels['] arguments.
>
> 2. That the Court considered the *Hollandsworth v.* [*Knyzewski*] decision, and weighed all factors set forth therein recognizing the presumption in favor of the custodial parent being allowed to move and that the non-custodial parent has the burden of rebutting that presumption and finds that the Defendant met that burden.
>
> 3. That the Court finds that all action[s] affect and impact minor children; therefore, weighing all considerations, the Court finds that the move would not be in the best interest of the minor child for the following reasons:

a. The father of the child is and has been since birth of the child very actively involved in her rearing and has had extensive visitation with the child since the divorce proceedings such that it would be impossible based upon the distance for the minor child to enjoy a meaningful visitation schedule with her father;

b. The child is healthy, stable and well adjusted in Arkansas and to pull [her] out of a stable, well adjusted situation to place [sic] in the unknown, recognizing that the Plaintiff testified that she would be living with her mom, who works full time and is raising another grandchild would not be in the child's best interest;[1]

c. The child has extended family in Arkansas that are actively involved in her rearing, to which she is bonded;

d. The school that she would be attending in Arkansas is a better school academically [than] the one she would be attending in Oklahoma based upon testing records[,] and offers a broader range of scholastic events with the child just having made the volleyball team in Arkansas, having worked very hard to obtain and being very proud of making the team; and

e. The Court finds that the Guardian Ad Litem's findings and report should be and are hereby incorporated within this Order as if set out word for word in that the Court finds that the Report was well thought out and grounded in fact.

4. That the Court denies the Defendant's [sic] Motion to Move Out-Of-State with the minor child in that the Court finds that the Plaintiff [sic] met his burden of proving that the move would not be in the best interest of the minor child.

Appellant subsequently filed a motion to reconsider, which was denied.

On appeal, appellant first contends that the trial court committed reversible error by relying upon and incorporating into its order the report of the attorney/guardian ad litem because the

[1] From our review of the record, we are unable to find any testimony that appellant would have lived with her mother had she been allowed to move to Oklahoma.

report was never introduced into evidence and is not part of the record. In view of our disposition of this case under appellant's second point, we need not address this point.

For her second point, appellant contends that the trial court erred in finding that appellee overcame the presumption in favor of allowing a custodial parent with primary physical custody to relocate with the child. She offers two arguments to support this point: first, that the trial court erroneously shifted the burden of proof and the burden of persuasion to appellant by requiring her to prove that the move was a real advantage; and second, that based on the five factors set forth in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), the evidence presented was insufficient to sustain the court's finding that it was in Bailey's best interest to deny the motion to move out of state.

In *Hollandsworth*, 353 Ark. at 475, 109 S.W.3d at 656-57 (internal citations omitted), our supreme court set forth the following standard of review in equity cases:

> This court has traditionally reviewed matters that sounded in equity *de novo* on the record with respect to fact questions and legal questions. We have stated repeatedly that we would not reverse a finding by a trial court in an equity case unless it was clearly erroneous. We have further stated that a finding of fact by a trial court sitting in an equity case is clearly erroneous when, despite supporting evidence in the record, the appellate court viewing all of the evidence is left with a definite and firm conviction that a mistake has been committed. These common law principles continue to pertain after the adoption of Amendment 80 to the Arkansas Constitution, which became effective July 1, 2001.

The court in *Hollandsworth* pronounced a presumption in favor of relocation for custodial parents with primary custody and stated that the custodial parent no longer has the obligation to prove a real advantage to herself or himself and to the children in relocating. *See Hollandsworth, supra.* The court further held that the noncustodial parent should have the burden to rebut the relocation presumption. *Id.* In addition, the court stated as follows:

> The polestar in making a relocation determination is the best interest of the child, and the court should take into consideration the following matters: (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in

> which the custodial parent and children will relocate; (3) visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; and, (5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.

Id. at 485, 109 S.W.3d at 663-64.

Appellant asserts that, although the trial court's order acknowledged a presumption in her favor, the rationale expressed by the trial court in support of its conclusion demonstrates that the court based its ruling on the belief that appellant failed to prove that the move was advantageous to the child. Specifically, appellant refers to the following statement by the court, which was contained in the order:

> The child is healthy, stable and well adjusted in Arkansas and to pull [her] out of a stable, well adjusted situation to place [sic] in the unknown, recognizing that the Plaintiff [appellant] testified that she would be living with her mom, who works full time and is raising another grandchild would not be in the child's best interest[.]

We agree with appellant that, although the trial court's order acknowledged the *Hollandsworth* decision and its presumption in favor of relocation by custodial parents, the court essentially placed the burden on appellant to prove that the move constituted an advantage to the child. The bases of the trial court's decision to deny relocation, as reflected in its oral recitations and its written order, are threefold: (1) the distance from Conway to Harrah renders it impossible for appellee to enjoy meaningful visitation with Bailey; (2) Bailey is actively involved with her father and members of her extended family in Conway, whereas the nature of her relationship with appellant's family in Harrah is uncertain; and (3) the Conway school that Bailey attends represents a known element, whereas the Harrah, Oklahoma, school is an unknown element that "may or may not" offer Bailey the same opportunities that she enjoys in Conway.

The first of these reasons is not supported by the evidence. Appellant and appellee agree that the driving time from Conway to Harrah is approximately four and one-half hours. While this would necessarily eliminate the Wednesday evening visitation presently enjoyed by appellee, as the supreme court

noted in *Hollandsworth, supra*, the "advantages of the move should not be sacrificed solely to maintain the 'same' visitation schedule where a reasonable alternative visitation schedule is available." *Id.* at 481-82, 109 S.W.3d at 661 (quoting *Cooper v. Cooper*, 491 A.2d 606 (N.J. 1984)). We do not consider that the driving distance involved in this case is so formidable as to preclude the court from promulgating a reasonable alternative visitation schedule that would accommodate the interests of the parties and assure that appellee and his family enjoy meaningful visitation with Bailey.

The trial court's second reason for denying relocation is that appellant would be moving Bailey from a healthy, stable environment to which she was adjusted to an environment that is unknown, noting specifically that appellant would be living with her mother and that it would not be in Bailey's interest to be living in the home of appellant's mother who works full time and is raising another grandchild. However, from our review of the record, we are unable to find any testimony that appellant would be living with her mother if allowed to move to Oklahoma. Furthermore, under *Hollandsworth, supra*, it is clearly not appellant's burden in this case to show that the move would provide an equally or more stable situation for the child. *See also Blivin v. Weber*, 354 Ark. 483, 126 S.W.3d 351 (2003) (reversing trial court's denial of appellant's relocation petition where the trial court found that the children were better off remaining in Arkansas because of stability and the added benefit of their relationship with their paternal grandparents).

The same can be said about the trial court's third reason for denying appellant's relocation request. There, the court noted the existence of some disparity between the Conway and Harrah school districts' standardized test scores (*i.e.*, that Conway's test scores were "marginally better"), recognized differences between scholastic opportunities offered at the school districts, and discussed the fact that Bailey had made the volleyball team in Conway. However, under *Hollandsworth, supra*, it was not appellant's obligation to prove that Harrah's schools were equal to or better than the schools in Conway. We do not believe that the supreme court's second factor in *Hollandsworth* (*i.e.*, that in making the relocation decision, the trial court should consider the educational, health, and leisure opportunities available in the location to which the custodial parent and children will relocate) constitutes a directive that any "marginal" differences between the quality of the sending and receiving schools shall constitute a basis for denial

of a custodial parent's relocation request in the absence of evidence that the difference is so significant as to cause the court to conclude that attendance at the new school will be detrimental to the interests of the child. Here, there is no evidence of any likelihood that Bailey, if allowed to attend school in Harrah, would not be among the students who would score high on standardized tests, graduate from high school, and attend a four-year college. Nor is there any evidence from which the court could have concluded that Bailey would be detrimentally affected by any reduced level of scholastic or extra-curricular opportunities. In its recitation, the court stated that such opportunities "may or may not be offered in Harrah," suggesting that the court did not know whether or not Harrah afforded such opportunities.

