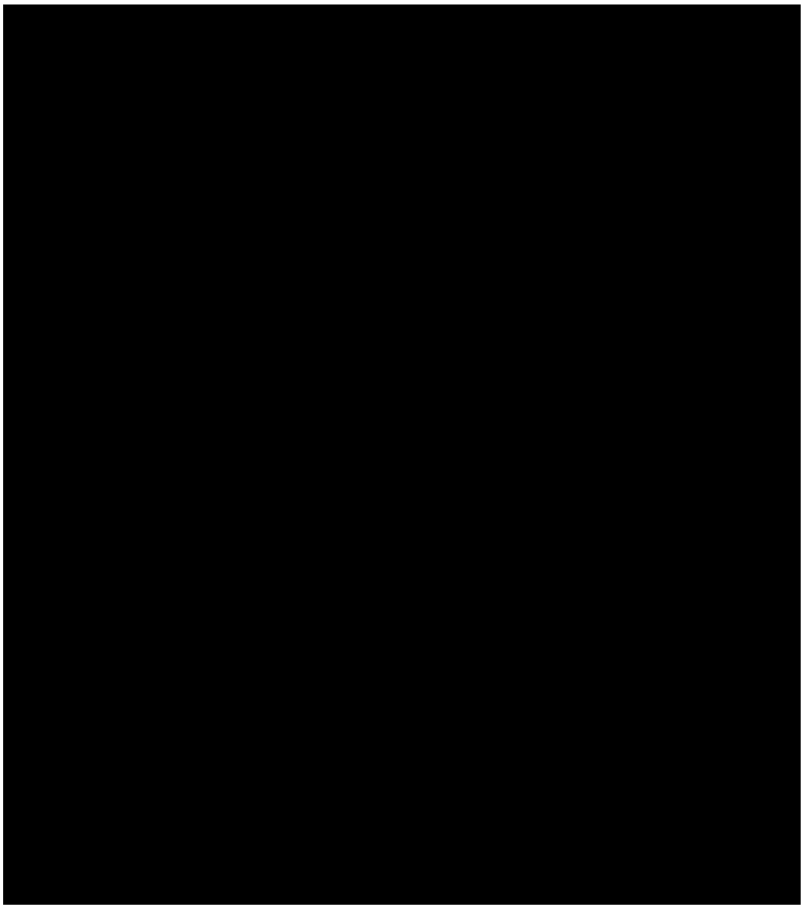
[redacted]

[redacted]

[redacted]



[redacted]

Dinzel NORMAN *v.* STATE of Arkansas

CR 95-361 922 S.W.2d 711

Supreme Court of Arkansas
Opinion delivered May 31, 1996

PER CURIAM. On May 20, 1996, we issued a per curiam granting appellant Dinzel Norman's motion to disqualify his attorney, George Stone. In that per curiam, we set out the various earlier orders of this court directing Stone to file the appellate record and brief in Norman's behalf.

Stone has been ordered on three occasions to file the record and brief in this cause, but he never did so. He has also appeared before this court twice in response to orders directing his appearance to show cause why he should not be held in contempt. On each occasion, Stone was late.

When Stone made his first appearance on February 26, 1996, he pled guilty to contempt, but assured the court he would file his brief on or before March 23, 1996. We held matters in abeyance, giving Stone time to comply with the new briefing date. No brief was filed on March 23. Instead, Stone waited until March 25, 1996 to request more time, stating his license had been suspended for a

CLE deficiency. We gave Stone until May 6, 1996, since he said his CLE deficiency would be corrected on or before March 29, 1996.

On or about April 3, 1996, Stone's suspension of license had been stayed by the CLE Board, but Stone still failed to file Norman's brief on May 6, 1996.

This court again was required to serve Stone with notice to appear, and while late, he appeared on May 28, 1996. At that hearing, Stone offered no valid reason for failing to meet the court's briefing schedule and complying with the court's directives. In sum, his response was that because he disliked his client, Norman, he had difficulty in preparing a brief. He gave no reason for failing to comply with this court's earlier directives. During this same hearing, Stone stated that he had never been sanctioned by the Professional Conduct Committee in this matter or any other. However, this court's clerk's office reflects Stone has been previously reprimanded by letter dated January 30, 1996. That letter was served on Stone by restricted delivery, and he signed upon its receipt. That sanction ensued from Norman's earlier grievance with the Commission filed in late 1995.

Because Stone has been found in criminal contempt, and he gives no valid reason in mitigation of punishment, we hereby order Stone to be incarcerated for forty-eight hours. Accordingly, we direct him to present himself to the Pulaski County Regional Detention Facility on Friday, June 7, 1996, at 5:00 p.m., where he will be incarcerated for a forty-eight-hour period. If Stone fails to appear, as ordered, the State Police will take immediate custody of Stone and deliver him forthwith to the Pulaski County Detention Facility for a forty-eight-hour period from the time he is delivered to the Facility.

DUDLEY, J., not participating.

Heath KENNEDY *v.* STATE of Arkansas

CR 95-711 923 S.W.2d 274

Supreme Court of Arkansas
Opinion delivered June 3, 1996

[redacted]

Didi Sallings, Executive Director, Arkansas Public Defender Commission, by: *Elizabeth S. Johnston*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

DAVID NEWBERN, Justice. Heath Kennedy stands convicted of capital murder and sentenced to life imprisonment without parole. He argues that the evidence was insufficient to have been permitted to go to the jury, thus his motion for directed verdict should have been granted. He also contends a statement given by him to the

police should have been suppressed. We affirm the conviction because the evidence was not only sufficient but overwhelming, and the State has shown that the statement was knowingly and voluntarily given.

Testimony at the trial revealed these undisputed facts. On March 5, 1994, Heath Kennedy, age 18, and Wade Miller, age 16, entered the Subway Sandwich Shop in El Dorado. Mr. Miller produced a .25-caliber pistol and pointed it at the cashier, who was the only employee in the store. The cash register was emptied and the cashier, 21-year-old Leona Cameron, was shot twice in the head. The shooting was done by Mr. Miller who had gone over the counter and taken Ms. Cameron to the storage area in the rear of the store. After killing Ms. Cameron, Mr. Miller called Mr. Kennedy to the rear of the store. He was having trouble getting the video tape out of the video cassette recorder (VCR) which was connected to the store security camera. The two young men left the store with the VCR which they dumped in a "mud hole" at Calion. Although the VCR and the tape it contained had been under water for days, still pictures taken from the tape after enhancement by the FBI clearly showed the young men in the store at 9:52 p.m. on the night of the murder.

1. Sufficiency of the evidence

Arkansas Code Ann. § 5-10-101 (Repl. 1993) provides in part:

> (a) A person commits capital murder if:
>
> (1) Acting alone or with one (1) or more other persons, he commits or attempts to commit ... robbery, ... and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or
>
> ***
>
> (4) With the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person;
>
> ***
>
> (b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the

> defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in its commission.

As Mr. Kennedy did not do the shooting, his argument is that his responsibility could only be that of an accomplice. Arkansas Code Ann. § 5-2-403(a) (Repl. 1993) provides:

> A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person in planning or committing it; or
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
>
> (3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

In the statement he gave to the El Dorado police, Mr. Kennedy said he did not know Mr. Miller had the pistol in his possession when they entered the store and that he protested strongly when Mr. Miller pulled it out and pointed it at Ms. Cameron. There is, however, strong evidence that Mr. Kennedy did know the gun would be used and that he helped plan and execute the robbery and murder and thus was an accomplice.

Ricky Church testified he saw Mr. Kennedy give the gun to Wade Miller, and was with Mr. Kennedy when he attempted to purchase ammunition for the gun. Darla Chance, a firearms dealer, stated that Mr. Kennedy purchased a magazine for the pistol several months prior to the murder. She also corroborated the testimony of Mr. Church that Mr. Kennedy attempted to purchase ammunition from her on March 4, 1994, the day before the murder. As he was under 21, he was not allowed to purchase the ammunition.

David Crawford testified that Mr. Kennedy asked him to purchase a box of .25-caliber ammunition. He stated that Mr. Kennedy drove him to Wal-Mart where he bought the shells for Mr. Kennedy the day before the shooting.

John Bennefield testified he saw Mr. Miller and Mr. Kennedy with the pistol on the evening of the murder. He stated that he saw

Mr. Miller "wiping down shells with a rag in his lap." According to Mr. Bennefield, when he asked them what they were going to do he was told, "Don't worry about it."

Jason Jackson told the jury he saw Mr. Kennedy and Mr. Miller about 8:00 p.m. on the night of the murder. According to his testimony, they brought up the idea of robbing a store and asked him if he would like to be the getaway driver for them. Mr. Jackson testified they told him they got the idea from the movie, *Menace II Society*, which, in the opening scene, depicts the robbery of a store, the killing of the cashier, and the removal of the videotape. Mr. Jackson testified the two told him they were going to rob the Subway Sandwich Shop because it would not be very crowded.

Mr. Jackson further testified that he saw Mr. Kennedy the day after the murder and that Mr. Kennedy showed him a newspaper reporting the crime and told him that he and Wade Miller had done it. Mr. Kennedy told him they went to the store but people were there. When they returned about ten minutes later, Wade pulled his gun, and demanded the money. Mr. Jackson stated that Mr. Kennedy said he grabbed the money while Miller took the young woman to the back. Mr. Kennedy told Jason that he heard three shots, then, after the fourth shot, he heard the victim scream, "Oh God." He then went to the back room and helped get the VCR.

A defendant may properly be found guilty not only of his own conduct, but also the conduct of his accomplice. *Purifoy* v. *State,* 307 Ark. 482, 822 S.W.2d 374 (1991). When two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979). There is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned. *Purifoy* v. *State, supra.*

In view of the testimony showing that Mr. Kennedy participated in the planning of the robbery and murder, including his purchase of ammunition for the pistol used by Mr. Miller, his presence at the scene during the commission of the crime, his participation in attempting to dispose of the VCR after the shooting, and his admission to a friend of having committed the crime, we conclude it was not error to allow the jury to consider the evidence against Mr. Kennedy.

2. Involuntary statement

Mr. Kennedy moved to suppress evidence of an inculpatory statement he made to Lt. Carolyn Dykes and Detective James Morrow of the El Dorado Police Department. At a hearing on the motion, the testimony of the officers revealed the following.

Detective Morrow had once been married to an aunt of Mr. Kennedy and had close ties with the Kennedy family until he and the aunt were divorced some five years ago. He had, during the time of that marriage, been Heath Kennedy's baseball coach as well. On Monday, March 7, 1994, Detective Morrow went with another officer to the Kennedy home to speak to Heath Kennedy about the disappearance of Joe Johnson, about information that Mr. Kennedy had been seen with a gun, and about the Subway store murder. Mr. Kennedy denied knowledge of any of the three.

On March 8, 1994, Detective Morrow called Mr. Kennedy and asked if he could come to the police station to discuss the disappearance of Joe Johnson and bring Wade Miller with him. Mr. Kennedy agreed. Shortly thereafter, Mr. Kennedy's mother called Detective Morrow to ask what was going on. Detective Morrow told her he was having a group of young people come in to discuss Joe Johnson's disappearance. He did not mention the Subway robbery and homicide.

Mrs. Kennedy arrived at the police station with Heath and Wade Miller late the afternoon of March 8, 1994. She and Heath were taken to a room by Lt. Dykes. Detective Morrow was present. Lt. Dykes had learned of Detective Morrow's previous family relationship with the Kennedys and had informed her superior that she would take the lead in the interview. She presented Heath Kennedy a waiver of rights form which stated the interview was to be about the homicide at the Subway store and the missing juvenile, Joe Johnson. The form had a place for the person executing it to state his date of birth. When Heath Kennedy informed Lt. Dykes of his date of birth, indicating that he was 18 years old, Lt. Dykes asked Mrs. Kennedy to leave the room. Mrs. Kennedy objected. She testified Lt. Dykes told her the law required that she leave. Mrs. Kennedy went into the hallway and was then asked to move further away, which she did.

Heath Kennedy admitted that he had a gun and had been with Wade Miller on the night of the murder. He denied knowledge of

Joe Johnson's disappearance and of the Subway robbery and the murder of Ms. Cameron. Lt. Dykes testified she assumed there was no further information to be obtained from him at that time, so she left the room to report that fact to her superior. At that point, Detective Morrow told Mr. Kennedy it would break his parents' hearts to learn that he was running around with a gun. Shortly thereafter, Mr. Kennedy asked if he could tell Detective Morrow something and have his "name kept out of it." Morrow replied he could make no promises, but asked, "What's on your mind?" Heath Kennedy then, according to Detective Morrow, admitted "his complicity or his part in the Subway incident." Lt. Dykes returned to the room and took a full statement from him in which he gave the details of the robbery, the shooting, and the attempt to dispose of the VCR, but said he did not know Miller had the gun and that he urged him not to use it.

Mr. Kennedy makes no claim that he was in any way coerced into making his statement to the police. His argument is that his statement should have been suppressed because of the "underhanded and deceitful" conduct on the part of a man he knew as "Uncle Jamie" and trusted to treat his statement as confidential. There is a suggestion that, had Mrs. Kennedy not been lied to about the nature of the investigation, she would not have permitted Heath to go to the police station without an attorney. He claims the VCR and the tape it contained as well as the gun recovered from beneath Wade Miller's grandparents' front porch should have been suppressed as fruit of the poisonous tree.

The State has the burden of proving by a preponderance of the evidence that a custodial confession or inculpatory statement was given voluntarily, and was knowingly and intelligently made. *Phillips* v. *State*, 321 Ark. 160, 900 S.W.2d 526 (1995). Consideration of the validity of a criminal defendant's waiver of the right to remain silent and the right to counsel prior to giving an inculpatory statement may be divided into two components. *Clay* v. *State*, 318 Ark. 122, 883 S.W.2d 822 (1994). The first component is the voluntariness of the waiver, and it concerns whether the accused has made a free choice, uncoerced by the police, to waive his rights. The second component involves whether the defendant made the waiver knowingly and intelligently, and the inquiry then focuses on determining if the waiver was made with a full awareness of both the nature of the right being abandoned and the conse-

quences of the decision to abandon it. *Id.* We must also decide if the confession or inculpatory statement, given after a waiver of rights has occurred, was itself voluntarily made.

When reviewing the voluntariness of confessions, we make an independent determination based on the totality of the circumstances and reverse the trial court only if its decision was clearly erroneous. *Oliver* v. *State*, 322 Ark. 8, 907 S.W.2d 706 (1995); *Rucker* v. *State*, 320 Ark. 643, 899 S.W.2d 447 (1995). In determining whether a confession was voluntary, the Court considers the following factors: age, education, and intelligence of the accused, lack of advice as to his constitutional rights, length of detention, repeated and prolonged nature of questioning, or the use of physical punishment. *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985); *Barnes* v. *State*, 281 Ark. 489, 665 S.W.2d 263 (1984). Two other pertinent factors in considering the totality of the circumstances are the statements made by the interrogating officer and the vulnerability of the defendant. *Oliver* v. *State*, *supra*; *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

As Mr. Kennedy does not claim that the officers threatened him or induced him with promises of leniency, or that there was an unduly long or otherwise oppressive interrogation, the voluntariness of the statement hinges on his claim of vulnerability. Mr. Kennedy's claim of vulnerability is based primarily on his youth, his relationship of trust with Detective Morrow, and the fact that he and his mother were misled initially as to the scope of the interview in which he ultimately inculpated himself.