Because the trial court's second and third reasons for denying relocation placed the burden on appellant to show that the move to Oklahoma would be advantageous, which is clearly contrary to the holding in *Hollandsworth* (*i.e.*, that the custodial parent need not prove a real advantage to herself and the children in relocating and that the burden is on the non-custodial parent to rebut the relocation presumption) we hold that the trial court clearly erred in reaching its decision.

We recognize that issues relating to appellee's visitation schedule with Bailey and transportation arrangements must be addressed as a result of this decision. Therefore, we reverse and remand this case to the trial court for further proceedings relating to visitation issues, and for the entry of an appropriate order that is consistent with this opinion.

Reversed and remanded.

HART and NEAL, JJ., agree.

Earnest Dale LOHMAN *v.* SSI, INC.
& Villanova Insurance Company

CA 05-1044 232 S.W.3d 487

Court of Appeals of Arkansas
Opinion delivered March 15, 2006

Walker, Shock, Cox & Harp, PLLC, by: *Eddie H. Walker, Jr.*, for appellant.

Huckabay, Munson, Rowlett & Moore, P.A., by: *Carol Lockard Worley* and *Melissa Ross*, for appellees.

SAM BIRD, Judge. This workers' compensation claim involves a claim for permanent partial disability benefits in excess of permanent physical impairment. Appellant, Earnest Dale Lohman, suffered multiple injuries in a job-related accident on April 16, 2001, when he was working for appellee SSI, Inc., and fell twenty feet from a roof to the ground. The next day he underwent surgery consisting of an anterior cervical fusion with internal and external fixation, and several weeks later a posterior fusion with internal

fixation was performed on the same area. Lohman continued to see other doctors and to receive prescriptive pain medication after his surgeon released him from care and after a permanent physical impairment rating of fifteen percent was accepted by SSI and appellee Villanova Insurance Company. He also underwent a social-security evaluation and several rehabilitation evaluations by specialists hired by appellees.

At a July 12, 2004, hearing before an administrative law judge, the parties stipulated that Lohman had suffered compensable injuries on April 16, 2001; that appellees had accepted and were paying permanent partial disability benefits based upon a fifteen-percent rating; and that appellees had refused a request of May 14, 2003, to provide Lohman with a psychological evaluation and/or treatment. The only issue before the law judge was the extent of Lohman's permanent disability benefits. Lohman contended that he was entitled to permanent disability greatly in excess of his fifteen-percent impairment rating, while appellees contended that he was barred from benefits beyond the rating because he did not cooperate with assistance in job placement. The law judge found that Lohman had met his burden of proof to show entitlement to permanent partial disability benefits in the amount of a sixty-percent wage loss disability.

The Workers' Compensation Commission reversed the law judge's opinion in a decision of June 2, 2005, finding that Lohman refused to participate in or cooperate with an offered program of rehabilitation and job-placement assistance. Therefore, the Commission concluded that, under Ark. Code Ann. § 11-9-505(b)(3), Lohman was not entitled to permanent partial disability benefits in excess of his permanent physical impairment. Lohman contends on appeal that no substantial evidence supports the Commission's finding that he refused to participate in or cooperate with an offered program of rehabilitation and job-placement assistance. We agree, and we reverse and remand for a determination of permanent disability benefits.

Arkansas Code Annotated section 11-9-505(e) (Repl. 2002), entitled "Additional compensation — Rehabilitation," states:

> The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of

> rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

The Commission has the authority under this statute to increase a disability rating when the claimant has been assigned an anatomical-impairment rating to the body as a whole, and the Commission can find a claimant permanently disabled based upon wage-loss factors. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.*

The evidence at the hearing included medical reports, vocational rehabilitation reports, Lohman's testimony, and testimony by Terry Owens, a vocational rehabilitation consultant. The Commission evaluated the evidence as follows to support its finding that Lohman refused to participate in or cooperate with an offered program of vocational rehabilitation:

> Based on our review of the record, the Full Commission is unable to determine that the claimant's refusal to participate in vocational rehabilitation had anything to do with mental depression or addiction to prescribed medication. The claimant just chose not to participate. We recognize that a psychologist diagnosed depression in April 2003. The claimant does not contend, however, that he sustained a compensable mental injury or illness pursuant to Ark. Code Ann. § 11-9-113. In May 2003, Dr. Short noted a diagnosis of "opiate withdrawal" and opted not to continue to treat the claimant "because of his continued misuse of pain medicines for his chronic pain situation after his industrial injury." In June 2003, Dr. Shahim stated that the claimant could return to light-duty work for at least three months.
>
> The claimant began seeing another physician, Dr. Howell, in June 2003. Dr. Howell wrote that the claimant's medication regimen had "fairly well controlled his pain .... He reports that since he has been on his current regimen he has increased his physical activities. He goes for walks, etc. He also suffers from chronic anxiety disorder." The evidence demonstrates, therefore, that the claimant was physically able to return to gainful employment at that time.
>
> After the claimant contended that he was entitled to permanent partial disability in excess of his anatomical impairment rating, the

> claimant began consulting with Terry Owens of Rehabilitation Management in October 2003. Ms. Owens arranged (1) physical therapy; (2) adult education; and (3) job placement assistance. By December 2003, Ms. Owens was forced to note that the claimant "has no true intentions of following through with vocational assistance." Ms. Owens' notes do not indicate, nor does any other evidence in the record show, that the claimant was depressed to the point that he could not participate in vocational rehabilitation.

Lohman argues on appeal that appellees' offer of a vocational-rehabilitation program was not a bona fide offer because, despite knowing that he had major depression, they did not provide psychological help to him. Appellees argue that Lohman was barred from receiving any permanent disability benefits because he had no reasonable cause for his refusal of vocational training and the plan provided to him.

The findings of the Commission will be upheld unless there is no substantial evidence to support them. *Ark. Dep't of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Substantial evidence exists only if reasonable minds could have reached the same conclusion without resort to speculation or conjecture. *White Consol. Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001). Conjecture and speculation, even if plausible, cannot take the place of proof. *Glover, supra.* While the appellate court defers to the Commission on issues involving the weight of the evidence and the credibility of the witnesses, the Commission may not disregard testimony, and it is not so insulated as to render appellate review meaningless. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

Lohman asserts that he cooperated with vocational consultant Dale Thomas, and that his (Lohman's) medical condition deteriorated after working with Thomas. Lohman notes information included in Thomas's report of March 28, 2002, that Lohman had started an active job search based on job leads provided by Thomas, had registered with the Employment Security Department, and had been sent on one interview. As evidence that he did not refuse to cooperate with the vocational consultant, Lohman points to Thomas's statement that he was "encouraged by Mr. Lohman's motivation to seek employment."

Lohman testified that he "was doing pretty good" when Thomas was working with him. Lohman stated that "somewhere around in there . . . I got in with [Dr.] Short and I was taking that

OxyContin, it was like . . . a wonder drug." Lohman testified that after three months of taking six a day, he would run out and had withdrawals "so bad that I wanted to go outside where my kids wouldn't find me and put a cap in my head. When I say put a cap in my head, I mean shoot myself."

Dr. Bradley Short, who reviewed Lohman's medical records and performed a physical examination of him on June 6, 2002, reported that Lohman's doctor at the time was unwilling to continue him on OxyContin, which Lohman said was helpful for his pain. Dr. Short wrote:

> [W]e will start him on pain medicines and copies of his prescriptions are in his chart. He does appear to be profoundly depressed. I offered to start him on Prozac 90mg a week. We will see him back after he has his functional capacity evaluation.

On a return visit of July 2, 2002, Dr. Short wrote that Lohman reported increased pain and reported that the Prozac had not really helped. Dr. Short changed the medications at that time. Three weeks later Dr. Short wrote that Lohman had run out of OxyContin after increasing his dosage on his own, that Lohman reported being more functional with the increased dosage, that Dr. Short therefore increased the OxyContin and Roxicodone, and that Lohman was still taking Celexa. Lohman again had run out of his medicines when he returned to Dr. Short on September 10, 2002. Dr. Short talked to him at length about his medicine usage, which Lohman said was effective for his pain. Dr. Short referred Lohman to a psychologist, Dr. Bier, about the matter. There is no record of any visit with Dr. Bier, however, and Dr. Short's reports through the end of the year show that he continued to see Lohman and prescribe his medications.

Neuropsychologist Patricia J. Walz, Ph.D., who evaluated Lohman in April 2003 in connection with his application for social security benefits, opined that Lohman appeared to have put forth a decent effort and that his test results were valid. She noted that he was a thirty-seven-year-old divorcee raising three children (with help from his ex-wife's mother), that his relevant work had been construction, that he said he was not a high school graduate, and that he said he could read most words in the newspaper but was not very good at arithmetic. She wrote that when he was asked about mental health problems, he responded that he "fell into a deep depression. He used to work all the time and couldn't stand the thought that he couldn't do anything." Dr. Walz noted that he had

not received psychiatric hospitalization, nor had he participated in counseling or psychotherapy. Her summary of the testing and evaluation includes the following:

> [He] reports chronic depression with vegetative symptoms including poor concentration, impaired sleep and appetite, and low energy. He also reports feeling despondent and useless. He appears to have an agitated, edgy type of depression in which he worries excessively and doesn't really feel he has much control over his worry. This depression is severe enough to interfere with his ability to function on the job in that it would interfere with his concentration and attention and his irritability could interfere with his relationships with peers, supervisors and the public.
>
> Diagnostic Impression:
>
> Axis I: Major depression, Recurrent, Moderate without Psychosis
> Somatoform Pain Disorder
>
> Axis II: Borderline Intellectual Functioning.

At the hearing before the administrative law judge, appellees stipulated that "they were in fact requested on May 14, 2003, to provide a psychological evaluation and/or psychological treatment pursuant to the recommendation of Dr. Walz and that they did not do so."

Appellees referred Lohman to vocational specialist Terry Owens in September 2003, after Dr. Short had recommended the involvement of a psychologist and Dr. Walz had given the diagnosis of major depression. Owens testified that she met Lohman in October 2003 and had no opportunity to test him, but she interviewed him and read his records. She said that her impression when she first interviewed Lohman was that he wanted to get better and wanted to look for work, and that he worked with people trying to get a job but had fears of not being able to keep a possible job because of his physical abilities.

Owens testified that she sent Lohman a list of jobs she had found through labor-market research. She testified that Lohman went to only the first session of physical therapy that she set up for him pursuant to his request, and that he did not go to a meeting she set up at the Adult Education Center, which helps individuals learn skills to get jobs in their communities. She opined that Lohman eventually would have been capable of sedentary to light work.

Owens testified that she closed her file on Lohman after the insurance company told her that she should not continue services because he had not followed through on opportunities he had been given to participate in vocational rehabilitation and physical therapy. Owens stated, "I feel that I gave him ample opportunity." She said that Lohman left her a voice mail after she closed his file, apologizing greatly and indicating "that he had a hard time and he was really trying and he wanted another chance." She said that she reported this information to the insurance carrier, but their response was that no further services would be provided. She further testified:

> I have worked with clients who have been diagnosed as having major depression. Generally, major depression decreased one's incentive or motivation. They are so depressed they don't have the ability to initiate an activity. . . .
>
> As a vocational expert, if somebody approached me and asked me to help place someone and you knew that person had a current diagnosis of major depression, I would more than likely recommend that the depression be treated before I try to place them.
>
> If the depression is being treated and it is still exhibiting in the moderate to severe [range], then the treatment needs to be looked at to consider if there needs to be different medications, more medications, or some other psychotherapy going on in conjunction with that before they are really able to work with you and to follow through with the things you need to do.

Sufficiency of the Evidence

The issue before us is the sufficiency of the evidence to support the Commission's determination that Lohman refused to participate in or cooperate with an offered program of rehabilitation and job-placement assistance. We hold that no substantial evidence supports this finding.

Vocational consultant Dale Thomas reported that Lohman was motivated to seek employment in March 2002. Lohman testified that he was taking the "wonder drug" OxyContin for his pain, but that his withdrawals became so bad when he ran out of it that he wanted to shoot himself. Dr. Short reported that Lohman was profoundly depressed in June 2002, and Dr. Walz diagnosed him with major depression in April 2003. These diagnoses were a

part of the record before appellees sent Lohman to Terry Owens for further vocational evaluation. Owens's first impression of Lohman was that he wanted to get better and look for work but had fears of his physical ability. The Commission, focusing on the lack of a claim for compensable mental injury or illness, failed to acknowledge Owens's testimony that a person with major depression should be treated before she would try to place the person in a job.

We hold that reasonable minds could not conclude that Lohman refused to participate in or cooperate with an offered program of rehabilitation and job-placement assistance, particularly in light of appellees' refusal to provide psychological assistance that their own witness said was necessary in order for her vocational rehabilitation services to be meaningful. Therefore, his claim was not barred by Ark. Code Ann. § 11-9-505(e). We reverse and remand this case for the Commission to determine whether Lohman was entitled to permanent partial benefits in excess of the percentage of his permanent physical impairment.

Reversed and remanded.

GLOVER and CRABTREE, JJ., agree.

David JOHNSON *v.* LATEX CONSTRUCTION COMPANY and Zurich American Insurance Company

CA 05-1140 232 S.W.3d 504

Court of Appeals of Arkansas
Opinion delivered March 15, 2006

Harrelson, Moore & Giles, L.L.P., by: *Greg Giles*, for appellant.

Wright, Lindsey & Jennings, LLP, by: *Lee J. Muldrow* and *Gary D. Marts, Jr.*, for appellees.

DAVID M. GLOVER, Judge. Appellant, David Johnson, suffered an admittedly compensable injury to his back while working for appellee Latex Construction Company. At a hearing on

July 29, 2004, the ALJ was presented with the following issues pertinent to this appeal: 1) whether appellant was entitled to additional temporary-total disability benefits, and 2) whether appellant had sustained wage loss in excess of his assigned anatomical impairment rating. The ALJ concluded 1) that appellant was not entitled to additional TTD benefits for the period beginning October 30, 2003, and ending March 4, 2004, and 2) that he was entitled to permanent impairment in the form of wage-loss disability in the amount of forty-five percent above his five-percent permanent-impairment rating to the body as a whole. The Commission modified the ALJ's wage-loss determination and concluded that appellant was only entitled to a ten-percent loss in wage-earning capacity, thereby giving him fifteen percent in total-permanent impairment. The Commission affirmed the ALJ's denial of TTD benefits beyond the date of October 30, 2003. This appeal followed. We reverse and remand for an award of benefits consistent with this opinion.