Although youth is a factor, it alone is not a sufficient reason to exclude a confession. *Misskelley* v. *State*, 323 Ark. 449, 915 S.W.2d 702 (1996); *Oliver* v. *State*, *supra*. Mr. Kennedy was over eighteen years of age, thus his mother's consent was not required for a waiver of his right to counsel. Ark. Code Ann. § 9-27-317 (Repl. 1993).

The only authority cited by Mr. Kennedy in support of his argument on this point consists of *Free* v. *State*, *supra*, and *Davis v. State*, 275 Ark. 264, 630 S.W.2d 1 (1982). Those cases recite the general law on voluntariness but do not help with the facts of this case. *Wong Sun* v. *United States*, 371 U.S. 471 (1963), is cited for the "fruit of the poisonous tree" doctrine regarding the VCR and the gun.

For the proposition that the police "may make misrepresentations of fact so long as the officer does not coerce the suspect and does not make promises of leniency, so long as the suspect's in-custodial statement is otherwise freely and voluntarily made, with the suspect having been previously informed of his so-called *Miranda* rights," the State cites *Gardner* v. *State,* 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied* 440 U.S. 911 (1979), and *Tucker* v. *State,* 261 Ark. 505, 549 S.W.2d 285 (1977).

In the *Gardner* case, we held there was no error in admitting evidence of an inculpatory statement when there was a factual dispute of whether the defendant and his father had been misled by police officers about whether the statement could be withdrawn if he later obtained an attorney. Here we have no factual dispute about whether Mrs. Kennedy and Heath Kennedy were misled or the degree to which they were misled.

More relevant is the *Tucker* case, in which there was evidence that a police officer had led the 16-year-old defendant to believe physical evidence that he had killed his mother was stronger than it was. The officer went so far as to refer to the misleading as a "ruse" and a "con." There was also evidence that the officer had become a "dutch uncle" to the defendant. In our opinion holding these facts did not make the statement involuntary we cited *Frazier* v. *Cupp,* 394 U.S. 731 (1969). There the Supreme Court dealt with a case in which a defendant was falsely told by an interrogator that another had confessed that he and the defendant had committed a crime. The interrogator further misled the defendant when the defendant suggested he might get in more trouble if he said more without a lawyer's guidance. The interrogator misled him by saying that he could not be in any more trouble than he was already. The Supreme Court held the misrepresentation about the confession was relevant but not sufficient to make an otherwise voluntary confession inadmissible.

In this case, there is no question Mr. Kennedy was of age and waived his rights after being informed the investigation was about not only the disappearance of Joe Johnson but the homicide of Ms. Cameron as well. Although Mr. Kennedy was described at one point as mildly retarded in connection with an academic evaluation, he was in the eleventh grade and could read and write.

There is no suggestion that Mr. Kennedy did not understand

his situation. There were no threats of violence or promises of leniency. He had been asked about possession of a pistol on the day before he went in for questioning; thus, he shouldn't have been too surprised when that topic arose. He was questioned for less than two hours. There is no suggestion that he asked to be represented by an attorney. His inculpatory statement was made at his own instance after it appeared that his interview at the police station would end with his denials. Given these circumstances, we cannot say the statement was involuntary.

The totality of the circumstances surrounding the taking of the confession in this case is such that we cannot say the Trial Court erred in admitting evidence of the statement. The Trial Court was entitled to rely on the testimony of Detective Morrow that the statement was volunteered without prompting. *Everett* v. *State*, 316 Ark. 213, 871 S.W.2d 568 (1994).

3. Rule 4-3(h)

In accordance with Arkansas Supreme Court Rule 4-3(h), the record of trial has been examined for rulings adverse to the defendant on objections, motions, and requests by either party, and we find no reversible error.

Affirmed.

DUDLEY, J., not participating.

Ilene KINGSBURY *v.* R. Maxine ROBERTSON

95-435 923 S.W.2d 273

Supreme Court of Arkansas
Opinion delivered June 3, 1996

Donald R. Roberts, for appellant.

Sam L. Anderson, Sr., for appellee.

TOM GLAZE, Justice. Appellant Ilene Kingsbury is the niece and heir of Claude Rogers, who died on October 16, 1989. Rogers, a widower with no children, had engaged appellee Maxine Robertson to be his caretaker-nurse and gave her power of attorney on February 15, 1989. There was evidence that Robertson was representing herself to be Rogers's wife at the time of his death, although the two had never married. On November 12, 1993, Kingsbury sued Robertson, alleging breach of fiduciary duty and intentional infliction of emotional distress. Specifically, the complaint stated that Robertson: (1) concealed assets of Rogers's estate; (2) attempted to probate the estate using a fraudulent will; (3) misrepresented herself to be Rogers's wife, "causing acts to be done which would not have been but for the misrepresentation"; (4) concealed Rogers's death from the next of kin; (5) ordered the cremation of his body without Kingsbury's knowledge; and (6) attempted to convert the assets of Rogers's estate after his death using a power of attorney.

Robertson moved to dismiss on the basis that the suit was barred by the three-year statute of limitations that applies to tort actions. Ark. Code Ann. § 16-56-105 (1987). She asserted that any

cause of action would have accrued on October 16, 1989, the date of Rogers's death. Kingsbury argued in response that these acts had been ongoing until March of 1990, and she attached various documents reflecting these acts and their dates of occurrence.

The trial court treated the motion to dismiss as a motion for summary judgment. It found that all of the alleged breaches of fiduciary duty took place more than three years prior to the filing of Kingsbury's suit and Kingsbury was aware of these acts. Further, the trial court concluded that the allegations regarding concealment of Rogers's death and cremation were the only claims that would give rise to a suit for outrage, and as Rogers had died more than three years prior to the filing of this action, the statute of limitations barred such claims.

Kingsbury contends that the trial court erred in finding her claims for breach of fiduciary duty and the tort of outrage were barred by the statute of limitations. However, we are unable to reach the merits of Kingsbury's appeal because her abstract is flagrantly deficient. Ark. Sup. Ct. R. 4-2(b)(2).

Kingsbury's argument to this court concerns the applicability of the statute of limitations to the specific allegations in her complaint, but the abstract of her complaint fails to reflect those specific allegations. Instead, the complaint, as abstracted, simply states that Kingsbury sought compensatory damages for breach of fiduciary duty and compensatory and punitive damages for outrage. We have repeatedly held that a proper summary of the pleadings upon which the case was brought is essential for the court to consider the case. *Bohannon* v. *Arkansas State Bd. of Nursing*, 320 Ark. 169, 895 S.W.2d 923 (1995); *Logan County* v. *Tritt*, 302 Ark. 81, 787 S.W.2d 239 (1990).

Kingsbury also significantly failed to abstract exhibits that are essential to the determination of this appeal. Her argument to the trial court was that breaches of fiduciary duty had been ongoing since the date of Rogers's death and not before. In her response to Robertson's motion to dismiss, Kingsbury attached the following documents and orders in support of her contention that the statute of limitations had been tolled and was therefore inapplicable: (1) an authorization to cremate dated October 16, 1989; (2) a funeral home information sheet dated October 17, 1989, upon which Robertson stated she was Rogers's wife; (3) Rogers's obituary dated

October 17, 1989, reflecting that Robertson was his wife; (4) an order from the probate court dated December 22, 1989, requiring Robertson to turn over assets of his estate; (5) a letter from Robertson's lawyer dated February 28, 1990, stating that the assets had been turned over; (6) a joint will of Robertson and Rogers, along with a February 26, 1990 opinion of a handwriting expert stating that Robertson had signed Rogers's name to it; (7) an April 30, 1990 order of the probate court dismissing Kingsbury's petition to probate the will; (8) an order dated May 8, 1991, requiring Robertson to release assets of decedent; and (8) Rogers's medical records with a notation dated March 10, 1990, wherein Robertson, representing herself as Rogers's wife, had requested that no medical information be given to Kingsbury.

Under Ark. Sup. Ct. R. 4-2(a)(6), exhibits necessary for a clear understanding of a case must be included in an abstract. *Id.*; *see also Carton* v. *Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993). When such exhibits are not included in the abstract, we will summarily affirm. *Pennington* v. *City of Sherwood*, 304 Ark. 362, 802 S.W.2d 456 (1991). We have repeatedly stated that it is impractical to require all seven members of this court to examine one transcript in order to decide an issue. *Zini* v. *Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986). The burden on an appellant to reproduce exhibits is slight, but the ability of seven justices to understand the issues presented is essential. *See* George Rose Smith, *Arkansas Appellate Reports: Abstracting the Record*, 31 Ark. L. Rev. 359, 365 (1977). Here, Kingsbury's complaint and exhibits to her responsive pleading presented the core of her argument that the limitations statute did not bar her claims. Without those items being abstracted for the court's consideration, her argument must fail. Therefore, because Kingsbury's abstract is inadequate for a resolution of the issues presented, we summarily affirm the decision of the trial court.

DUDLEY, J., not participating.

Jack WELLS and Reba Wells *v.* The ESTATE of Reba A. WELLS

95-1299 922 S.W.2d 715

Supreme Court of Arkansas
Opinion delivered June 3, 1996

Michael J. Medlock, for appellants.

Paul R. Post, for appellee.

TOM GLAZE, Justice. This litigation arose after Reba A. Wells died on May 13, 1994. Five days later, Ms. Wells's stepson, Jack Wells, filed a petition in probate court, submitting an untitled instrument dated May 6, 1994, as Ms. Wells's last will, and requesting he be appointed executor. On May 19, 1994, Michie Daniels, Ms. Wells's niece, petitioned the probate court, offering an instrument dated July 8, 1993, entitled the Last Will and Testament of Reba A. Wells. After a hearing, the trial judge declined to probate the instrument proffered by Jack Wells, holding the instrument was not a will, nor properly executed as such. The judge concluded (1) the instrument failed to reflect it was a will, (2) it was not executed as a will under Ark. Code Ann. § 28-25-103 (1987), and (3) the decedent, Ms. Wells, never declared before a witness that the instrument was a will. Furthermore, the judge held the proof of will accompanying the instrument submitted by Jack Wells was not supported by the evidence. Finally, he found that, when she executed the May 6, 1994 instrument and other related documents, Reba A. Wells was under duress and undue influence. The probate judge admitted to probate the Reba A. Wells will dated July 8, 1993, finding it properly executed and valid.

In this appeal, Jack Wells challenges all of the probate judge's findings in holding the May 6, 1994 instrument to be invalid. He argues that, while Reba A. Wells may not have declared to the witnesses that the May 6, 1994 instrument was her will, such a declaration was not required. *See Faith*, 286 Ark. 403, 692 S.W.2d 239 (1985) (court stated it is not required that a testator recite precisely the words "this is my will," although that is obviously the preferred practice). Nor, he argues further, was it impermissible for one of the two witnesses to be the notary who subscribed the instrument and accompanying proof of will. Wells relies on the principle that, where there is no indication of fraud, deception, undue influence, or imposition, this court avoids strict technical construction of statutory requirements in order to give effect to the testator's wishes. *Faith* v. *Singleton*, 286 Ark. 403, 692 S.W.2d 239. In sum, Wells argues that the facts of this case do not call for the strict application of § 28-25-103 and its requirement for the proper execution of a will; therefore, the trial judge erred in refusing to probate the May 6, 1994 instrument as Reba Wells's last will. We

cannot agree.

■ We first point out that probate cases are reviewed *de novo* on appeal, and this court will not reverse unless the findings of the probate judge are clearly erroneous. *Looney* v. *Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). Due deference will be given to the superior position of the probate judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.* In the typical will contest, the party contesting the validity of the will has the burden of proving by a preponderance of the evidence that the testator lacked mental capacity at the time the will was executed or that the testator acted under undue influence. *Id.* The probate judge here found the evidence showed clearly that Reba A. Wells was under duress and undue influence when she executed the May 6, 1994 instrument and therefore the instrument should not be found to be Reba's will.

Jack Wells argues that the probate judge erred because there was no credible evidence of malign influence on his and his family's part. He points to the evidence he presented at the hearing that he and his wife took care of Reba after her husband died, and he was named on Reba's checking account. Jack's wife testified that Reba spent holidays with their family and pictures were introduced of these family events. His wife also related that it was Reba, not Jack Wells, who requested the May 6 instrument be prepared. Dr. David Staggs also testified that, in his view, Reba was capable of managing and handling her business affairs.

Other strong evidence conflicted with that presented by Jack Wells. For instance, Reba's niece, Doris Lundeen, testified that Jack Wells did not contact any of the nieces for three days after Reba was hospitalized for her heart attack in March 1994; and Jack had asked Reba's sister not to call. Niece Michie Daniels said that Jack Wells told her and others that they could not see Reba because of doctor's orders, but hospital personnel allowed them to do so. Franklin Wilder, Reba's attorney, said that Reba called him, saying she had been a prisoner held by Jack Wells, that Jack Wells and others made her sign a bunch of papers, and that she did not know what she had signed. Wilder testified Reba had said that they were trying to get her house and that she wanted her niece to come rescue her. Another niece of Reba's, Barbara Barnes, testified that Reba said Jack and his wife had mistreated her, and she was afraid of him. Barnes quoted Reba as saying that Jack and his family were holding

her prisoner and that Jack had taken her someplace to sign something; she did not know what it was, but was afraid she signed her house away. A neighbor also testified confirming Jack had been mean to Reba after they had gotten what they wanted from her.

Although there was considerable other testimony introduced below, the foregoing testimony shows that, whether Reba was under duress and undue influence when she signed the May 6, 1994 instrument the Jack Wells family had prepared, was very much in issue. Based upon the record before us, we cannot say the probate judge was clearly erroneous in finding duress and undue influence and refusing to probate the May 6 instrument as Reba's last will.

Jack Wells's other argument is that the probate judge erred in probating the other titled instrument, July 8, 1993 Last Will and Testament of Reba A. Wells, because it had been revoked by an Inter Vivos Trust executed on February 24, 1994, revoking all prior wills. Wells does not otherwise contest the validity and execution of the 1993 will.

First, while not argued, Wells probably has no standing to raise the issue since we find nothing in the record except the May 6, 1994 instrument that purports to give him any interest in the trust or the July 8 will. Nonetheless, his argument is without merit in any event. The revocation of wills is governed by Ark. Code Ann. § 28-25-109 (1987), which provides as follows:

> (a) A will or any part thereof is revoked:
>
> (1) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or
>
> (2) By being burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.
>
> (b) If, after making a will, the testator is divorced or the marriage of the testator is annulled, all provisions in the will in favor of the testator's spouse so divorced are revoked. With these exceptions, no will or any part thereof shall be revoked by any change in the circumstances, condition, or marital status of the testator; subject, however, to the provisions of § 28-39-401.

(c) Where there has been a partial revocation, reattestation of the remainder of the will shall not be required.

In construing § 28-25-109, we have uniformly held that the only methods of revoking a will are those enumerated in the statute. *In Re Estate of O'Donnell*, 304 Ark. 460, 803 S.W.2d 530 (1991); *Mosely* v. *Mosely*, 217 Ark. 536, 231 S.W.2d 99 (1950). Section 28-25-109 does not provide that a prior will can be revoked by a trust instrument, nor is there any evidence that Reba's July 8, 1993 will was revoked by any method authorized under § 28-25-109.