Appellant was employed by appellee Latex Construction as a welder's helper when he sustained a compensable injury to his back on February 7, 2003, while working on a construction project in Alabama. Although appellant was a trained welder, he explained that it was easier to find regular work as a helper. Appellant was first treated for his injury by Dr. Greg Massanelli at an emergency room in Alabama. A February 13, 2003 MRI revealed "mild dehydration of the discs at L3-4, L4-5 with anterior spondylitic changes and mild disc bulge at L3-4. No other abnormalities noted." After appellant returned to Arkansas, the Commission granted him a change of physician to Dr. Jeffrey DeHaan, who eventually referred appellant to Dr. Edward Saer. Dr. Saer subsequently referred appellant to Dr. Sundar Krishnan. A second MRI was performed on July 31, 2003, as ordered by Dr. Krishnan. It revealed annular tears at L2-3, L3-4, and L4-5, along with small central protrusions at L3-4 and L4-5; however, the study revealed "no definite sign of nerve root impingement." Dr. Krishnan recommended a discogram, but appellees denied the procedure. Dr. Krishnan appealed the denial, contending that the discogram results might indicate the need for intradiscal electrothermal therapy (IDET) or spinal surgery; however, the request was still denied.

Dr. Krishnan's notes reveal that he discussed appellant's condition with Dr. Charles Mauriello, an orthopedic specialist for appellees' utilization reviewer, and that they agreed the next appropriate step was facet injections. Those injections were per-

formed on November 14, 2003; however, appellees terminated appellant's temporary-total disability benefits as of October 29, 2003, which was the day that Dr. Krishnan and Dr. Mauriello agreed that the injections were an appropriate next step. As it turned out, the injections were of no help. Appellees agreed in January 2004 to allow a discogram. Dr. Krishnan opined that the discogram and a subsequent CT exam showed mild degenerative changes at L2-3, a posterior annular tear at L3-4, and a small central disc herniation at L4-5. He noted, however, that appellant expressed pain at every level from L2 through S1, even though the L5-S1 disc appeared "pretty much within normal limits." Pending a functional-capacity evaluation, Dr. Krishnan released appellant from his care on February 11, 2004, concluding that he had nothing left to offer appellant. Dr. Donald Smith performed the functional-capacity evaluation on March 1, 2004. He concluded that appellant had reached maximum-medical improvement, that he had no permanent impairment, and that he was capable of performing medium-level work. Dr. Smith's review of appellant's radiographic studies prompted him to opine that they showed "some very mild degenerative changes in the L3-L4 and L4-L5 levels, which are commensurate with the patient's age and work history. These studies are essentially normal for a patient of this age group." Dr. Saer released appellant on March 5, 2004, assigning him a five-percent impairment rating to his body as a whole.

On July 5, 2004, a second functional-capacity evaluation was performed by Doin Dahlke. Mr. Dahlke described appellant's functional limitations, in part, as being "able to sit continuously for 20-25 minutes and stand continuously for 20-25 minutes without a change in postural position. He can return to standing after a 5-10 minute sit break." Mr. Dahlke concluded that "Mr. Johnson demonstrated the ability to perform work activities at the LIGHT Physical Demand Classification as determined through the Department of Labor for an 8-hour day with the above limitations."

Bob White, a vocational specialist, was hired by appellant's attorneys to evaluate appellant. Mr. White concluded, in part, that "a combination of age, education, limited work history (*i.e.*, [appellant] has only done heavy unskilled work during his life) in conjunction with a back injury that has not resolved and for which there is no effective treatment, has effectively eliminated him from returning to work in any capacity."

Dale Thomas, a vocational consultant, was hired by appellees' attorneys to evaluate appellant. Mr. Thomas concluded:

> Mr. Johnson sustained a job related injury to his lower back and has been diagnosed with low back strain. Functional Capacity Testing was performed in March and July of this year. Test results indicate that Mr. Johnson has at least the ability to perform Light work and possibly the ability to perform some types of Heavy work. However, he is not a suitable candidate to return to past work due to the Heavy nature of that work. He is capable of full time work according to the most recent FCE. Past work as a Welder's Helper has been unskilled. However, the claimant has the skills needed to perform the job of Welder. Mr. Johnson has poor literacy abilities. However, he has some ability to read, write and do simple arithmetic.
>
> Mr. Johnson is capable of working in an unskilled job that falls within the light level of work for a full workday.

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. *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* 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. *Id.* We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000). The rules of appellate review in workers' compensation cases insulate the Commission from judicial review, and properly so, as it is a specialist in the area and this court is not. *Id.* However, a total insulation would obviously render the appellate court's function in reviewing these cases meaningless. *Id.*

For his first point of appeal, appellant contends that the Commission's decision to award him only a ten-percent wage-loss disability benefit is not supported by substantial evidence. We have concluded that the Commission's analysis of appellant's entitlement to wage-loss disability benefits was flawed in a critical respect, and therefore did not display a substantial basis for the denial of relief.

Appellant's entitlement to permanent-partial disability benefits is controlled by Arkansas Code Annotated section 11-9-522(b) (Repl. 2002), which provides:

> (b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.
>
> (2) However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Pursuant to this statute, when a claimant has been assigned an anatomical-impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). Wage-loss disability is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.* The Commission is charged with the duty of determining disability based upon consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Id.* In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Id.*

In its opinion, the Commission summarized its reasoning for modifying the wage-loss benefits that the ALJ had assigned to appellant:

> The claimant is 49 years old and he has vocational education in welding although the claimant did not pursue this career. The claimant lacks motivation to return to work because he will not take

> a job that pays less than the $18.63 he was making before he sustained his compensable injury. *The claimant refuses to move from the area where he lives even though the labor market in his area is depressed. The claimant should not be rewarded for refusing to seek employment at lesser wages and for refusing to move to an area that offers more opportunities for work.* Simply put, when we consider the claimant's age, education, work experience, motivation and physical restrictions, we find that the claimant has proven by a preponderance of the evidence that he is entitled to wage loss disability benefits in the amount of 10% over and above his permanent anatomical impairment of 5% to the body as a whole thereby giving the claimant a total of 15% in permanent impairment. Accordingly, we modify the Administrative Law Judge's award of 45% to 10%.

(Emphasis added.) While it was perfectly acceptable for the Commission to consider appellant's motivation to return to work in assessing his wage-loss disability, we conclude that the Commission erred in relying upon appellant's refusal to move from his geographical area as a factor establishing that he lacked motivation to return to work. That factor is more appropriately considered under subsection (2) of section 11-9-522(b) with respect to a "bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident[.]"

In addition, neither the parties' research, nor ours, nor the Commission's opinion has revealed an Arkansas case that addresses the geographical location of jobs in determining whether a claimant's refusal to consider jobs that are remotely located is an indication of lack of motivation. However, with respect to whether the refusal of an actual job offer is reasonable, in other jurisdictions, such "[r]efusals have been usually, but not always, sustained as reasonable when the proffered position required a long-distance commute or when the position only offered part-time income." *Larson's Workers' Compensation Laws* § 85.02 (2005).

Here, of course, appellant was not actually offered a job in a remote location because he refused even to consider such a relocation, a fact that the Commission attributed to lack of motivation. In short, we hold that the Commission erred in analyzing the lack-of-motivation issue in that fashion, especially in light of the fact that in many jurisdictions the refusal of an actual job offer is reasonable if the job is remote in location. The Commission's determination that appellant lacked motivation to return to work seemingly formed a substantial part of the basis for

its denial of wage-loss disability benefits. Because the Commission's analysis of that issue was flawed, the Commission's opinion did not display a substantial basis for the denial of relief, and we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. We therefore reverse and remand on this issue.

For his second point of appeal, appellant contends that he was "entitled to an award of temporary total disability for the period from October 30, 2003 through March 5, 2004." We agree.