For the reasons above, we affirm.

DUDLEY, J., not participating.

ARKANSAS DEPARTMENT OF HUMAN SERVICES *v.* ESTATE OF Ruby LEWIS, Deceased

96-131 922 S.W.2d 712

Supreme Court of Arkansas
Opinion delivered June 3, 1996

C. Norton Bray, for appellant.

Paul C. Crumpler, for appellee.

ROBERT L. BROWN, Justice. This case involves the issue of whether the probate court erred in ruling that the appellant, Arkansas Department of Human Services (DHS), was estopped from recouping Medicaid benefits paid to Ruby Lewis from her Estate. We agree with DHS that the probate court did err in this regard, and we reverse and remand.

Ruby L. Lewis died intestate on December 14, 1994, at the age of 73. She was survived by two daughters and two granddaughters, and her estate at the time of her death was valued at approximately $25,000. A petition to open her estate was filed on Decem-

ber 20, 1994. On February 10, 1995, DHS filed a claim against the Estate for Medicaid benefits paid on Ruby Lewis's behalf for medication and home health care during her lifetime pursuant to Act 415 of 1993, now codified at Ark. Code Ann. § 20-76-436 (Supp. 1995). Act 415 provides in part that DHS may make a claim against the estate of a deceased recipient of Medicaid benefits for the amount of the benefits paid. The amount claimed by DHS was $9,977.36. The claim was denied by the administratrix of the Estate.

On March 20, 1995, DHS filed an amended claim against the estate for $9,488.01. The amended claim subtracted those charges paid prior to August 13, 1993, which DHS believed to be the effective date of Act 415. The actual effective date of Act 415 of 1993 was August 15, 1993. This claim was also denied by the administratrix.

On May 17, 1995, and August 23, 1995, hearings were held before the probate court on the various claims by DHS. At the first hearing, William Freevern, a program administrator in the medical assistance unit of DHS, testified as to the Medicaid payments made on behalf of Ruby Lewis for medication and home health care since August 15, 1993. Neva Braswell, one of the daughters of the decedent and the administratrix of her estate, also testified that her mother applied for services provided by the Elder Choice Program in 1992. She added that her mother was never informed that DHS would be able to recoup the Medicaid benefits after her death.

On August 23, 1995, the second hearing was held before the probate court to allow further testimony by the Estate. At that hearing, DHS stipulated that Ruby Lewis never received any notice or information from DHS about its ability to recover Medicaid payments from her Estate. This point was corroborated by the testimony of other DHS employees, one of whom added that she was never told by DHS to advise recipients of the change worked in the law by Act 415. Neva Braswell expanded her testimony to say that after her mother was denied Medicaid eligibility in 1992, she hired an attorney and appealed. She was eventually granted eligibility in June of 1993. Braswell testified that her mother had personal insurance that would have paid over 80 percent of her medication bills. She added that Medicaid paid approximately $1,800 for her medication, which it is now seeking to recoup.

On September 26, 1995, the probate court issued a letter opinion which stated in part:

> Ruby Lewis as a part of her agreement with DHS was required to inform DHS of any change in her financial circumstance which could then disqualify her from receiving the medicaid benefits. It seems reasonable that the same responsibility could be expected of DHS to inform Ruby Lewis of any changed circumstances which would affect her. The Supreme Court of Arkansas in the *Wood* case, *supra*, [*Estate of Wood* v. *Department of Human Services*, 319 Ark. 697, 894 S.W.2d 573 (1995)], described the result of Act 415 of 1993 as changing the benefit received from an entitlement or gift to a loan. Surely this important change in the status of the relationship between benefit recipient and provider of the benefit is of such significance that DHS should have concluded that its medicaid recipients should be advised of this change. Such was not done and in fact local DHS employees testified that they were not even aware of the change brought about by Act 415 so that they could in turn advise their clients.
>
> It is the conclusion of this Court that DHS had an obligation to advise its benefit recipients such as Ruby Lewis of the change in nature of the benefits which would occur as a result of Act 415 of 1993. Failing to do so DHS should be and in this case is estopped from then making a claim against this decedent's estate for such benefits.
>
> The equitable doctrine of estoppel is an affirmative defense and as such should be pled. This is to allow the opposing party to present evidence in opposition. In this case it is hard to imagine evidence DHS might offer since the facts are not in dispute. The pleadings here are deemed amended to conform to the evidence.

A formal order by the probate court was entered on October 3, 1995.

[redacted] DHS's sole point on appeal is that the probate court erred in finding that DHS was estopped from asserting its claim against the Estate. There are four elements necessary for a finding of estoppel: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that the conduct be acted on or

must act so that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the facts; and (4) the party asserting the estoppel must rely on the other's conduct and be injured by that reliance. *Miller* v. *City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990); *Foote's Dixie Dandy* v. *McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980). In *Foote's Dixie Dandy* v. *McHenry, supra*, this court abandoned the principle that the State can never be estopped by the actions of its agents. We stated in *Foote's Dixie Dandy*, however, that "[e]stoppel is not a defense that should be readily available against the state, but neither is it a defense that should never be available." 270 Ark. at 822, 607 S.W.2d at 325.

Since *Foote's Dixie Dandy* v. *McHenry, supra*, this court and the Arkansas Court of Appeals have only applied the doctrine of estoppel against the State where an affirmative misrepresentation by an agent or agency of the State has transpired. *See, e.g., Foote's Dixie Dandy* v. *McHenry, supra* (state auditor's misrepresentation that further documentation need not be filed may estop the State from collecting unemployment insurance contributions); *Wells* v. *Everett*, 5 Ark. App. 303, 635 S.W.2d 294 (1982) (Employment Security Agency informed recipient that amount disbursed was correct amount and was estopped from collecting the overpayment); *Fountain* v. *Everett*, 3 Ark. App. 214, 623 S.W.2d 861 (1981) (misinformation supplied by an Employment Security Agency of a sister state may estop Arkansas's agency from denying benefits); *Rainbolt* v. *Everett*, 3 Ark. App. 48, 621 S.W.2d 877 (1981) (Employment Security Agency informed applicant that she need not seek employment until after she viewed a training film and was estopped from using the delay to deny benefits).

Indeed, in *Everett* v. *Jones*, 277 Ark. 162, 639 S.W.2d 739 (1982), this court held that estoppel should not be applied where there was no clear proof of an affirmative misrepresentation by the agency. In *Jones*, the only evidence that was presented was that the State agency had failed to advise the claimant of the procedure to be followed. This court stated:

> Certainly, we do not intend that the *Foote's* doctrine be extended to a nebulous and indefinite situation where the agent of the State has not clearly caused the claimant to believe that nothing more is necessary other than to return on the assigned date .... Before the State is estopped from

> applying this law there must be substantial evidence that the citizen relied upon *actions or statements* by an agent of the State.

Jones, 277 Ark. at 167, 639 S.W.2d at 742. (Emphasis added.) The specific reference to *actions or statements* by a State agent underscores the need for some affirmative act as a prerequisite to a judicial finding of estoppel. *See also AP&L* v. *Arkansas Pub. Serv. Comm'n*, 275 Ark. 164, 169, 628 S.W.2d 555, 559 (1982), where this court referred to the "necessary reliance upon misleading action by the Commission" for estoppel to pertain.

In the case at hand, there was no affirmative misrepresentation by the State but only silence on the part of DHS of its right to recoup Medicaid benefits after Ruby Lewis's death. It necessarily follows that under these conditions, there can be no evidence that Ruby Lewis in any way relied on the State's silence regarding Act 415 to her detriment. For us to conclude otherwise would be to engage in guesswork and rank speculation which we will not do.

We take particular note of the fact that Act 415 does not impose a duty on DHS to inform Medicaid recipients of its right to file claims against their estates for benefits paid; nor do the federal Medicaid statutes or regulations. *See, e.g.*, 42 U.S.C. § 1396 p(b) and 42 C.F.R. § 433.36. In fact, the Federal Regulations only provide that notice to a recipient be given if the agency is placing a lien on the property of that recipient while he or she is in a nursing facility and not reasonably expected to be discharged. 42 C.F.R. § 433.36(d).

In sum, we decline to expand the *Foote's Dixie Dandy* doctrine to encompass incidents devoid of affirmative misrepresentation by the State. We further decline to impose a duty on State agencies to inform recipients of state benefits of changes in state programs, such as occurred in Act 415, absent a clear directive by the General Assembly to do so. This case, accordingly, is reversed and remanded for a determination of the precise amount of DHS's claim.

Reversed and remanded.

DUDLEY, J., not participating.

Keith Cox HILSTROM *v.* STATE of Arkansas

CR 96-563 921 S.W.2d 953

Supreme Court of Arkansas
Opinion delivered June 3, 1996

James O. Cox, for appellant.

No response.

PER CURIAM. Appellant, Keith Cox Hilstrom, was convicted on October 9, 1995, of theft of leased personal property and theft by deception. His notice of appeal was filed on November 6, 1995. The deadline for filing the record was May 6, 1996. The record was tendered to the clerk's office after the time for filing had lapsed.

The appellant, by his attorney, James O. Cox, has filed a motion for rule on the clerk to compel the clerk's office to accept the record. In his motion, appellant's attorney states that he relied upon misinformation given his office staff with regard to the filing date.

This court has held that we will grant a motion for rule on the clerk when the attorney admits that the record was not timely filed due to an error on his part. *See e.g., Tarry* v. *State*, 288 Ark. 172, 702 S.W.2d 804 (1986). Here, the attorney does not admit fault on his part but instead implies the court reporter who prepared the transcript provided him with misinformation. We have held that a statement that it was someone else's fault or no one's fault will not suffice. *Clark* v. *State*, 289 Ark. 382, 711 S.W.2d 162

(1986). Therefore, appellant's motion must be denied.

The appellant's attorney shall file within thirty days from the date of this per curiam a motion and affidavit in this case accepting full responsibility for not timely filing the transcript, and upon filing same, the motion will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct.

Deloris JACKSON *v.* STATE of Arkansas

CR 96-333 923 S.W.2d 280

Supreme Court of Arkansas
Opinion delivered June 3, 1996

Petitioner, pro se.

No response.

PER CURIAM. In 1994, Deloris Jackson was found guilty by a jury of murder in the second degree and sentenced to 240 months' imprisonment. Ms. Jackson was represented at trial by her retained attorney, J. Sky Tapp, who filed a timely notice of appeal of the judgment. The appeal was not perfected, and petitioner Jackson has now tendered to this court a partial record of the lower court proceedings with a motion for rule on clerk and an affidavit of indigency, asking that the appeal be allowed to proceed. Petitioner contends that the appeal was not perfected because she did not have the money to pay for the transcript.

Rule 16 of the Rules of Appellate Procedure—Criminal provides that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout appeal, unless permitted by the trial court or this court to withdraw. Once the notice of appeal is filed with the circuit clerk, only the appellate court can relieve counsel of the obligation to proceed with the appeal. Sup. Ct. Rule 4-3(j)(1). A convicted defendant can

waive her right to appeal by not informing counsel that she desires to appeal, but the timely filing of a notice of appeal in the instant case clearly demonstrates that the petitioner here did not waive her appeal right. *Franklin* v. *State*, 317 Ark. 42, 875 S.W.2d 836 (1994). The direct appeal of a conviction is a matter of right, and a criminal defendant cannot be denied her first appeal because counsel has failed to follow mandatory appellate rules. *See Reagan* v. *State*, 316 Ark. 511, 872 S.W.2d 369 (1994), citing *Evitts* v. *Lucey*, 469 U.S. 387 (1985). To extinguish a defendant's right to appeal because of an attorney's failure to follow procedural rules would violate the Sixth Amendment right to effective assistance of counsel. *Evitts* v. *Lucey*, *supra*. *See also Pennsylvania* v. *Finley*, 481 U.S. 551 (1987).

Even if there are insufficient funds to pay for the appeal transcript, an attorney cannot abandon the convicted defendant solely because there is no money for an appeal. *Parker* v. *State*, 303 Ark. 185, 792 S.W.2d 619 (1990). An attorney, knowing the convicted defendant desires to appeal, is obliged under Rule 16, regardless of the defendant's financial circumstances, to file the notice of appeal and then file a partial record, consisting of at least the judgment and notice of appeal, in the appellate court with a motion to be relieved containing a statement of the reasons for the request to withdraw. A copy of the motion to be relieved should be mailed to the defendant. *See Lewis* v. *State*, 279 Ark. 149, 649 S.W.2d 188 (1983).

Attorney Tapp did not receive permission from the appellate court to be relieved of his obligation to proceed with the appeal in this case and thus remains attorney-of-record. As petitioner Jackson contends that she is now indigent and the State has not contested that assertion, Mr. Tapp is appointed to represent her in this appeal. A writ of certiorari is issued to bring up within ninety days the entire record as designated by Mr. Tapp in the notice of appeal. A copy of this opinion shall be forwarded to the Committee on Professional Conduct.

Motion granted; writ of certiorari issued.

DUDLEY, J., not participating.

Frederick JACOBS *v.* STATE of Arkansas

CR 95-808 922 S.W.2d 344

Supreme Court of Arkansas
Opinion delivered June 3, 1996

Haskins Law Firm, by: *Steven R. Davis*, for appellant.

No response.

PER CURIAM. Appellant Frederick Jacobs moves for a belated appeal, which is granted. However, this case involves another appeal where a transcript has been requested of the court reporter of the 10th Judicial Circuit, and she states her tapes, reflecting the trial record, cannot be reproduced. The court reporter, Val Dixon Sims, is apparently no longer employed by the court, but she testified at a January 30, 1996 hearing regarding the state of the record in this cause, and her testimony seems somewhat conflicting. Ms. Sims indicated she had about twenty tapes produced during the appellant's trial, but those tapes cannot be transcribed because "you can't hear what's on them."[1] She later said, "You can hear on some of the tapes some voices very, very faint." Then, Ms. Sims said, "I didn't count them, . . . but you can't pick out portions of a tape to transcribe and then later try and certify it as fully true and correct. So if you don't have it all in a trial, you don't have anything."

[1] It appears ten tapes were produced from Sims's steno mask and ten tapes were made on a separate (or backup) tape recorder.

From the testimony given at the January 30 hearing, it does not appear anyone has actually attempted to transcribe any of the tapes, and from Sims's statements, there are tapes that could or might be transcribed, but all, or portions could not be. We understand a set of the tapes may have been sent to the FBI for enhancement, if possible. However, we would also direct the trial court to order transcription of whatever can be heard on the tapes.

Recently, in another case seemingly comparable to the one here, a partial transcript was made of Ms. Sims's tapes, even though a suppression hearing and side-bar conference could not be transcribed. *See Hood* v. *State*, 324 Ark. 457, 920 S.W.2d 854 (1996). We remanded the *Hood* case for the purpose of settling the record under Ark. R. App. P. 6(d) and (e), since it seemed feasible that the omitted portions might be reconstructed in view of the transcript that had been provided.

Accordingly, in addition to what the trial court has already ordered done in this matter, we direct that it order a licensed court reporter to transcribe all tapes, and portions thereof, in an attempt to see if a sufficient record can be obtained, so omitted portions can be reconstructed by the court and parties.

DUDLEY, J., not participating.

NATIONAL BANK OF COMMERCE, et al. *v.*
J. Gerald QUIRK, M.D., et al.

94-575 922 S.W.2d 717

Supreme Court of Arkansas
Opinion delivered June 3, 1996

Davidson & Associates, P.A., by: *Bob Davidson*; and *Bernard Whetstone, P.A.*, by: *Bernard Whetstone*, for appellants.

Friday, Eldredge & Clark, by: *J. Phillip Malcom*, for appellees.

PER CURIAM. Appellants, National Bank of Commerce, et al., have filed a "motion to amend mandate" and request additional costs on appeal. In the mandate issued April 5, 1996, costs on appeal were awarded as follows: Appellants' Brief $500.00; Record $2,442.75; Filing Fee $100.00. The appellants submit that the total cost for preparing the record was $26,009.98; therefore, the appellants contend that they are entitled to an additional $23,567.23 for the cost of producing the record.

Arkansas Supreme Court Rule 6-7, Taxation of Costs, provides in part:

> (b) Reversal. The appellant may recover brief costs not to exceed $3.00 per page; total costs not to exceed $500.00, the filing fee of $100.00 and the certified costs of the transcript.
>
> (c) Affirmed in Part and Reversed in Part — Law. In cases at law, the appellant is entitled to the appeal costs if a reversal is ordered, and a substantial recovery is made.

In the instant case, we affirmed in part and reversed in part the decision of the trial court. Because of the partial reversal, we award the appellants one-half of the amount of the requested costs for the record. *See In Re Marriage of Swanson*, 904 S.W.2d 88 (Mo. App. S.D. 1995); *Steffens* v. *Paramount Properties, Inc.*, 667 S.W.2d 725 (Mo. App. E.D. 1984); *see also* 5 Am. Jur. 2d, *Appellate Review* § 935 (1995). Consequently, we amend the mandate to award costs on appeal as follows: Appellants' Brief $500.00; Record $13,004.99; Filing Fee $100.00.

DUDLEY, GLAZE, and BROWN, JJ., not participating.

Special Justices JAMES MCLARTY and W. KELVIN WYRICK would award the entire amount requested by the appellants.

Larry RAYFORD *v.* STATE of Arkansas

CR 96-428 921 S.W.2d 954

Supreme Court of Arkansas
Opinion delivered June 3, 1996

John F. Gibson, Jr., for appellant.

No response.

PER CURIAM. The appellant, Larry Rayford, has filed a motion for rule on the clerk. This is his second motion. The first motion was denied in our *per curiam* opinion dated May 6, 1996. In the *per curiam*, we ordered the appellant's attorney, John F. Gibson, Jr., to file an affidavit accepting full responsibility for not timely filing the transcript. Mr. Gibson filed the affidavit on May 16, 1996.

We find that such an admission of error, made by an attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*). A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DUDLEY, J., not participating.

Kenny SMITH *v.* STATE

CR 96-573 921 S.W.2d 953

Supreme Court of Arkansas
Opinion delivered June 3, 1996

Michael L. Allison, for appellant.

No response.

PER CURIAM. Appellant, Kenny Smith, by his attorney, Michael L. Allison, has filed a motion for a rule on the clerk. We treat this as a motion for belated appeal. Mr. Allison states by motion that the record was refused by the clerk because the notice of appeal was filed prior to the date the posttrial motion was deemed denied. Mr. Allison admits the notice of appeal was filed untimely due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion is therefore granted.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DUDLEY, J., not participating.

STATE of Arkansas *v.* John Paul PARKMAN

CR 96-41 923 S.W.2d 281

Supreme Court of Arkansas
Opinion delivered June 3, 1996

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen. and Senior Appellate Advocate, for appellee.

No response.

PER CURIAM. This is an appeal by the State in a criminal matter. The transcript was filed by the State on January 10, 1996, and the appellant's brief was due forty days from that date. Ark. Sup. Ct. R. 4-3(b). The State first received a seven-day Clerk's extension on February 20, 1996. Thereafter, this court granted extensions of time for filing the State's brief (1) on February 26, 1996; (2) on March 14, 1996; (3) on March 28, 1996; (4) on April 11, 1996; and (5) on April 25, 1996. On April 25, 1996, we noted that this was the final extension and that the extended date for filing was May 8, 1996. No brief was filed by the State on that date.

On May 8, 1996, the State moved for eight additional days in which to file its brief, which would extend the deadline to May 16, 1996. No extension was granted by this court, and no brief was filed by that date.

On May 16, 1996, the State moved for an extension of time to file its brief to May 23, 1996. In that motion, the State observed that appellee Parkman is not incarcerated in Arkansas but is incar-

cerated in Texas as a suspected serial rapist. The State also mentioned that its basis for appeal was an improvident dismissal of an Arkansas rape charge for violation of the speedy trial rules. Parkman's counsel had no objection to the extension. No extension was granted by this court, and no brief was filed by May 23, 1996. On May 23, 1996, the State filed an identical motion for extension of time in which to file its brief to May 31, 1996.

In sum, nine extensions have been requested by the State. Three extensions have been requested since the final extension granted by this court on April 25, 1996, and no approval of those later extensions has been forthcoming from this court.

It is clear to this court that the State has not acted responsibly or with diligence in this matter. The specific Deputy Attorney General involved states that he is inundated with work, but even so, there should be others in the Criminal Appeals Division of the office available to take up the slack for him. We, therefore, conclude that if the State's brief in this matter is not filed by May 31, 1996, the State's appeal will be dismissed. Henceforth, we will not entertain appeals by the State when the State's brief is not filed in accordance with the specified deadline in the final extension granted by this court.

DUDLEY, J., not participating.

Robert Lee DAVIS *v.* STATE of Arkansas

CR 95-1168 924 S.W.2d 452

Supreme Court of Arkansas
Opinion delivered June 10, 1996
[Petition for rehearing denied July 1, 1996.*]

* Dudley, J., not participating.

Heather Patrice Hogobrooks, for appellant.

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

DAVID NEWBERN, Justice. Robert Lee Davis was convicted of two counts of possession of a controlled substance with intent to deliver. He was sentenced to 33 years' imprisonment. His sole point on appeal is that he was denied a speedy trial in violation of Ark. R. Crim. P. 28.1. We must affirm the conviction as Mr. Davis's abstract of the record is flagrantly deficient.

Mr. Davis's abstract shows he was arrested January 13, 1993, and admitted to bail the following day. He was tried on May 24, 1995, which was obviously more than the time permitted by Rule 28.1 for bringing him to trial. We have, however, no way of knowing if the Trial Court properly found that a sufficient number of days were excluded from that time in accordance with Rule 28.3.

Although the abstract indicates Mr. Davis moved to dismiss for lack of a speedy trial on March 14, 1995, the substance of the motion is not abstracted. The Trial Court's ruling on the motion is not abstracted. The abstract indicates that there were motions for continuances by Mr. Davis, which apparently were granted. Neither the grounds asserted for the continuances nor the Trial Court's orders in response to those motions are abstracted.

Apparently a hearing was held on September 12, 1994, concerning the speedy-trial motion. The hearing has not been abstracted. The abstract refers to a motion for reconsideration, apparently of an order denying the motion to dismiss, but the substance of the motion is not abstracted. The abstract does not contain the Trial Court's ruling on the motion. The abstract does not contain the jury verdict, the judgment and commitment order, or Mr. Davis's notice of appeal.

With only one record on appeal and seven justices, it is essential that the material parts of the record be abstracted. *Coney* v. *State*, 319 Ark. 709, 894 S.W.2d 583 (1995). *See, e.g., Franklin* v. *State*, 318 Ark. 99, 884 S.W.2d 246 (1994); *Britton* v. *State*, 316 Ark. 219, 870 S.W.2d 762 (1994). When an abstract is so deficient that

we cannot discern what happened in the Trial Court, we must affirm. *Franklin* v. *State, supra.*

Affirmed.

DUDLEY, J., not participating.

Kenneth SLOCUM *v.* STATE of Arkansas

CR 95-1039 924 S.W.2d 237

Supreme Court of Arkansas
Opinion delivered June 10, 1996

Herbert T. Wright, Jr. and *Alvin Schay*, for appellant.

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

TOM GLAZE, Justice. This appeal is a companion to the case, *King* v. *State*, 323 Ark. 671, 916 S.W.2d 732 (1996). Elgin King and Kenneth Slocum, the appellant here, were charged with the capital murder of Willie Simpkins. Their cases were severed, and King was convicted of the lesser included offense of first-degree murder and sentenced to forty years' imprisonment. At his separate trial, Slocum was convicted of capital murder and sentenced to life without parole. Upon King's appeal, we rejected the contention that the evidence was insufficient to support his conviction, but we reversed, holding the trial court erred in refusing King's proffered disputed accomplice instruction, AMCI2d 403.

Slocum raises four points for reversal in his appeal, two of which involve the sufficiency of the evidence and accomplice issues we decided in *King*. The evidence relevant to the disposal of these two points is largely the same as that proof set out in the *King* opinion, and focuses on the testimony of Vernon Scott, who identified King and Slocum as Simpkins's abductors and murderers. Scott told the police and later testified at trial that Slocum had given him

$40.00 of crack cocaine to get Simpkins to go to a hangout known as Hat Box Hattison's house. About thirty minutes after Scott and Simpkins arrived at the house, two masked men entered the house, brandished guns, taped Simpkins's hands together and took Simpkins out towards a field from which Scott said he heard gun shots. Scott identified the masked men as Slocum and King. Scott testified the man holding a .45 gun on Simpkins was Slocum, whom Scott had known most of his life. Other testimony showed Slocum had a motive for killing Simpkins because Simpkins was to be a witness in a murder trial against one of Slocum's relatives. Simpkins died from at least ten gunshots made with .45 and .38 weapons. A rubber mask was found near Simpkins's body. As noted previously, we found this evidence sufficient to support King's conviction, *King*, 323 Ark. at 676, and it is likewise sufficient here to support Slocum's capital murder conviction.

As in *King*, Slocum argues Scott was an accomplice as a matter of law because Scott had lured Simpkins to the scene of his abduction. Slocum contends that because Scott had been offered $40.00 worth of cocaine to lure Simpkins to Hat Box Hattison's house, Scott had to know some type of criminal activity was intended toward Simpkins. In *King*, we held this evidence was insufficient to declare Scott an accomplice as a matter of law, and we adhere to that holding as controlling in Slocum's appeal, as well.

However, in *King*, we also concluded that Scott's testimony was sufficient to create fact questions as to his status as an accomplice. *King*, 323 Ark. 678. Accordingly, we held the trial court erred in refusing to give King's proffered AMCI2d 403 disputed accomplice instruction, and reversed for that reason. Here, however, Slocum concedes he never raised Scott's disputed status as an accomplice at trial, nor did he proffer AMCI2d 403 to present that issue to the jury. In view of this failure, he argues for the first time on appeal that his trial attorney's failure to proffer instruction 403 constituted ineffective assistance of counsel, and asks us to decide this Rule 37 issue on direct appeal. We must reject Slocum's request. It is well settled that this court will not consider ineffective assistance of counsel as a point on direct appeal unless that issue has been considered by the trial court. *Edwards* v. *State*, 321 Ark. 610, 906 S.W.2d 310 (1995). Because the disputed accomplice status issue concerning Scott was not raised or ruled on below, we are unable to consider it in this appeal.

Slocum also raises two other points unique to his appeal. The first evolves from the law enforcement officers' search of Slocum's grandmother's house where Slocum had frequented. The officers found an unfired .45 bullet which was admitted into evidence over Slocum's objection that the bullet was irrelevant because the state's expert, Ronald Andrejack, could not say it was the same brand as the .45 bullets found in Simpkins's body. The state points out Andrejack was able to testify that the unfired bullet and one found in Simpkins were of the same manufacturing process by weight and design. The expert said, "[T]hey both have the same weight, that being 230 [grams]. They both are full metal copper jacketed. They both have open exposed lead on the base."

The similarities of the .45 bullets provided some additional link, albeit circumstantial, making it more probable than not that Slocum had committed the murder. Such a link is not irrelevant simply because it is circumstantial. *See Huggins* v. *State*, 322 Ark. 70, 907 S.W.2d 697 (1995). The weight to be given such evidence was for the jury to decide. *See Weaver* v. *State,* 324 Ark. 290, 920 S.W.2d 491 (1996); *cf. Bohanan* v. *State*, 324 Ark. 158, 919 S.W.2d 198 (1996).

In sum, Slocum's counsel thoroughly cross-examined Andrejack concerning the underpinnings of his opinion which appropriately went to the weight and credibility of this evidence, not to its admissibility. Because Andrejack's testimony did have some relevance in tending to connect Slocum with a .45 weapon, the caliber of which was used in Simpkins's murder, we hold the trial court did not abuse its discretion when admitting it into evidence.

Slocum's final point of appeal involves direct and indirect references to gangs made during Scott's testimony. However, we are unable to reach the merits of his argument because Slocum failed to preserve this issue for appeal. Prior to trial, Slocum filed a motion in limine to exclude any references to gangs, contending such evidence was irrelevant and unduly prejudicial. At a pretrial hearing, the trial court reserved judgment on the issue indicating that if the evidence was relevant, it would be admitted. Not until Scott had already made a number of references to gangs, nicknames, and colors did Slocum object, and then Slocum based his objection on the state asking leading questions.

When a trial court declines to rule on a motion in limine to exclude specific evidence, it is necessary for counsel to make a specific objection during the trial in order to preserve the issue for appeal. *See Massengale* v. *State*, 319 Ark. 610, 906 S.W.2d 310 (1995). Because Slocum failed to make a specific, contemporaneous objection during Scott's testimony as to his references to gangs, Slocum has waived this issue on appeal.

For the reasons discussed, we affirm.

Pursuant to Ark. Sup. Ct. R. 4-3(h), the state has reviewed the record in its entirety and has found no other rulings adverse to Slocum that involve prejudicial error.

DUDLEY, J., not participating.

R.J. "BOB" JONES EXCAVATING CONTRACTOR, INC. *v.* FIREMEN'S INSURANCE COMPANY of Newark, New Jersey

95-1318 922 S.W.2d 723

Supreme Court of Arkansas
Opinion delivered June 10, 1996

Stanley D. Rauls, for appellant.

No response.

DONALD L. CORBIN, Justice. Mr. Stanley D. Rauls, attorney for the appellant, R.J. "Bob" Jones Excavating Contractors, Inc., filed a motion requesting the disqualification of Associate Justice Donald L. Corbin from appellant's petition for rehearing. The motion for disqualification was filed *subsequent* to this court issuing a unanimous decision that was adverse to his client's interest.[1]

Rule 6-4 of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas requires that a motion to disqualify "shall be filed a reasonable time prior to the submission of the case to the Court." It is questionable whether the present motion to disqualify was timely filed since it accompanied the petition for rehearing, the latter of which, by definition, is filed after a case has been submitted and decided. However, Rule 6-4 is not controlling given that the present motion is for disqualification from the *rehearing only*. Despite the limited scope of the present motion, a party should not delay filing a motion to disqualify until he receives a ruling that is unfavorable to his position.