Temporary-total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Searcy Indus. Laundry, Inc. v. Ferren*, 92 Ark. App. 65, 211 S.W.3d 11 (2005). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary-total disability. *Id.* The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id.* 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.* These are matters of weight and credibility, and thus lie within the exclusive province of the Commission. *Id.*

Here, the Commission's finding that appellant's healing period ended on the date of October 30, 2003, is not supported by substantial evidence. Rather, the Commission, in something of an after-the-fact fashion, reasoned:

> It is clear that the claimant's healing period ended on October 30, 2003. *None of the medical treatment the claimant received after October 30, 2003, improved the claimant's condition.* Therefore, the claimant is not entitled to temporary total disability benefits after October 30, 2003.

(Emphasis added.) We reject the Commission's rationale for denying appellant's temporary-total disability benefits.

At the time appellant was receiving the medical treatment during this period, it is clear that Dr. Krishnan hoped that it would improve appellant's condition. In addition, the treating doctors

did not assign October 30, 2003, as the date upon which appellant reached maximum-medical improvement. Pending a functional-capacity evaluation, Dr. Krishnan released appellant from his care on February 11, 2004, concluding that he had nothing left to offer him. Dr. Donald Smith performed the functional-capacity evaluation on March 1, 2004. Dr. Saer found that the healing period ended on March 5, 2004.

In summary, we hold that the Commission's analysis of this issue was flawed in that it based its decision on the fact that none of the procedures after October 29, 2003, were successful in treating appellant's condition rather than deciding the issue on the medical evidence that was presented, which showed that appellant remained within his healing period and was being treated with the goal of improving his medical condition. Because the Commission's analysis of this issue was also flawed, its opinion did not display a substantial basis for the denial of this relief either, and we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. We therefore reverse and remand on this issue.

For his final point of appeal, appellant contends that he is "entitled to continued medical treatment for his pain." This issue is moot. The ALJ found in appellant's favor on this issue, and appellees did not appeal the issue to the Commission. Therefore, the ALJ's decision on this point remains intact.

Reversed and remanded.

BIRD and CRABTREE, JJ., agree.

Terry WILLIAMS *v.* STATE of Arkansas

CA CR 05-1064 236 S.W.3d 519

Court of Appeals of Arkansas
Substituted Opinion on Rehearing delivered May 24, 2006

Lucas Wayne Zakrezewski, for appellant.

Mike Beebe, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

DAVID M. GLOVER, Judge. In *Williams v. State*, CACR05-1064 (Mar. 15, 2006), we reversed and dismissed Terry Williams's conviction for being a felon in possession of a firearm, and we reduced his conviction for possession of marijuana from a Class D felony to a Class A misdemeanor. Subsequently, the State filed a petition for rehearing, asserting that "a fundamental error has permeated" the appeal of appellant's conviction for possession of marijuana.[1] By explanation, the conviction was originally presented to this court by both appellant and the State as being governed by Arkansas Code Annotated section 5-64-401(c)(2) (Supp. 2005).[2] In retrospect, the State points out in its petition for rehearing that since appellant was charged with possessing marijuana in 2004, sentencing must be in accordance with the statute in effect at the time of the commission of the crime. *See State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000). Since our opinion incorrectly relied upon the cited 2005 replacement of the statute, we therefore issue this substituted opinion analyzing the applicable 2003 statute.

Terry Williams was convicted by a Pulaski County jury of the offenses of possession of firearms by certain persons and second-offense possession of a controlled substance — marijuana. He was sentenced to forty years in the Arkansas Department of Correction for the firearms conviction and six years for the possession-of-a-controlled-substance conviction, with the sentences to run concurrently. On appeal, he argues that the circuit court erred (1) by denying his motion for directed verdict with regard to the firearms charge; (2) by sustaining the State's objection to the line of argument pursued by defense counsel in closing argument; and (3) by refusing penalty-phase jury instructions proffered with respect to the possession of marijuana charge. We reverse and dismiss in part and affirm in part.

The State called two witnesses at trial. Elliot Young, a Little Rock police officer, testified that on February 7, 2004, he responded to a weapon-disturbance call at 1812 Reservoir Road, Apartment 263. Young was advised by dispatch that the subject was about to leave the premises in a Lincoln Town Car. When he arrived, Young

---

[1] The State made no argument in its petition for rehearing with regard to this court's reversal and dismissal of appellant's conviction for being a felon in possession of a firearm.

[2] Codified as Ark. Code Ann. § 5-64-401(c)(2) (Repl. 2005).

saw appellant standing by the described car with the driver's side door open; Young ordered appellant to put his hands up because appellant had started to reach into his left pocket when he saw Young's patrol car.

Appellant put his hands in the air, and Young performed a safety pat-down search, during which he found a plastic bag containing a green leafy substance that was later determined to be 12.8 grams of marijuana. Young also found appellant's photo-identification card during the search, and the address on the identification card was the same apartment address from which the disturbance call had come. Young testified that he did not find a weapon on appellant's person, and that he did not see any weapons in plain view in the vehicle.

Another Little Rock police officer, Harold Scratch, testified that he responded to a disturbance-with-a-weapon call on February 7, 2004, at an apartment on Reservoir Road. When he arrived Officer Young was placing appellant into custody, and Scratch assisted him. After appellant was arrested, Officer Scratch made contact with the complainant of the disturbance call, appellant's girlfriend, a Ms. Harris, who granted permission to enter the apartment to search for a weapon. In one of the two bedrooms, Scratch found a brown pistol case under the right side of the bed, containing a Ruger .44 magnum with a laser-sighting system and loaded with six hollow-point bullets.

On cross-examination, Scratch testified that Ms. Harris did not lead him to the gun, but then he acknowledged that in his report he had written that Ms. Harris had shown them where the gun was, and he said that statement was true. Scratch said that there were no signs of a struggle in the apartment, and that Ms. Harris had no bruises, contusions, or anything to indicate that she had been in a struggle. Scratch stated that the bag, gun, and bullets were not fingerprinted, and he did not know if the gun had ever been fired. Scratch said that the .44 magnum was a very powerful and very deadly weapon; that it would have considerable discharge; that it would be hard to control with one hand; and that you would have to be a strong person to use it.

After the officers' testimony, both parties stipulated to the fact that appellant had previously been convicted of a prior violent felony, first-degree battery, for purposes of the firearms possession charge, and the State rested. Appellant moved for a directed verdict with regard to the firearms charge, arguing that the jury would have to resort to speculation with regard to whether appellant possessed the firearm, and the trial judge denied that motion. Appellant rested without calling any witnesses, and he renewed his directed-verdict

motion, which was again denied by the trial judge. The jury found appellant guilty on both charges, and appellant now brings this appeal.

In his first point on appeal, appellant argues that the trial court erred in denying his motion for directed verdict with regard to the charge of possession of firearms by certain persons. In *Vergara-Soto v. State*, 77 Ark. App. 280, 282, 74 S.W.3d 683, 684 (2002), this court set out our well-known standard of review for challenges to denials of directed-verdict motions:

> Directed-verdict motions are treated as challenges to the sufficiency of the evidence. 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. 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. Only evidence supporting the verdict is considered.

(Citations omitted.)

Arkansas Code Annotated section 5-73-103(a)(1) (Repl. 2005) provides that, but for exceptions not pertinent to the facts of this case, no person who has been convicted of a felony shall possess or own any firearm. In the present case, the parties stipulated that appellant had previously been convicted of a violent felony. However, appellant's argument is not that the State failed to prove he was a convicted felon, but that the State failed to prove that he possessed the gun that was found. We find merit in appellant's argument.