The briefs in the instant case did not reflect a conflict of interest, nor was there anything in the briefs that would cause this justice to believe that the law firm where his wife is employed had any interest in the case under submission. I reached my independent decision on the merits of this case based upon the facts and law contained in the briefs presented by the parties to this appeal. I have never had any interest in the disposition of this appeal other than concluding it in the highest degree of professional competence

[1] *Reporter's note: See R.J. "Bob" Jones Excavating Contr., Inc.* v. *Firemen's Ins. Co.*, 324 Ark. 282, 920 S.W.2d 483 (1996).

possible.

Motion denied.

DUDLEY, J., not participating.

Reginald JOHNSON *v.* STATE of Arkansas

CR 95-1227 924 S.W.2d 233

Supreme Court of Arkansas
Opinion delivered June 10, 1996

Tell Hulett, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Reginald Johnson appeals from an order denying his motion for a new trial on grounds of ineffective assistance of counsel. He urges two points in support of his appeal: (1) trial counsel was ineffective in failing to call witnesses to impeach the testimony of a primary state witness, Charlie Farmer; and (2) trial counsel prejudiced his case by failing to communicate plea options to him. We hold that the appeal is meritless, and we affirm.

Reginald Johnson was charged with first-degree murder in connection with the shooting death of Bruce Hatchett on February 15, 1994, in North Little Rock. The State produced the following testimony: Barbie J. Oliver testified that on the night Bruce Hatchett was killed, two men came to her house looking for him. (She later identified one of the men as Johnson, and she positively identified him at trial.) Johnson asked if Hatchett was there. When Oliver replied that he was not, Johnson retorted that she was lying because he had just seen Hatchett run to the back of the house with his (Johnson's) stereo.[1] Additional words were exchanged, and Johnson pulled his pistol out and threatened to kill Hatchett.

Derrick Jackson, Johnson's cousin, testified that he was the unidentified man with Johnson at Oliver's house. He essentially confirmed the testimony of Barbie Oliver but added that Hatchett was present at Oliver's house. Johnson asked Hatchett for his things, and Hatchett claimed that he did not have anything belonging to Johnson. Words and threats were exchanged. Jackson testified that Johnson became upset and pulled his gun out and put it in Hatchett's face. Jackson grabbed Johnson and told him that they should leave.

Johnson and he left the Oliver house and went to the house of Johnson's aunt. Fifteen to thirty minutes later, Hatchett appeared. Jackson testified that Hatchett entered the room and headed straight for Johnson. Hatchett got close to Johnson, and more words were exchanged. Johnson pushed Hatchett away twice and then shot him several times. Jackson added that a couple of the shots were fired after Hatchett had fallen to the floor.

---

[1] The testimony of witnesses is in conflict on whether it was a stereo set or a television set.

Melissa Steele, Johnson's cousin, testified that the shooting occurred at her former residence in North Little Rock. She testified that Hatchett, a large man, came to the house that night and immediately confronted Johnson. Although she never saw a gun, she stated that Hatchett walked in with his hand behind his back. She testified that Hatchett would not let up and forced Johnson against the wall. Suddenly, Johnson pushed Hatchett off and began shooting him. Steele testified that after Hatchett was shot, he fell to the ground.

Charlie Farmer, Barbie Oliver's son, testified that he was with Hatchett on the night he was slain and that Hatchett did not have a weapon. Farmer stated that he followed Hatchett into the house where the shooting occurred and was a few steps behind him when he heard a shot and saw Hatchett hit the floor. He then saw Johnson and a "shadow of a weapon." When he saw Hatchett lying on the floor, he was leaving the house and heard two more shots. He added that someone began shooting at him as he headed for the car.

Lisa Sakevicious, a criminalist with the State Crime Lab, testified that she conducted a gunshot residue examination on the victim's clothing. She testified that several of the shots were fired at close range. Dr. Frank Peretti, the associate Medical Examiner for the State Crime Laboratory, testified that Hatchett died of multiple gunshot wounds: one to the chest, three to the abdomen, one to the back, and one to the left thigh.

Johnson mounted a defense of self-defense with the following testimony. LaShonda Hatchett, an 11-year-old girl, testified that she saw Hatchett come into the house and begin to shout and push Johnson. She said that Hatchett kept reaching into his back pocket as if he was trying to retrieve something. On cross-examination, she admitted that she saw Johnson shoot Hatchett while he was lying on the floor and that she never actually saw Hatchett with a pistol.

Craig Howard testified that Hatchett came in and began shouting and pushing Johnson. He stated that Johnson kept telling Hatchett to leave him alone and was trying to get away from him but that Hatchett would not stop. He testified that Hatchett was a large man and that it was his impression that Hatchett was going to hurt Johnson.

Johnson testified on his own behalf. He stated that on the afternoon of the murder, he went to Barbie Oliver's house and saw

Hatchett grab his television set and run with it. A verbal altercation followed. Hatchett pushed Johnson, and Johnson ultimately pointed his pistol at Hatchett. He then went to his aunt's house. According to Johnson, Hatchett arrived later at Johnson's aunt's house. He stated that Hatchett walked in and started pushing him, and Johnson began shooting. He stated that he thought Hatchett was going to hurt him because he (Johnson) had pointed a gun at him earlier, and Hatchett had threatened him. He also stated that Hatchett had a reputation for violence. The State asked Johnson if he continued to shoot Hatchett after he had fallen to the floor. Johnson answered that he did not. However, on cross-examination Johnson stated that he did not know whether Hatchett was standing the entire time that he was firing the bullets because he had closed his eyes.

The jury convicted Johnson of first-degree murder and sentenced him to sixty years in prison. After judgment was entered, Johnson filed a motion for a new trial, asserting that his trial counsel, James Massie, had failed to call essential witnesses who could have impeached the testimony of a crucial state witness, Charlie Farmer. Johnson further asserted that he would have accepted a negotiated plea if one had been offered and that the possibility of seeking a negotiated plea was never communicated to him by counsel. Massie testified that he thought he recalled hearing something about 25 years from the prosecutor, but no plea offer was made. He broached reducing the charge to manslaughter to the prosecutor, but nothing was resolved. He stated that he prepared a case of self-defense and believed that the 11-year-old girl, Lashonda Hatchett, was his most credible witness. The motion for a new trial was denied by the trial court.

Johnson appeals the denial of his new trial motion. Although Rule 37 generally provides the procedure for postconviction relief due to ineffective counsel, this court has recognized that the issue may be raised by a defendant on direct appeal after the issue is first raised during trial or in a motion for a new trial. *See* Ark. R. Crim. P. 37; *Missildine* v. *State*, 314 Ark. 500, 863 S.W.2d 813 (1993); *Tisdale* v. *State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Hilliard* v. *State*, 259 Ark. 81, 531 S.W.2d 463 (1976).

The criteria for assessing the effectiveness of counsel were enunciated in *Strickland* v. *Washington*, 466 U.S. 668 (1984). *Strickland* provides that when a convicted defendant complains of ineffective assistance of counsel, he must show that counsel's repre-

sentation fell below an objective standard of reasonableness, and that but for counsel's errors, there is a reasonable probability that the jury would have decided differently. *See also Missildine* v. *State, supra.* Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance under *Strickland* requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. A reviewing court must indulge a strong presumption that the conduct falls within the wide range of reasonable professional assistance. Finally, a court hearing a claim of ineffective assistance of counsel must consider the totality of the evidence that was placed before the jury. *Missildine* v. *State, supra; Cox* v. *State*, 313 Ark. 184, 853 S.W.2d 266 (1993); *Burnett* v. *State*, 310 Ark. 202, 832 S.W.2d 848 (1992).

Johnson first maintains that his trial counsel was remiss in not calling essential witnesses to impeach the testimony of Charlie Farmer. This court has stated that counsel must use his own best judgment to determine which witnesses will be beneficial to his client. *Huls* v. *State*, 301 Ark. 572, 785 S.W.2d 467 (1990); *Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984). When assessing an attorney's decision not to call a particular witness, it must be taken into account that the decision is largely a matter of professional judgment which experienced advocates could endlessly debate, and the fact that there was a witness or witnesses that could have offered testimony beneficial to the defense is not in itself proof of counsel's ineffectiveness. *Huls* v. *State, supra*; *Dumond* v. *State*, 294 Ark. 379, 743 S.W.2d 779 (1988).

In the case at hand, Johnson specifically contends that his trial counsel was ineffective for failing to rebut the testimony of Farmer, who testified that he was in the house at the time of the shooting and suggested that he saw Johnson shoot Hatchett while Hatchett was lying on the floor. A review of the record, however, reveals that Farmer never testified precisely that Johnson shot Hatchett when he was down. He testified, instead, that he heard a shot and that Hatchett fell to the floor. He was leaving the house when he heard two more shots fired.

Johnson contends, nonetheless, as he did at the new-trial hearing that his trial counsel should have called Toni Hatchett, Tina Steele, and Derrick Jackson as defense witnesses to cast doubt on

Farmer's testimony that he was in the room at the time of the shooting. However, both Hatchett and Steele testified at the hearing on the motion for new trial that they left the room when the fight between Johnson and Hatchett began. Hatchett added that she closed the door after Hatchett came in and that no one entered after him. She did not see Farmer in the house. Jackson testified that he was in the room during the shooting and did not see Farmer until he (Jackson) was leaving the house. The trial court concluded on this point that even if Farmer's testimony was thrown out, there was ample testimony from other witnesses of the shooting and what transpired between Johnson and Hatchett. We agree. At least three other witnesses described what transpired, as has been already noted in this opinion.

Johnson further contends that these witnesses would have undercut Farmer's suggestion that Johnson shot Hatchett while he was down. Again, it is unclear that that was Farmer's testimony. But, in addition, witnesses other than Charlie Farmer testified that Johnson shot Hatchett while he was on the floor. For example, Derrick Jackson testified, "I think maybe one or two [shots] may have went in him after he hit the floor." LaShonda Hatchett also testified on cross-examination that she saw Johnson shoot Hatchett while he was on the floor. Thus, even if trial counsel had called witnesses to impeach Farmer's assumed prejudicial statement about shooting Hatchett while he was on the floor, there was other independent testimony to that effect.

We view these circumstances as categorically different from those in *Wicoff* v. *State*, 321 Ark. 97, 900 S.W.2d 187 (1995), where trial counsel failed to call the defendant's grandmother on behalf of the defendant. There, the grandmother would have testified that the alleged rape victim, who was the defendant's 11-year-old stepdaughter, told her she had fabricated her story. We held, under those circumstances, that a new trial was warranted. Here, the testimony of Charlie Farmer, whether he was present at the scene or not, added little to the State's case. In sum, we fail to glean any significant prejudice from the failure to impeach Farmer either on his whereabouts or concerning what he saw.

Finally, Johnson contends on appeal that James Massie called a witness on Johnson's behalf, Craig Howard, who Massie believed was not telling the "whole truth." This argument, however, was not made to the trial court and, therefore, was not

preserved for appeal. *See Roberts* v. *State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

Johnson's remaining point is that trial counsel failed to inform him about specific plea negotiations. This court has stated that "[t]he decision on whether to enter into plea negotiations is a matter of strategy beyond the purview of postconviction relief." *Jones* v. *State*, 308 Ark. 555, 559, 826 S.W.2d 233, 235 (1992); *see also Lomax* v. *State*, 285 Ark. 440, 688 S.W.2d 283 (1985). Furthermore, trial counsel testified at the new trial hearing that though he thought he remembered hearing something about 25 years from the prosecutor, the State never made a plea offer to him on Johnson's case. Thus, there was no basis for communicating a plea offer to Johnson. Tamika Hrobowski, the Deputy Prosecuting Attorney handling this case, confirmed that she made no plea offer. There is, too, the fact that Johnson himself remained resolute throughout his trial that he did not think that he was guilty of first- or second-degree murder because he was acting in self defense. When asked by the trial court if he would lie to the court and say that he did something that he did not do in order to get a lighter sentence, he answered, "No." Based on these facts, Johnson has failed to show that the trial court's ruling was clearly erroneous on this point.

Affirmed.

DUDLEY, J., not participating.

BILL FITTS AUTO SALES, INC. *v.* Carrie A. DANIELS

95-1100 922 S.W.2d 718

Supreme Court of Arkansas
Opinion delivered June 10, 1996

Diana M. Maulding, for appellant.

Central Arkansas Legal Services, by: *Kenneth E. Baker* and *Griffin J. Stockley*, for appellee.

ANDREE LAYTON ROAF, Justice. Appellant, Bill Fitts Auto Sales, Inc. ("Fitts"), appeals from a judgment awarding appellee Carrie Daniels a surplus resulting from the repossession and resale of a car which she had purchased from Fitts under a security agreement. Fitts contends that the trial court erred in (1) interpreting Ark. Code Ann. § 4-9-504 to require payment of a surplus to Daniels; (2) not allowing credit for expenses incurred by Fitts in a subsequent repossession of the car from the person to whom it had been resold; (3) not finding that Daniels had waived any right to surplus in the contract she signed for purchase of the car; and (4) denying Fitts' motion to dismiss for lack of sufficient evidence to award judgment. We find no error, and affirm.

Fitts sold a 1992 Mitsubishi Galant to Daniels for $10,500, on February 22, 1993. Daniels made a down payment of $6,500 and financed the remainder at 24 payments of $180.95 each. After Daniels missed a few payments, Fitts repossessed the car on December 1, 1993. Fitts paid off the recourse debt of $2941.81 and incurred the following expenses in connection with the repossession: $300 repossession fee, $300 discount fee, $251.11 commission, $327.45 get ready fee, $100 detail fee and a $100 lot fee.

Fitts then resold the automobile to Joyce Harris on January 3, 1994, for $8950. Harris paid a $1500 down payment but never made any further payments, and the car was again repossessed within a month. Fitts incurred costs attributable to Harris' repossession and paid off Harris's recourse debt of $6997.34.

Daniels filed suit seeking the surplus from the resale of the car to Harris. Daniels sought the difference between the $8950 resale price to Harris, and the $2941.81 Daniels owed when the car was repossessed from her, pursuant to Ark. Code Ann. § 4-9-504(2) (Repl. 1991).

After a non-jury trial, the trial court entered judgment against Fitts. The trial court determined the difference between the resale to Harris and the debt Daniels owed on the car to be $6008.19 ($8950 minus $2941.81) and allowed Fitts only the expenses of $1378.56 incurred in the repossession from Daniels, in awarding judgment in favor of Daniels for $4629.63. From that determination comes this appeal.

Fitts first argues that the trial court erred in interpreting the following provision contained in Ark. Code Ann. § 4-9-504(2)(Repl. 1991):

> (2) If the security interest secures an indebtedness, *the secured party must account to the debtor for any surplus*, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides. [emphasis added].

Fitts contends that the word "account" does not mean "pay" and requires only that a post-disposition statement of charges and credits be submitted to the debtor and that this was done.

Arkansas Code Annotated § 4-9-504 deals with a secured party's right to dispose of collateral after default. Section 4-9-504(1) provides that a secured party after default may sell the collateral, and that the proceeds of the disposition shall be applied, first, to the reasonable expenses of retaking, holding, and preparing the collateral for sale, next to the satisfaction of the indebtedness under which the disposition is made, and third to the satisfaction of indebtedness secured by any subordinate security interest in the collateral. We must thus determine what is required of a secured party, such as Fitts, if there are funds remaining from the proceeds of disposition of the collateral after payment of the credits allowed in § 4-9-504(1).

■ The first rule in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Henson* v. *Fleet Mortgage Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995). However, we are not limited to the dictionary definition of a term, as Fitts would suggest. The basic rule of statutory construction to which all other interpretive guides defer is to give effect to the intent of the legislature. *McCoy* v. *Walker*, 317 Ark. 86, 876 S.W.2d 252 (1994). In interpreting a statute and attempting to construe legislative intent, the appellate court looks 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 means that throw light on the subject. *Id.*

■ We first note that section 4-9-504(2) further provides that a debtor is *not entitled* to any surplus from the sale of accounts or chattel paper unless the security agreement so provides. This is surely strong, if not conclusive, indication that a debtor is entitled to the surplus from the sale of other collateral. Moreover, the proper procedure for post-sale accounting pursuant to U.C.C. § 9-504 (2) has been described as follows:

> When a duty to account exists, the proceeds of the foreclosure sale of the collateral are to be applied to: (a) liquidation expenses, (b) payment of debt, (c) subordinate security interests, (d) *payment of remaining surplus.*

9A Ronald A. Anderson, *Anderson on the Uniform Commercial Code*, § 9-504. (3d ed. 1994) (emphasis added). *Anderson* further provides that once the creditor has obtained satisfaction of his or her debt by

the disposition of the collateral, the creditor cannot recover more than the deficiency from the debtor. The trial court thus correctly determined that the requirement to account for any surplus included the payment of the surplus to Daniels.

Fitts next contends that the trial court erred in not considering and crediting Fitts with the expenses of the Harris repossession.

Arkansas Code Annotated § 4-9-504(1)(a) provides that reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing, and the like shall be deducted from the proceeds of the disposition of the collateral. Section 4-9-504(3) further provides that:

> (3) Disposition of the collateral may be by public or private proceedings and may be made by *way of one or more contracts*. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable.

Ark. Code Ann. § 4-9-504(3) (Repl. 1991) (emphasis added). Fitts argues that the expenses incurred after the sale to Joyce Harris should be deducted from the proceeds of the sale to her because collateral may be disposed of by way of "one or more contracts," and it took more than one contract to effectively dispose of the collateral.

According to Fitts, the Harris repossession costs include a $500 "quick note" that was not collected, $300 repossession fee, $1,254.87 commission, $521.25 dealer discount, and a $367.45 get ready fee along with a payoff of Harris's debt of $6997.34. Fitts argues that the transaction with Harris was but another expense on the continuum that started when the car was repossessed from Daniels and the Harris expenses should be counted as reasonable expenses under Ark. Code Ann. § 4-9-504(1)(a). Fitts asserts that "disposition" should be construed as a final parting with the collateral by the secured creditor. This argument is also without merit.

According to *Anderson, supra*, not every transfer of collateral by a secured party is a disposition for the purposes of the section in question. However, after a creditor has repossessed the collateral, a delivery of it to a third person "with the expectation that such person will ultimately pay the balance due" is a "disposi-

tion" within U.C.C. § 9-504 of which notice of sale must be given, even though no title is transferred to such third person at the time of delivery. 9A Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 9-504 (3d ed. 1994); *First City Bank-Farmers Branch, Tex.* v. *Guex*, 677 S.W.2d 25 (Tex. 1984).

The provision for disposition of the collateral by way of one or more contracts clearly pertains to collateral involving more than one unit. To accept Fitts's construction of the statute would result in a defaulting debtor being liable for any subsequent buyer's default until that buyer's contract was fully paid. Clearly, the car was delivered by Fitts to Harris with the expectation that she would ultimately pay the balance due; the collateral was thus disposed of pursuant to § 4-9-504.

Fitts contends that the trial court erred when it did not find that Daniels waived the right to any surplus when she signed the contract for the purchase of the vehicle. The contract between Daniels and Fitts contained the following clause:

> REPOSSESSION
>
> You can repossess the property if I default. I'll turn it over to you upon request. You may enter my property to get the property so long as you do it peacefully. You have the right to sell the property to cover my obligations and I'll also pay for your costs of retaking it, holding it, preparing it for sale [sic] and the like. If the sale doesn't cover all that I owe, I'll still be responsible for the difference. But I can still recover the property before you sell it by paying any amount due and any charges you are entitled to.

Fitts argues that Daniels is bound by the contract and that the contract does not provide that she get any surplus. This argument is also without merit.

Arkansas Code Annotated § 4-9-501 provides:

> (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below *may not be waived or varied* except as provided *with respect to compulsory disposition of collateral* (4-9-504, and 4-9-505), and with respect to redemption of collateral (4-9-506), but the parties may by agreement determine the standards by which the fulfillment of these

rights and duties is to be measured if such standards are not manifestly unreasonable:

> (a) Section 4-9-502(2) and 4-9-504(2) *insofar as they require accounting for surplus proceeds of collateral*[.]

(Emphasis added.) The debtor's rights to a surplus from the disposition of the collateral cannot be waived even by an express agreement. 68A Am. Jur. 2d *Secured Transactions* § 693 (1993).

Fitts's contract with Daniels was silent regarding the possibility of a surplus. However, Daniels's right to a surplus granted by Ark. Code Ann. § 4-9-504(2), cannot be waived even by an express agreement to do so.

Fitts finally contends that there was insufficient evidence for the court to grant judgment to Daniels. He argues that Daniels failed to prove her case and, therefore, it was error not to grant Fitts's motion to dismiss.

Fitts argues, in essence, that the trial court erred when it denied the motion to dismiss because there was no sufficient evidence in the record, placed there by Daniels, because Daniels could not testify to the precise amount of the debt owed by her or the expenses incurred by Fitts with the repossession and resale, even though she had obtained this information in discovery. Daniels's testimony, as well as the contract itself, provided evidence that Daniels paid $6,500 down on a $10,500 automobile. Yvonne Fitts, wife of Bill Fitts, was called as a witness by Daniels and confirmed without objection, that there was $2,941 owing on the automobile. She also testified on direct examination, again without objection, to the costs incurred in the repossession from Daniels.

Furthermore, Fitts waived his claim of error because, after Daniels rested her case and Fitts's motion to dismiss was denied, he went forward with his proof. Both Fitts and his wife testified again, providing the amount of the payoff for Daniels's loan and the costs incurred in repossessing the car from Daniels during their testimony. If, after the denial of a request for a directed verdict or a dismissal, a defendant introduces evidence which, together with that introduced by the plaintiff, is legally sufficient to sustain a verdict, he waives his claim of error by the court in refusing to direct a verdict, or dismiss, at the close of the plaintiff's case. *Shamlin* v. *Shuffield & Garot*, 302 Ark. 164, 787 S.W.2d 687 (1990); *Higgins*

v. *Hines*, 289 Ark. 281, 711 S.W.2d 783 (1986); *Kansas City Southern Ind., Inc.* v. *Stewman*, 266 Ark. 544, 587 S.W.2d 12 (1979).

There was clearly sufficient evidence upon which the trial court could base its judgment, without having to resort to conjecture or speculation. *See Aronson* v. *Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995).

Affirmed.

GLAZE, J., concurs; DUDLEY, J., not participating.

Guy C. BARNES *v.* STATE of Arkansas

CR 96-114 924 S.W.2d 453

Supreme Court of Arkansas
Opinion delivered June 10, 1996

Appellant, pro se.

No response.

PER CURIAM. On March 21, 1995, judgment was entered reflecting that Guy C. Barnes had pleaded guilty in the Circuit Court of Sebastian County to four counts of delivery of a controlled substance and had been sentenced to an aggregate sentence of twenty-two years' imprisonment. Mr. Barnes filed in Sebastian County a pro se petition pursuant to Criminal Procedure Rule 37 seeking to vacate the judgment. An order was entered denying the petition from which an appeal was not taken. Petitioner Barnes sought permission from this court to proceed with a belated appeal. The motion was denied. *Barnes* v. *State*, CR 96-114 (March 26,

1996). Petitioner has filed the motion for reconsideration which is now before us.

The motion is denied. There is no provision in the rules of procedure for a motion for reconsideration in a postconviction case. *In Re Motions for Reconsideration in Postconviction Matters*, 319 Ark. Appx. 826 (1994).

Motion denied.

DUDLEY, J., not participating.

James S. SANSON *v.* STATE of Arkansas

CR 96-620 922 S.W.2d 723

Supreme Court of Arkansas
Opinion delivered June 10, 1996

Paul A. Schmidt, for appellant.

No response.

PER CURIAM. Petitioner, James S. Sanson, by his attorney, Paul A. Schmidt, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry* v. *State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 295 Ark. 964 (1979) (per curiam).

A copy of this per curiam will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

DUDLEY, J., not participating.

Anthony Lamar ABERNATHY *v.* STATE of Arkansas

CR 95-966 925 S.W.2d 380

Supreme Court of Arkansas
Opinion delivered June 17, 1996

William R. Simpson, Jr., Public Defender, by: *Julia B. Jackson*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

BRADLEY D. JESSON, Chief Justice. Appellant Anthony Lamar Abernathy was convicted by jury of the first-degree murder of his girlfriend, seventeen-year-old Kendra Broadway, and sentenced to life imprisonment. On appeal, he asserts that the trial court abused its discretion in admitting testimony of prior bad acts. We affirm.

The State's evidence against the appellant included the following. On the evening of January 28, 1994, and into the early morning hours of January 29, 1994, appellant was drinking at a friend's house in Little Rock when he noticed he was missing $80.00. Angrily suspecting that his girlfriend Kendra had taken the money, he took a cab to his duplex at 125 College Park Circle in North

Little Rock, where Kendra was staying. According to appellant's statement to police, he thought about shooting her during the taxi ride home, but decided not to do so.

Upon arrival at the duplex at approximately 3:00 a.m., appellant confronted Kendra with the allegations of theft. When she refused to admit that she had stolen the $80.00, appellant beat her with his fists and kicked her with his steel-toe boots. Sherrie Pitts, who lived on the other side of the duplex, was watching television when she heard fighting, yelling, and what she described as "licks" or continuous hitting lasting approximately thirty minutes. She further recalled hearing the appellant repeat, "Bitch, don't you know I will kill you?" to which the victim, who was crying, would reply, "I know. I know." Pitts did not call the police because she did not have a telephone.

Shortly before 7:00 a.m., appellant called 911 from a pay telephone at a nearby intersection. Officer John Murphy of the North Little Rock Police Department was dispatched to the appellant's location. When Murphy arrested him, appellant stated, "I think I killed my girlfriend. I beat her up." Officers then located the victim's body at the duplex. Officer Tom Osborne testified that he found evidence of the appellant's attempt to clean up blood stains, including a water spot on the wall, a mop bucket filled with dirty and bloody water, and bloody rags. According to appellant's statement to Detective Jerry Smith, appellant told the victim he wanted her to die. He told Smith that he was mad at Kendra for stealing his money and admitted to hurting other people with whom he had intimate relationships, stating, "I stay with a person until I end up hurting them."

Dr. Charles Kokes of the State Crime Lab performed the autopsy on the victim and determined that her death was caused by "multiple blunt force injuries to everywhere actually." He estimated that Kendra would have died within two hours of sustaining the injuries. These injuries included a severe wound to the internal nasal structures, a laceration on the left frontal region near the forehead, hemorrhages to the chest and abdominal wall, a large laceration of the liver and right kidney, intestinal bruises, and extensive defensive injuries. According to Dr. Kokes, Kendra could have bled to death from the injury to her internal nasal structures alone. The State introduced photographs depicting the extent of these injuries.

Despite this overwhelming evidence it had against appellant, the State chose to introduce at trial the testimony of four witnesses regarding alleged prior threats and acts of violence by him. The State's theory was that this evidence was necessary to refute the theory that Kendra's killing was an accident. We need only discuss the most egregious of this prior-bad-act evidence, which was offered in the form of testimony of Sam Abernathy, appellant's stepbrother. Sam testified that on January 9, 1993, appellant kicked open the front door of his apartment in the middle of the night and shot him in both thighs, causing a compound fracture in one of his legs necessitating surgery. After Sam, who was unarmed, had fallen to the floor, appellant stood over him and kicked him in the head.

The evidentiary rule at issue in this case is A.R.E. 404(b). It reads:

> Other Crimes, Wrongs, or Acts. 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.

We have interpreted this rule as permitting introduction of testimony of other criminal activity if it is "independently relevant to the main issue — relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal — then evidence of that conduct may be admissible with a proper cautionary instruction by the court." *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986); *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980), *quoting Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). On appeal, we review the trial court's decision on this issue, like other evidentiary determinations, under an abuse-of-discretion standard. *Larimore* v. *State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

We stressed the requirement that there be a very high degree of similarity between the charged crime and the prior uncharged act in *Diffee* v. *State*, 319 Ark. 669, 894 S.W.2d 564 (1995). While the issue in that case was identity and the erroneously admitted evidence was offered to show a method of operation, the requirement of similarity in circumstances between the uncharged misconduct and the charged crime also applies when the State

offers the evidence to prove intent or the absence of mistake. Professor Imwinkelried illustrates this point in his treatise:

> Although the courts have been receptive to uncharged misconduct offered to disprove accident, there are restrictions on the introduction of evidence for this purpose. As is generally true under Wigmore's theory, the uncharged act must be similar to the charged act. Wigmore's theory rests on the doctrine of chances, and the evidence does not trigger the doctrine unless the charged and uncharged acts are similar.
>
> Furthermore, the judge has wide discretion to exclude the evidence under Rule 403. The ideal case for exclusion is one in which (1) the defendant has not affirmatively claimed accident and (2) the nature of the crime is such that accident would not be a plausible defense.

Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5:10 at 26-27 (1984)(footnotes omitted).

■ We are mindful of the State's burden to prove that appellant killed Kendra with the purpose of doing so. *See Russey* v. *State*, 322 Ark. 786, 912 S.W.2d 420 (1995); Ark. Code Ann. § 5-10-112(a)(2)(Repl. 1994). Nevertheless, we can find no logical connection between the uncharged acts perpetrated against appellant's stepbrother and the killing of his girlfriend in the present case. The trial court remarked that appellant's act of kicking his stepbrother in the head is similar to what is alleged in the present incident. Yet to accept that this evidence was relevant would require an inference that if appellant shot his stepbrother in the legs and kicked him in the head afterwards, he therefore had the purpose to kill his girlfriend when he hit and kicked her one year later. Because we conclude that the uncharged act perpetrated against Sam was not sufficiently similar to the charged offense, we hold that the trial court abused its discretion in admitting Sam's testimony at trial.

■ We must now consider whether this evidence was sufficiently prejudicial to mandate reversal. The universal view is that an error in the admission of uncharged-misconduct evidence is not error per se. Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 9:73 at 124 (1984). For the most part, other courts purport to apply the same harmless-error test to uncharged-misconduct errors as they apply to other trial mistakes. *Id.*, §9:74 at 125. As appellant

did not raise any constitutional objection to the admission of the prior-bad-acts evidence either at trial or on appeal, we need not evaluate the admission of this evidence under the constitutional standard of harmless beyond a reasonable doubt. *See Griffin* v. *State*, 322 Ark. 206, 909 S.W.2d 625 (1995).