In *Absure v. State*, 79 Ark. App. 317, 321-22, 87 S.W.3d 822, 826 (2002), this court stated:

> To convict one of possessing contraband, the State must show that the defendant exercised control or dominion over it. Neither exclusive nor actual physical possession, however, is necessary to sustain a charge of possessing contraband; rather, constructive possession is sufficient. Constructive possession may be implied when the contraband is in the joint control of the accused and another; however, joint occupancy alone is insufficient to establish possession or joint possession. The State must establish in a prosecution for possessing contraband (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband.

(Citations omitted.)

When the premises where contraband is found are jointly occupied, control and knowledge of the contraband 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. *Young v. State*, 77 Ark. App. 245, 72 S.W.3d 895 (2002).

We hold that the State failed to establish that appellant exercised care, control, and management over the contraband. Although appellant does not concede that he lived in the apartment in which the gun was found, his photo-identification card indicated that apartment as his residence. Appellant apparently lived in this two-bedroom apartment with his girlfriend, because she was the person who gave consent for the search of the apartment in which the gun was found. There was no testimony as to who rented the apartment, appellant or his girlfriend, but because the gun was found in the jointly controlled apartment, the State was required to show that appellant exercised care, control, and management over the contraband, and that he knew the matter possessed was contraband.

Appellant was outside in the parking lot of the apartment complex when the police arrived, and he had already been arrested when the police found the gun in the apartment. The gun was under the right side of the bed, but there was no testimony as to who had placed it there; if appellant slept in that bedroom; if he slept on that side of the bed; or if he was the person who had brought the gun into the apartment. There was no evidence that the gun was found with any of appellant's personal belongings. The State did not test the weapon or the ammunition to see if appellant's fingerprints were found. The State also did not present evidence that appellant was the subject of the weapon-disturbance call. The only evidence the State presented was that the gun was found in an apartment jointly occupied by appellant and that it was large and difficult to handle, and that evidence is not sufficient to link appellant to the gun. We hold that the State failed to prove that appellant possessed the gun, and we reverse and dismiss appellant's felon-in-possession-of-a-firearm conviction. Due to this holding, it is unnecessary to discuss the second prong of the test, whether appellant knew that the matter possessed was contraband.

In his second point on appeal, appellant contends that the trial judge erroneously limited appellant's closing argument when the trial judge sustained the State's objection to his counsel's statement that "the prosecutors' main problem is they want to narrow possession of that gun down to two people. They want you to forget everybody else in the world." Due to our disposition of appellant's first point of appeal, it is unnecessary to address this point.

In his third point on appeal, appellant contends that the trial court erred in sentencing him for a Class D felony instead of a Class A misdemeanor on the possession-of-marijuana charge. Appellant

had previously been convicted of possession of cocaine, a Schedule II drug, but this conviction was his first offense for any controlled substance other than cocaine. Because of the previous conviction for possession of cocaine, the trial court increased appellant's possession-of-marijuana charge to a second offense, making it a Class D felony. Appellant argues that this conviction should only be a Class A misdemeanor because it was his first offense for a controlled substance that was not a Schedule I or Schedule II drug.

The pertinent language changes between the 2003 and 2005 versions of Arkansas Code Annotated section 5-64-401(c) are found in section 305 of Act 1994 of 2005 (Part A):

> (c) POSSESSION. It is unlawful for any person to possess a controlled substance or counterfeit substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. ~~Any person convicted of a first offense for violation of this subsection is guilty of a Class A misdemeanor. Provided any person who is convicted of a second offense for a violation of this subsection is guilty of a Class D felony. Provided, any person who is convicted of a third or subsequent offense for violation of this subsection shall be guilty of a Class C felony. Provided, however, any person who unlawfully possesses a controlled substance listed under Schedules I or II of subchapters 1-6 of this chapter shall be guilty of a Class C felony.~~ Any person who violates this subsection with respect to:
>
> (1) A controlled substance classified in Schedules I or II of this chapter is guilty of a Class C felony;
>
> (2) Any other controlled substance, first offense, is guilty of a Class A misdemeanor;
>
> (3) Any other controlled substance, second offense, is guilty of a Class D felony; and
>
> (4) Any other controlled substance, third or subsequent offense, is guilty of a Class C felony.

In statutory interpretation, we construe a statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Vergara-Soto v. State*, 77 Ark. App. 280, 282, 74 S.W.3d 683, 684 (2002). The pertinent portions of the 2003 statute provide that "any person who is convicted of a second offense for a violation of this subsection is guilty of a Class D felony. . . . Provided, however, any person who unlawfully possesses a controlled substance listed under Schedules I or II of subchapters 1-6 of this chapter shall be guilty of a Class C felony." Under this subsection, appellant

had previously been convicted of possession of cocaine, a Schedule II drug. This conviction for possession of marijuana was his first offense for any controlled substance other than cocaine. Under the 2003 statute, the marijuana possession was the second offense for a violation of the subsection, thereby making that violation a Class D felony. We hold that appellant's conviction for possession of marijuana is a Class D felony under the 2003 statute for the reasons stated above.

Reversed and dismissed in part; affirmed in part.

PITTMAN, C.J., ROBBINS, BIRD, CRABTREE, and BAKER, JJ., agree.

Mary & Alan DANIEL *v.* CITY OF ASHDOWN, Arkansas

CA 05-424 232 S.W.3d 511

Court of Appeals of Arkansas
Opinion delivered March 15, 2006

Thomas H. Johnson, for appellant.

Jay P. Metzger, for appellee.

ANDREE LAYTON ROAF, Judge. In 2002, appellants Mary and Alan Daniel filed suit against appellee City of Ashdown, claiming that the city had taken their property by inverse condemnation.[1] The City of Ashdown filed a counter-claim to quiet title to the property. The trial court ruled that the Daniels' claim was barred by the statute of limitations and that the City of Ashdown was entitled to the property, quieting title against the Daniels. On appeal, the Daniels argue that the trial court erred when it held that their inverse condemnation claim was barred. We affirm.

In May 1993, Mary Daniel inherited approximately two and one-half acres of property located in Little River County, Arkansas, which is the subject of this appeal. She received a fiduciary deed for this property from the estate of Clora Carlstead Wall. Since 1954, the City of Ashdown has owned ten acres of property adjacent to the property at issue ("disputed portion"), which the city has been using as a dump or landfill facility.

Silas Robbins testified that he remembered going to the disputed portion with his father in the 1950s to dump trash and other debris. He further testified that he began a trash-hauling business in 1974 and that he would bring trash to the disputed portion for dumping. According to Robbins, the dump closed some time in the 1980s, but the city continued to maintain and control the disputed portion.

Wayne Reed, the mayor of Ashdown at the time of the trial, testified that he was working for the City of Ashdown in 1974 and that one of his duties as a city employee was to cut brush, haul it to the disputed portion, and dump it. According to Reed, the City of Ashdown has maintained exclusive control of the disputed portion since at least 1974. Roy Staggs, who was mayor of Ashdown from 1975 until 1980, testified that he moved to Ashdown in 1966 and

[1] This is the third lawsuit the Daniels have filed regarding this property. In 1998, the Daniels took a non-suit in state court. The Daniels filed another complaint in federal court, which was dismissed for lack of subject-matter jurisdiction.

that he remembered people carrying their trash to the disputed portion for dumping. According to Staggs, the City of Ashdown had maintained and controlled the disputed portion since he moved to Ashdown.