■ We have said that when the evidence of guilt is overwhelming and the error is slight, we can declare that the error was harmless and affirm. *Rockett* v. *State*, 318 Ark. 831, 890 S.W.2d 235 (1994); *Greene* v. *State*, 317 Ark. 350, 878 S.W.2d 384 (1994). We find one Eighth Circuit case particularly persuasive. In *U.S.* v. *Johnson*, 879 F.2d 331 (8th Cir. 1989), the defendant was convicted of second-degree murder arising from a stabbing. The defendant stabbed the victim in the chest and face following an argument and claimed self-defense. The trial court admitted evidence of an incident six years earlier in which the defendant had allegedly threatened his aunt with a knife, reasoning that this evidence was relevant to defendant's state of mind or intent. While concluding that the trial court erred in admitting this evidence, as it was remote in time and unconnected to the events surrounding the murder at issue, the *Johnson* court held that the error was harmless in light of the fact that the jury could have inferred from the act itself that Johnson had the requisite mental state to commit the crime charged. The *Johnson* court also noted that the erroneously admitted evidence was admitted for limited purposes only.

■ Although Sam's testimony should not have been admitted into evidence, in light of the entire record, we determine that its admission constituted harmless error. As in *Johnson*, we think it significant that Sam's testimony, like the testimony of the other three witnesses at issue, was admitted with the following cautionary instruction:

> Members of the jury, you are instructed that evidence of other alleged crimes, wrongs, or acts of Anthony Lamar Abernathy may not be considered by you to prove the character of Anthony Lamar Abernathy in order to show he acted in conformity therewith. This evidence is not to be considered to establish a pertinent trait of character that he may have, nor is it to be considered to show that he acted similarly or accordingly on the day of the incident. This evidence is merely offered as evidence of motive, opportunity, intent, preparation, plan, knowledge, absence of mis-

> take or accident. Whether any other alleged crimes or acts have been committed is for you to determine.

Moreover, as appellant concedes in his brief, the State had very strong evidence against him, which included: (1) the "earwitness" testimony of Sherrie Pitts, who heard appellant repeatedly tell the victim, "Bitch, don't you know I will kill you?"; (2) appellant's confession, which included admissions that he thought about shooting the victim during the cab ride to the duplex; that he told the victim he wanted her to die; and that he was mad at her for stealing his money and blamed her for their child's death; (3) the lapse in time between the beating at approximately 3:00 a.m. and appellant's call to police at approximately 7:00 a.m. in light of Dr. Kokes testiimony that the victim would have died within two hours after sustaining the injuries; and (4) the evidence discovered at the duplex indicating that appellant tried to clean up the murder scene. Moreover, as in *Johnson*, the jury could have inferred purposeful murder from the act itself, as they heard Dr. Kokes's testimony regarding the nature and number of wounds to the victim's body, and were able to view photographs of these injuries as well. In sum, while we conclude that the State erred in admitting the testimony of Sam Abernathy because it was not sufficiently similar to the circumstances surrounding Kendra's murder, we hold that the admission of this evidence was harmless.

We have reviewed the record pursuant to Ark. Sup. Ct. R. 4-3(h) and have determined that there are no errors with respect to rulings on objections or motions prejudicial to the appellant not discussed above.

Affirmed.

DUDLEY, J., not participating.

BROWN, J., concurs.

Donald L. McPEEK, et al. *v.* WHITE RIVER LODGE ENTERPRISES, et al.

93-1267 924 S.W.2d 456

Supreme Court of Arkansas
Opinion delivered June 17, 1996

Austin & Osborne, by: *Brenda Austin*, for appellants.

Matthews, Campbell, Rhoads, McClure & Thompson, P.A., by: *David R. Matthews* and *Larry J. Thompson*, for appellees.

DAVID NEWBERN, Justice. The procedural history of this case, which began in 1988, is long and tortured. It now comes to an end as we must affirm on appeal and on cross-appeal because of failure of the parties to furnish abstracts of the orders from which the appeal and cross-appeal have been taken.

Donald and Mary Louise McPeek sought an injunction preventing White River Lodge Enterprises and its general partners (White River) from discharging effluent on the McPeeks' property from White River's sewage disposal system. White River counter-claimed, alleging the McPeeks were improperly claiming title to property belonging to White River at their joint boundary. The boundary dispute counter-claim was not pursued by White River at the trial, and a judgment was entered on June 21, 1993, denying the injunctive relief sought by the McPeeks.

The McPeeks filed a notice of appeal on July 9, 1993, and proceeded with an appeal before this Court. Thereafter, they moved in the Chancery Court to have the judgment set aside on the ground that Timothy Coplin, one of the owners of White River, had given false testimony. The appeal pending in this Court was dismissed, and the case was remanded to the Chancellor to settle the record. On March 25, 1994, the Chancellor set the original judgment aside.

After further hearings, the Chancellor awarded an injunction in favor of the McPeeks by an order entered August 2, 1994. The McPeeks filed a supplemental motion on October 20, 1994, alleging unnecessary delay, harassment, interference with discovery, false testimony, and a false claim against their real property, seeking costs and fees pursuant to Ark. R. Civ. P. 11. As abstracted, the motion mentions only Rule 11 as a basis for recovery.

In an order entered January 24, 1995, the Chancellor imposed Rule 11 sanctions on White River, and the McPeeks were given 10 days to submit an itemized list of fees and costs. The abstract contains no further order concerning the fees and costs; nor is there any abstract of the list of fees and costs to be considered by the Chancellor. Some fee and costs lists are included as "addenda" at the conclusion of the McPeeks' brief, but we have no way of knowing if, how, or when, these lists were submitted to the Chancellor. Many of the items in them are stated as "fees" without further information as to who charged them or to whom they were

paid, if they were paid, or to what aspect of the case they may have been related. We do have an abstract of testimony by Mr. McPeek stating that he was, during his testimony, handed a list of fees and expenses he says he paid in connection with the litigation, but we do not have any way of knowing if the lists in the addenda to the brief are the ones handed to him during his testimony.

■ In arguing their first point of appeal, the McPeeks contend the Chancellor erred in denying attorney's fees sought pursuant to Ark. Code Ann. § 14-236-106 (Supp. 1995). That section provides for the awarding of attorney's fees, damages, and a penalty against one who "willingly and knowingly" violates the Arkansas Sewage Disposal Systems Act. Ark. Code Ann. §§ 14-236-101 through 14-236-118 (1987 and Supp. 1995). The abstract contains no order denying a request for fees made pursuant to that statute. As noted above, the only reference in the abstract of the motion for fees shows that the fees were sought pursuant to Rule 11, and there is no mention of the statute. The McPeeks have not demonstrated that the Chancellor ruled on their motion, even if we could conclude the motion was made pursuant to the statute. *Farmers Bank* v. *Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990).

■ In their second point, the McPeeks argue the Chancellor erred by excluding part of the fees and costs requested for violation of Rule 11 and by denying fees and costs sought by them pursuant to Ark. Code Ann. § 16-22-309(a)(1) (Repl. 1994). The latter is the legislative provision for recovery of an attorney's fee against a party who files an action lacking a justiciable issue. Again, we have no order in the abstract denying such relief or showing that it was considered by the Chancellor.

In its first argument on cross-appeal, White River contends the Chancellor erred in setting aside the original judgment. There is no abstract of the motion to vacate or response to such a motion, nor is there any abstract of a hearing held to consider the motion. The order from which the cross-appeal is taken is abstracted in the McPeeks' abstract only as follows: "ORDER, dated March 21, 1994, filed March 25, 1994." White River provided no supplemental abstract in its opening brief on cross-appeal, so we have no idea what the order said or the basis of its entry.

■ A summary of the pleadings and the judgment appealed from are the bare essentials of an abstract. *Logan County* v. *Tritt*, 302

Ark. 81, 787 S.W.2d 239 (1990); *Jolly* v. *Hartje*, 294 Ark. 16, 740 S.W.2d 143 (1987). An appellant's abstract or abridgement of the record should consist of an impartial condensation of the material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the court for decision. *Davis* v. *Peebles*, 313 Ark. 654, 857 S.W.2d 825 (1993). The reason for the rule, as we have often explained, is that there is only one record and there are seven judges. It is impractical, and oftentimes impossible, for all seven judges to attempt to pass around the one record. *Pennington* v. *City of Sherwood*, 304 Ark. 362, 802 S.W.2d 456 (1991). It is the appellant's burden to abstract the record to demonstrate error, and the appellate court will not go to the record to determine whether reversible error occurred. *Farmers Bank* v. *Perry, supra.* The same rule applies, of course, to cross-appellants. *See Stephens Prod. Co.* v. *Johnson*, 311 Ark. 206, 849 S.W.2d 479 (1993).

Without abstracts of the sanction ruling from which the McPeeks appeal and the order setting aside the judgment from which White River appeals, we decline to reverse the Chancellor on either.

In conclusion, we note that White River has moved to dismiss the McPeeks' appeal, supporting the motion with a supplemental abstract in its reply brief. The McPeeks have moved to strike White River's supplemental abstract. In view of our decision to affirm on the basis of Rule 4-2(h), we need not consider or decide those motions.

Affirmed on appeal and on cross-appeal.

DUDLEY, J., not participating.

BROWN, J., concurs in part and dissents in part.

ROBERT L. BROWN, Justice, concurring in part; dissenting in part. I agree with part of the majority opinion but take issue with one significant point. After White River Lodge Enterprises argued in its appellee's brief that the McPeeks' original brief was defective due to failure to abstract a certain trial court ruling on statutory fees and a statement of fees and costs, McPeek moved for permission to substitute an abstract to correct those deficiencies. The motion to substitute was filed on the date the McPeeks' reply brief was due, which was February 20, 1996. On that same date, McPeek ten-

dered a substituted original abstract and brief to rectify the deficiencies pursuant to Ark. Sup. Ct. R. 4-2(b)(2). This, of course, all occurred long before the case was submitted for this court's consideration. The motion to substitute was denied.

Now, a majority of the court refuses to consider the McPeeks' argument on appeal for failure to abstract a court ruling on statutory fees and a statement of fees and costs pursuant to Supreme Court Rule 4-2(b). This is so even though the McPeeks sought permission to correct their abstract deficiency well in advance of the submission of the case.

This court routinely grants motions to supplement abstracts before the case is submitted with any costs necessitated by the opposing party's rebriefing to be assessed against the moving party. *See, e.g., Dixon Ticonderoga Co.* v. *Winburn Tile Manuf. Co.*, 322 Ark. 817, 911 S.W.2d 955 (1995) (per curiam). We do so under the authority of Ark. Sup. Ct. R. 4-2(b)(2), which reads:

> (2) Whether or not the appellee has called attention to deficiencies in the appellant's abstract, the Court may treat the question *when the case is submitted on its merits.* If the Court finds the abstract to be flagrantly deficient, or to cause an unreasonable or unjust delay in the disposition of the appeal, the judgment or decree may be affirmed for non-compliance with the Rule. *If the Court considers that action to be unduly harsh, the appellant's attorney may be allowed time to revise the brief, at his or her own expense, to conform to Rule 4-2(a)(6).* Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. *Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct.* (Emphasis added.)

Hence, our rule allows us to accept substituted abstracts even after the matter has been submitted for decision. We have typically declined to do that, but where the requested abstract substitution occurred before submission, we generally grant the request.

I would correct the error in refusing to allow an abstract substitution in this case and reach the merits of White River Lodge Enterprises' motion to dismiss and the McPeeks' request for addi-

tional fees. For that reason, I respectfully dissent.

Anthony KEY *v.* STATE of Arkansas

CR 96-121 923 S.W.2d 865

Supreme Court of Arkansas
Opinion delivered June 17, 1996

Didi H. Sallings, Executive Director, by: *Teri Chambers*, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant, Anthony Key, appeals a judgment of the Pulaski County Circuit Court convicting him of capital murder and sentencing him to life imprisonment without parole. Jurisdiction of this appeal is properly in this court. Ark. Sup. Ct. R. 1-2(a)(2). Appellant presents three arguments for reversal of the judgment entered pursuant to a jury verdict. We find no merit to the arguments and affirm.

Appellant's first argument for reversal is that the trial court erred in denying his motions for directed verdict. At trial, appellant moved for a directed verdict at the close of the state's case, contending the state had not proven that appellant acted with the premeditated and deliberated purpose of causing a person's death. Appellant presented defense witnesses and then renewed the motion for directed verdict at the close of his evidence, adding as additional grounds that he was incapable of forming the requisite mental state. Appellant then renewed the motion at the close of the state's rebuttal evidence and again at the close of his surrebuttal evidence.

Appellant's initial motions were sufficiently specific to apprise the trial court of the particular evidence he claimed was lacking. The renewal motions were likewise sufficient to preserve the argument for our review. *Heard* v. *State*, 322 Ark. 553, 910 S.W.2d 663

(1995); *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). Although appellant asks us to review the evidence as it existed both at the close of the state's evidence and again at the close of the case, appellant waived his former motion for directed verdict by presenting evidence in his defense. Therefore, we decide his challenge to the sufficiency of the evidence as the evidence existed at the close of the case when he renewed his former motions. *Rudd* v. *State*, 308 Ark. 401, 825 S.W.2d 565 (1992).

In reviewing the sufficiency of the evidence, we consider the evidence in a light most favorable to appellee and affirm if there is substantial evidence to support the verdict. *Nance* v. *State*, 323 Ark. 583, 918 S.W.2d 114 (1996). 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.* We consider only the evidence that supports the conviction without weighing it against other evidence favorable to the accused. *Farris* v. *State*, 308 Ark. 561, 826 S.W.2d 241 (1992). Circumstantial evidence alone may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Nance*, 323 Ark. 583, 918 S.W.2d 114. Once the evidence is determined to be sufficient to go to the jury, the question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide. *Hadley* v. *State*, 322 Ark. 472, 910 S.W.2d 675 (1995); *Missildine* v. *State*, 314 Ark. 500, 863 S.W.2d 813 (1993); *Lolla* v. *State*, 179 Ark. 346, 15 S.W.2d 988 (1929).

Because appellant does not dispute that he killed the victim, we need not recite the evidence in great detail. Suffice it to say that appellant shot and killed Lisa Williams as she was looking out the window of her trailer following an argument she had with appellant's sister. The only issue we need determine is whether there is substantial evidence to support a finding that he acted with the premeditated and deliberated purpose of causing death.

As applied to this case, a person commits capital murder if, "[w]ith the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person[.]" Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1993). Premeditation and deliberation are not required to exist for any particular length of time and may be formed in an instant. *Ward* v. *State*, 298 Ark. 448, 770 S.W.2d 109 (1989); *Ford* v. *State*, 276 Ark. 98, 633 S.W.2d 3,

cert. denied, 459 U.S. 1022 (1982). Premeditation and deliberation may be inferred from the circumstances of the case, which include the type and character of the weapon used, the manner in which the weapon was used, the nature, extent, and location of the wounds inflicted, and the conduct of the accused. *Kemp* v. *State*, 324 Ark. 178, 919 S.W.2d 943 (1996); *Farris*, 308 Ark. 561, 826 S.W.2d 241.

The type of weapon used was a 12-gauge shotgun. As for the character of the weapon, appellant described it in his statement as being sawed-off at both ends. Three 12-gauge shell casings were recovered at the scene. Investigating officers described the shell casings as being mag load, double-00 buckshot, two and three-quarter inch. The officers estimated that the victim fell backward six feet from the window where she was looking outside when she was shot. According to the associate medical examiner, she suffered eleven entrance wounds from a single shotgun blast that caused multiple penetrations and perforations of her head, neck, chest, and right arm.