Wayne Francis, the superintendent for Ashdown's water department from June 1994 until September 2003, testified that he had lived in Ashdown since he was a child and remembered the disputed portion as a city dump. According to Francis, the City of Ashdown began bringing fill material upon the disputed portion prior to his employment with the city. This project, however, continued throughout his employment with the city for the purpose of filling in a gully. The City of Ashdown also laid a sewer line on the property. Francis testified that, when the city dug up the property to bury the sewer line, it uncovered debris. Francis further testified that it was not until March 1998 that the City of Ashdown realized that the ownership of the disputed portion was contested.

Barbara Hersom, the Little River County Assessor from 1975 until 2000, testified that she was familiar with the City's use of the disputed portion while she was the assessor. An independent appraisal group hired to reassess county property in 1980 recommended that Hersom remove the disputed portion from the property tax rolls of the Carlsteads, who were the Daniels' predecessors-in-title, and show that the disputed portion was owned by the City of Ashdown. In Hersom's opinion, it was unfair for the Carlsteads to pay taxes on property that had been used by the City of Ashdown for a dump for many years. After 1980, neither the Carlsteads nor the Daniels ever paid property taxes on the disputed property.

Mary Daniel testified that Mrs. Carlstead referred to the disputed portion as her own prior to her death in 1991, and that in 1998, Mary and her husband Alan had complained to Mayor Hoyt Johnson about the city trespassing on the disputed portion. She testified that they had never paid taxes on the disputed portion but that they had tried to several times. According to Mary, when the city ignored them and continued to use the disputed portion, Alan put a lock on the gate along the entrance to the disputed portion. The City of Ashdown cut the gate and continued to enter onto the disputed portion. Mary Daniel testified that she had had the disputed portion mortgaged with Commercial Bank since 1994. According to Mary Daniel, the City of Ashdown never paid her any money for the disputed portion.

Alan Daniel testified that the City of Ashdown damaged the disputed portion by dumping trash and other waste on it. According to Alan, when he or his wife would complain about the dumping, the city would bulldoze the waste back onto its own property. He testified that they had never paid taxes on the disputed portion. He further testified that he knew the city had been regularly entering the disputed portion and dumping on it since 1993.

The Daniels do not articulate or analyze specifically why the trial court erred in finding that their inverse condemnation claim was barred by the statute of limitations. They devote much of their brief to discussing the unconstitutionality of a government taking of property without just compensation, but they fail to further allege any specific errors. Here, the trial court held that the Daniels' inverse condemnation claim was barred by the statute of limitations. The Daniels argue that this holding is erroneous.

Chancery cases are reviewed *de novo* on the record, but the appellate court does not reverse unless it determines that the lower court's findings of fact were clearly erroneous. *Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003). 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. *Id.*

Inverse condemnation is a remedy for the physical taking of private property without following eminent domain procedures. *Nat'l By-Products, Inc. v. City of Little Rock*, 323 Ark. 619, 916 S.W.2d 745 (1996) (citing *Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990)). A taking occurs when a condemnor acts in a manner that substantially diminishes the value of a landowner's land, and a continuing trespass or nuisance could ripen into inverse condemnation. *Id.*

Arkansas Code Annotated section 18-15-410(a) (Repl. 2003) provides:

> If a municipality shall enter upon property which it has the right to acquire by condemnation proceedings without commencing condemnation proceedings, the owner of the property shall have the right to commence condemnation proceedings against the municipality *at any time before an action for the recovery of the property or compensation therefore would be barred by the statute of limitations.*

(Emphasis added.) Arkansas law defines the statute of limitations for actions to recover land as follows: "No person . . . shall have, sue, or

maintain any action or suit, either in law or equity, for any lands . . . after seven (7) years once his or her right to commence, have, or maintain the suit shall have come, fallen, or accrued." Ark. Code Ann. § 16-61-101(a)(1) (Repl. 2003). All suits for the recovery of any lands shall be had and sued within seven years after the title or cause of action accrued. Ark. Code Ann. § 16-61-101(a)(2).

The Arkansas Supreme Court held that an injured landowner's claim for land taken by a railroad company was barred, where the evidence showed that the railroad company had been in adverse possession for more than seven years. *Memphis & L.R.R. Co. v. Organ*, 67 Ark. 84, 55 S.W. 952 (1899). Since this 1899 case, our supreme court has consistently upheld the seven-year statute of limitations for inverse condemnation actions, holding that a landowner has a right to bring suit for compensation of land within the period of seven years after the land was taken. *Bryant v. Lemmons*, 269 Ark. 5, 598 S.W.2d 79 (1980); *Sebastian Lake Devs., Inc. v. United Tel. Co.*, 240 Ark. 76, 398 S.W.2d 208 (1966).

The Daniels suggest that the statute of limitation did not begin to run until 1998, because city personnel believed that the property belonged to the city until at least 1998, when Francis discovered the deed granting the property to the Daniels. Possession alone does not ripen into ownership, but the possession must be adverse to the true owner. *Thompson v. Fischer*, 364 Ark. 380, 220 S.W.3d 622 (2005). To establish ownership by adverse possession, one must show that the possession was actual, open, notorious, continuous, hostile, and exclusive.[2] *Id.* It is ordinarily sufficient proof of adverse possession that the claimant's acts of ownership are of such a nature as one would exercise over his own property and would not exercise over the land of another. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005). The Daniels suggest that the element of intent to hold against the true owner is missing here.

■ ■ An adverse claimant does not necessarily have to possess knowledge that the claimed land is not his; rather, the

[2] In 1995, the law governing adverse possession changed, requiring one to show color of title and payment of taxes in addition to all of the elements necessary under previously existing adverse possession case law. Ark. Code Ann. § 18-11-106 (Supp. 2005). The statutory changes made in 1995 do not apply to property owners whose rights to the disputed land had vested prior to that time. *Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003).

claimant's subjective intent to claim the land that he is possessing is derived from his objective conduct. *Dickson v. Young*, 79 Ark. App. 241, 85 S.W.3d 924 (2002). It is this objective conduct that is determinative. *Id.* Here, there was testimony that the City of Ashdown has maintained the disputed portion as its own since the 1950s. It used the disputed portion for a city dump, built a fence on the property, and exercised exclusive control over the land as if it were the owner. This objective conduct is sufficient to derive intent to possess adversely. Moreover, the Daniels had never paid taxes on the property. The City of Ashdown acquired the disputed portion by adverse possession at some time before the Daniels received the fiduciary deed to the disputed portion in 1993. Neither the Daniels nor their predecessors-in-title commenced suit against the City of Ashdown within seven years after the cause of action accrued. The trial court, therefore, did not err when it held that the Daniels' inverse condemnation claim was barred by the statute of limitations and when it quieted title of the disputed portion in the City of Ashdown.

The Daniels also devote one sentence in their brief to an assertion that the trial court should have awarded the City of Ashdown an easement in the disputed property and should not have awarded it the entire two and one-half acres of property. The Daniels, however, do not cite any authority in support of this argument and the argument is not otherwise convincing. Thus, this court need not address the argument. *See Jones Truck Lines v. Pendergrass*, 90 Ark. App. 402, 206 S.W.3d 272 (2005).

Affirmed.

HART and VAUGHT, JJ., agree.

Bobby SCISSOM *v.* STATE of Arkansas

CA CR 05-725 232 S.W.3d 502

Court of Appeals of Arkansas
Opinion delivered March 15, 2006

James Dunham, Managing Pub. Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. This is an appeal from a revocation proceeding. Bobby Scissom appeals from the

trial court's imposition of twelve months confinement in a regional correction facility as an additional condition of probation. On appeal, Scissom argues that the sentence exceeds the maximum authorized as a condition of his probation because he had originally been ordered to serve 120 days in the county jail. The State concedes error. We reverse the trial court's order and remand the matter for resentencing in accordance with this opinion.

In the underlying case, Scissom pleaded guilty to the offense of possession of marijuana with intent to deliver, a Class C felony, and was placed on probation for a period of sixty months, with several designated conditions of probation, including that he was to serve 120 days in the Pope County Jail. The judgment and disposition order and the conditions of suspension or probation were filed on October 2, 2003. On January 5, 2005, the State filed a petition to revoke Scissom's probation, alleging that he had violated several of the conditions of his probation. The revocation hearing was held on March 7, 2003. Following the presentation of evidence, the trial court stated: "I'm not going to revoke his probation but I am going to add as a condition of probation that he be sent to a Regional Correction Facility for one year, with credit for time served." In its March 8, 2005 order, the trial court specifically ordered, "The Court orders that Defendant's probation shall not be revoked, but that defendant shall serve 12 months in the Regional Punishment Facility as an additional condition of probation."

Scissom appeals from the imposition of additional confinement; the State has not cross-appealed the trial court's order that Scissom's probation not be revoked. For his sole point of appeal, Scissom contends that when the trial court added the additional twelve months' confinement as a condition of his probation, after previously ordering him to serve 120 days in the Pope County Jail, it was in excess of the period of confinement allowed by law. We agree.

The statute in effect at the time the underlying offense was committed must govern sentencing, and in the absence of a provision stating that an act will apply retroactively, the act will apply prospectively only. *State v. Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994). According to the Information, the crime for which Scissom pleaded guilty and received probation was committed "on or about 2/27/03." The Arkansas Code Annotated section 5-4-304 then in effect provided in pertinent part:

> (c) Following a revocation hearing held pursuant to Arkansas Code § 5-4-301 and wherein a finding of guilt has been made or the defendant has entered a plea of guilty or nolo contendere, the court may add a period of confinement to be served during the period of suspension of imposition of sentence or period of probation, *if no period of confinement was included in the original order placing the defendant on suspended imposition of sentence or probation.*
>
> (d)(1) *The period actually spent in confinement pursuant to this section shall not exceed one hundred twenty (120) days in the case of a felony* or thirty (30) days in the case of a misdemeanor.
>
> (2) For purposes of this subsection, any part of a twenty-four-hour period spent in confinement shall constitute a day of confinement.
>
> (e) If the suspension or probation of the defendant is subsequently revoked and the defendant is sentenced to a term of imprisonment, the period actually spent in confinement pursuant to this section shall be credited against the subsequent sentence.

(Supp. 2001) (emphasis added). By Act 1742 of 2003, which became effective July 16, 2003, *i.e.*, after the underlying offense was committed here, section 5-4-304(d) was amended to provide:

> (d)(1)(A) The period actually spent in confinement pursuant to this section in a county jail, city jail, or other authorized local detentional, correctional, or rehabilitative facility shall not exceed one hundred twenty (120) days in the case of a felony or thirty (30) days in the case of a misdemeanor.
>
> (B) In the case of confinement to a Department of Community Correction facility, the period actually spent in confinement under this section shall not exceed three hundred sixty-five (365) days.

[redacted] In paragraph 17 of the original "conditions of suspension or probation," Scissom was ordered to "serve a period of confinement for 120 days at county jail credit 2 days served." In the order following the revocation hearing, which was filed on March 8, 2005, the trial court ordered "that Defendant's probation shall not be revoked, but that defendant shall serve 12 months in the Regional Punishment Facility as an additional condition of probation." Because the statute in effect at the time the underlying

offense was committed only allowed for a period of confinement not to exceed 120 days, the trial court, at the revocation hearing, apparently operated under the amended statute, which became effective July 16, 2003, and clearly erred in imposing an additional period of confinement of 365 days. In addition, subsection (c) of the statute in effect when the underlying offense was committed provided that a period of confinement to be served during the time of probation may be added "*if* no period of confinement was included in the original order placing the defendant on . . . probation." (Emphasis added.) Here, a period of confinement *was* included in the original order, *i.e.*, 120 days. Therefore, no additional period of confinement may now be imposed.

Accordingly, we reverse and remand this matter with instructions to strike the twelve-month period of confinement imposed by the trial court as an additional condition of Scissom's probation. The trial court, of course, may impose such other available additional conditions of probation or fines during the period of probation as authorized by Ark. Code Ann. § 5-4-306(b) (Supp. 1999). *See Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41 (1999).

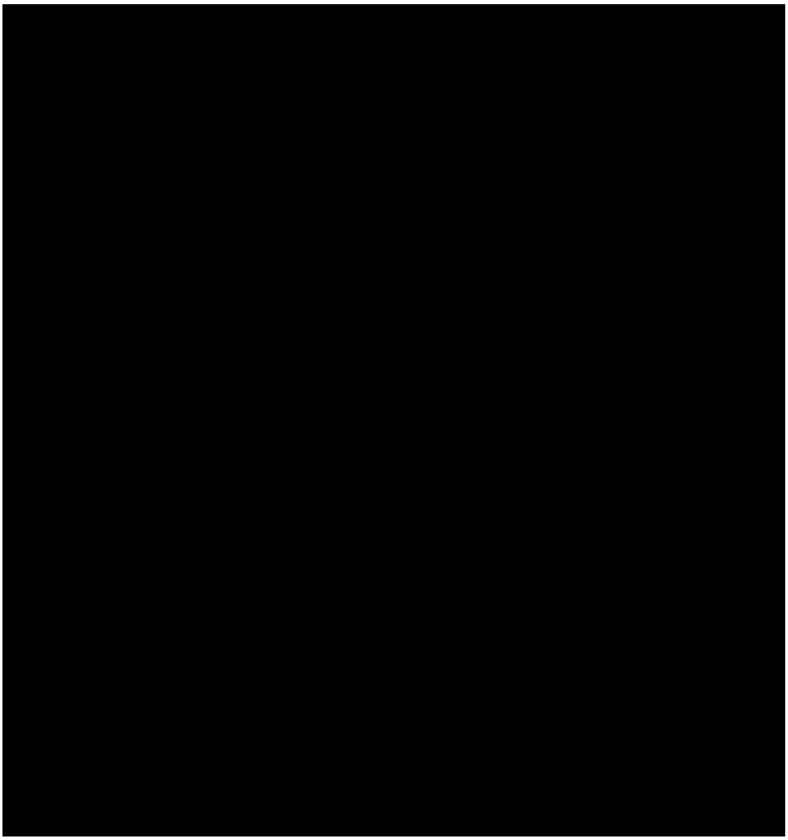
Reversed and remanded.

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

PITTMAN, C.J., and GLOVER, J., concur in part; dissent in part.

DAVID M. GLOVER, Judge, concurring in part; dissenting in part. I dissent from the majority opinion to the extent that it limits the trial court to imposing "such other available additional conditions of probation or fines during the period of probation as authorized by Ark. Code Ann. § 5-4-306(b) (Supp. 1999)." In my opinion, we should not, at this point, attempt to define the full range of options available to the trial court upon remand. It appears to me that it is premature to decide that the trial court is limited to adding to or modifying the conditions of appellant's probation. Notably, at the revocation hearing, the trial court specifically found that appellant had violated the terms and conditions of his probation. Whether the trial court could decide upon remand to revoke the probation is an issue that is not yet before us and one which has not been briefed by the parties. I do not read the case cited by the majority, *Reeves v. State*, 339 Ark. 304, 5 S.W.3d 41 (1999), which did not involve a revocation

hearing, as prohibiting the trial court from considering revocation as an option upon remand. In the absence of any definitive authority regarding the options available to the trial court, I think that we should express no opinion on that matter.

PITTMAN, C.J., joins in this opinion.

[redacted]