Willie Williams, the victim's husband, testified that he and his wife were at home in their trailer when they heard a gunshot. He stated that they went to the doorway and saw appellant shooting at the trailer next door. He then saw appellant turn and shoot in their direction, with the shot hitting the corner of the doorway where they stood. Mr. Williams stated that his wife then went to the bedroom while he remained near the doorway and called 911. He testified that, while still on the phone to 911, he saw appellant moving closer to their trailer in their direction. He stated that when he went to the bedroom he saw his wife looking out the corner of the window; he then heard another shotgun blast and she fell backwards.

A total of five shots were fired at the scene. One shot hit the trailer next to the Williamses', and one shot hit the Willliamses' car. Three shots hit the Williamses' trailer, one on the north side near the doorway where the Williamses stood when they heard the first shot, and two at the west end near the corner of the window where the victim was looking outside. One of these hit above the window and the other hit the corner of the window. Photographs of the crime scene indicated that the shot that hit near the doorway and the shot that hit the corner of the window were both fired at head level.

On appeal, appellant's argument is twofold. First, he argues that the number and scattering of the blast patterns indicate he acted with an intent to scare or to cause property damage, rather than to kill the victim. Second, he argues that he was incapable of forming the mental state of premeditated and deliberate purpose to kill because, given the quick period of time between the argument and the homicide, he was unable to weigh consequences in his mind and to cope with the stress of the fight between his sister and the victim. In support of this argument, appellant relies on testimony from Charlotte Bull, appellant's former special education teacher; Drew Camp, a licensed psychological examiner for the North Little Rock School District; and Dr. James Moneypenny, a psychologist. Collective testimonies of these three witnesses revealed that appellant had an IQ of 72, which borders on the mildly-mentally-retarded range, and was reading at the third-grade level when he quit school approximately two years prior to the homicide; that he had diminished reasoning abilities when under stress; and that he had difficulty developing coping skills. Dr. Moneypenny opined that, given appellant's lack of abilities and the stress of his sister being involved in a fight, appellant was functioning under a diminished capacity on the date of the homicide. He also testified that the fact that the gunshots were scattered and disorganized was consistent with his opinion of appellant's diminished capacity.

■ We are convinced there was substantial evidence from which a jury could very easily conclude, without speculating, that appellant acted with a premeditated and deliberated purpose to cause the death of Lisa Williams. In short, appellant used a sawed-off, 12-gauge shotgun loaded with double-00 buckshot in March; the shots were fired into the trailer at head-level; and the shots appeared to have been aimed at a certain target as they followed the victim when she moved from the doorway of her home to the bedroom. It was for the jury to determine that this evidence excluded every other hypothesis consistent with appellant's innocence, and they could do so on this evidence without speculating. The jury was not persuaded by appellant's evidence. This was a credibility determination by the jury that we affirm upon substantial evidence. Accordingly, we find no merit to appellant's first argument.

■ Appellant's second argument for reversal is a challenge to

the trial court's finding that appellant was fit to proceed to trial. Ordinarily, a criminal defendant is presumed to be mentally competent to stand trial, and the burden of proving incompetence is on that defendant. *Mitchell* v. *State*, 323 Ark. 116, 913 S.W.2d 264 (1996). The test for determining an accused's competency to stand trial is whether he is aware of the nature of the proceedings against him and is capable of cooperating effectively with his attorney in the preparation of his defense. Ark. Code Ann. § 5-2-302 (Repl. 1993); *Mitchell*, 323 Ark. 116, 913 S.W.2d 264. On appellate review of a finding of fitness to stand trial, we affirm if there is substantial evidence to support the trial court's finding. *Id.* at 121, 913 S.W.2d at 266 (quoting *Mauppin* v. *State*, 314 Ark. 566, 865 S.W.2d 270 (1993).

Appellant argues that, because he told the examiner at the state hospital that he was charged with first-degree murder when he was actually charged with capital murder, he was not aware of the nature of the charges against him. He argues further that he had a significant history of poor communication abilities, thus he could not assist in his defense. Following the filing of appellant's notice pursuant to Ark. Code Ann. § 5-2-304 (Repl. 1993) and motion for evaluation, the trial court entered an order committing appellant to the state hospital for examination. Dr. O. Wendall Hall, a psychiatrist at the state hospital, filed a report with the court finding that appellant appeared to be aware of the nature of the charges and the proceedings taken against him and was capable of cooperating effectively with an attorney in the preparation of his defense.

The trial court later held a competency hearing and heard testimony from Drew Camp, a licensed psychological examiner in the North Little Rock School District; Dr. Albert Kittrell, a fourth-year psychiatry resident at the state hospital; and Dr. Susan Doi, a clinical psychologist at the state hospital. Collectively, their testimonies established that appellant had an IQ of 72, which is on the borderline of mild mental retardation; that various tests of language skills, motor skills, and behavior skills indicated appellant functioned at an equivalent age of ten to twelve years; that while in the eleventh grade he functioned at the third-grade level in all areas except math, in which he functioned at the fifth-grade level; that appellant had no problems functioning in the social environment at the state hospital; that appellant was fairly poor in both judgment and insight; that appellant showed no evidence of major mental

illness or psychotic behavior; and that appellant was aware of the charges and could assist in his own defense.

■ The law does not require an accused to identify with specificity the charges filed against him. Rather, section 5-2-302 requires that an accused have the capacity to "understand the proceedings against him." Both doctors from the state hospital testified that appellant knew he had been charged with murder. They both concluded that appellant was aware of the nature of the charges against him. In addition, both doctors testified that he cooperated in their examinations and with others at the state hospital. Again, both doctors stated appellant could assist in his defense. Their testimonies constitute substantial evidence to support the trial court's conclusion that appellant was competent to stand trial.

Appellant's third argument for reversal is that the trial court erred in refusing to suppress appellant's pretrial statement, wherein he admitted to firing the shotgun at the Williamses although he did not intend to kill anyone. Appellant contends his waiver of *Miranda* rights was not voluntary, knowing, or intelligent because the interrogating officer made a false promise to send appellant home if appellant would admit to being the shooter. He argues that persons of ordinary intelligence would not be induced to confess on such an obviously false promise and that his low intelligence and lack of education rendered him extremely vulnerable.

■ When the voluntariness of a confession is in issue, we make an independent determination of voluntariness based upon the totality of the circumstances surrounding the confession, and we do not reverse the trial court's finding of voluntariness unless it is clearly against the preponderance of the evidence. *Misskelley* v. *State*, 323 Ark. 449, 915 S.W.2d 702 (1996). Some of the factors we consider are the age, education, and intelligence of the accused; the advice or lack thereof on constitutional rights; the length of the detention; the repeated or prolonged nature of the questioning; and the use of physical punishment. *Id.* A custodial confession is presumed involuntary and the burden is on the state to show the confession was voluntarily made. *Id.*

■ A confession obtained through a false promise of reward or leniency is invalid. *Id.* However, the only evidence that appellant's custodial statement was obtained through a false promise of reward comes from appellant's testimony at the suppression hearing.

In his statement, however, he clearly stated that the detective advised him of his *Miranda* rights in a manner that he understood, that no one had made any threats or promises in exchange for the statement, and that he was giving the statement "of [his] own free will." Thus, this is a credibility issue that the trial court assessed in favor of the state. *See Misskelley*, 323 Ark. 449, 915 S.W.2d 702.

While the factors of age and mental capacity are factors to consider in determining voluntariness of a confession, those factors alone are not sufficient to require suppression. *Misskelley*, 323 Ark. 449, 915 S.W.2d 702. In addition, a low score on an intelligence quotient test does not render an accused incapable of voluntarily giving a confession. *Id.* The facts of *Misskelley* are almost identical to the facts of this case. Misskelley was aged seventeen when he was interrogated, had an IQ of 72, and read at the third-grade level. In the present case, appellant was aged eighteen when he was interrogated, had an IQ of 72, and read at the third-grade level. We found Misskelley's confession to be voluntary. Likewise, we find appellant's to be voluntary. On this evidence, we cannot say the trial court's finding of voluntariness was clearly against the preponderance of the evidence.

In accordance with Rule 4-3(h), the record has been reviewed for adverse rulings objected to by appellant but not argued on appeal, and no such errors were found. For the aforementioned reasons, the judgment of conviction is affirmed.

DUDLEY, J., not participating.

Natalie Ann McGARRAH, Appellant *v.* Joe McGARRAH, Appellee; Johnny McGarrah and Sharon McGarrah, Intervenors

94-680 924 S.W.2d 453

Supreme Court of Arkansas
Opinion delivered June 17, 1996
[Petition for rehearing denied September 9, 1996.]

Naif Samuel Khoury, for appellant.

Paul R. Post, for appellee and intervenors.

DONALD L. CORBIN, Justice. Natalie Ann McGarrah appeals a divorce decree from the Crawford County Chancery Court. We affirm the chancellor's decision pursuant to Ark. Sup. Ct. R. 4-2(b)(2) due to appellant's failure to sufficiently abstract the proceedings below.

The standard of review of chancery court proceedings is whether the chancellor's findings were clearly erroneous or clearly against the preponderance of the evidence. *Riddick* v. *Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993). This we cannot determine with the abstract we have been provided. We have frequently held that the record on appeal is limited to that which is abstracted, and that it is appellant's burden to produce a record sufficient to demonstrate error. *See, e.g., McAdams* v. *Automotive Rentals, Inc.*, 324 Ark.

332, 924 S.W.2d 464 (1996); *Burgess* v. *Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985). We find that the abstract submitted in this case is a record too insufficient for a review of the merits of appellant's arguments.

Pursuant to Ark. Sup. Ct. R. 4-2(a)(6), an appellant is required to compile an abstract containing material parts of the pleadings, proceedings, facts, documents, and any other matters which are necessary for an understanding of all questions presented to this court. *Chrysler Credit Corp.* v. *Scanlon*, 319 Ark. 758, 894 S.W.2d 885 (1995). Surely, the orders of the lower court, as well as the notice of appeal, are encompassed in that requirement.

Both of appellant's arguments on appeal question the chancellor's rulings and orders concerning the validity of several pre-divorce agreements entered into by appellant and appellee. Appellant has not, however, abstracted any order which indicates the chancery court's ruling as to that issue. Specifically, appellant has omitted the final chancery court order. We assume that it is the holding contained in that final chancery court order upon which appellant bases this appeal, although we cannot be sure as appellant has failed to abstract the notice of appeal. It is, therefore, impossible for this court to determine whether or not the chancellor's rulings were clearly erroneous when we have not been provided with the rulings themselves and when we cannot discern from which order or orders the appeal is taken. For this reason, we affirm the decision below.

Affirmed.

BROWN and ROAF, JJ., dissent.

DUDLEY, J., not participating.

ROBERT L. BROWN, Justice, dissenting. The majority affirms on grounds of a deficient abstract and concludes that it is "impossible for this court to determine whether or not the chancellor's rulings were clearly erroneous when we have not been provided with the rulings themselves and when we cannot discern from which order or orders the appeal is taken." I disagree. Both parties abstracted the ruling made by the chancellor on April 21, 1994, regarding the invalidity of Joe McGarrah's relinquishment of his parental rights, and the appellee and intervenors abstracted the ruling relating to the visitation rights of the intervening paternal

grandparents. The appellant makes it clear that she is appealing from these rulings.

On pages 16 and 17, appellant Natalie Ann McGarrah included this ruling by the chancellor:

> Plaintiff is granted a Decree of Divorce on the grounds of general and personal indignities. Custody would be with the mother. We're going to start today with a completely clean slate. ... *Now, let me make another statement about this document where the parental rights were given up in anticipation of the divorce. It's unfortunate that it occurred, but it has no legal effect, not yet, not just the signing of it. But, the Court is the only person or the only entity that can terminate someone's right as a parent. He could sign - he could have red, white and blue ribbons put on it, it still doesn't — isn't effective.* (Emphasis ours.)

The same ruling, as well as the ruling regarding grandparental visitation rights, was abstracted by the appellee and intervenors on pages 10 and 11 of their supplemental abstract:

> THE COURT: Plaintiff is granted a divorce and custody of the child to be with the mother. You (Natalie McGarrah) were treading on very thin ice trying to substitute your judgment for that of the Court. There will be unsupervised visitation according to the Standard Order of Visitation. Visitation will be overnight for one weekend a month but visitation will begin every Saturday from 9:00 a.m. until 5:00 p.m. Starting in June we are going to use the Standard Order allowing weekend visitation on the first weekend of each month. Make sure the house is safe and that the child is never left unattended. While the child is in the home, no smoking around the child. *Visitation will be the right of the father. The grandparents and the father can exercise that jointly, or if the father is not available the grandparents can exercise it. Visitation is to be in the home of the Defendant and unsupervised. Let me make another statement about this document were (sic) the parental rights were given up in anticipation of divorce. It is unfortunate that it occurred, but it has no legal effect, not just the signing of it. It's not a piece of property. We are talking about a human being and parental rights. The Court is the only entity that can terminate someone's rights as a parent. It isn't effective.* (Emphasis ours.)

In short, both parties to this appeal agree essentially on the chancellor's rulings from the bench. The chancellor's rulings were later memorialized in two orders: the Divorce Decree entered June 2, 1994, and the Contempt Order entered August 31, 1994, and it is true that the formal Divorce Decree and Contempt Order were not abstracted. But where the rulings are abstracted by both parties *and* where both parties agree on what the rulings were, I cannot conclude that the abstracting is fatally deficient under Ark. Sup. Ct. R. 4-2(b) or that this court cannot discern the issue on appeal from the abstract.

This court has affirmed on grounds of a fatally deficient abstract, when the order appealed from has not been abstracted. *See, e.g., Winters* v. *Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996). But this is not such a case. The rulings from the bench are abstracted, and the parties agree on what those rulings were. Under these facts, to decide the appeal on (1) the failure to abstract the two orders, which merely duplicate the chancellor's rulings, and (2) the failure to abstract the notice of appeal is unduly technical. I would reach the merits of the case. For that reason, I respectfully dissent.

ROAF, J., joins.

SEBASTIAN LAKE PUBLIC UTILITY COMPANY, Inc. *v.* SEBASTIAN LAKE REALTY, et al.

96-167 923 S.W.2d 860

Supreme Court of Arkansas
Opinion delivered June 17, 1996

John W. Settle Law Firm, by: *John W. Settle*, for appellant.

Skinner Law Firm, P.A., by: *Jack Skinner*, for appellees.

ANDREE LAYTON ROAF, Justice. Sebastian Lake Public Utility Company, Inc., appeals from an order granting summary judgment in favor of the appellees, Sebastian Lake Realty and John's Jiffy Stop, Inc. In granting the summary judgment, the chancellor ordered the South Sebastian County Water Users Association, Inc., to provide water service to the appellees. The trial court further concluded that, as a matter of law, the appellant, which had been providing water to the appellees, did not have an exclusive franchise for the delivery of water service to any area in Sebastian County, Arkansas. We affirm.

On October 4, 1994, John's Jiffy Stop and Sebastian Lake

Realty, operators of a convenience store and apartment complex, filed a complaint against South Sebastian County Water Users Association (Association) alleging that they operated businesses in Sebastian County and that the Association was a public utility that provided water service to Sebastian County. The complaint further alleged that the Association had refused to provide water service to the appellees despite the fact that its water line was within a hundred feet of the appellees' businesses. The appellees asserted that the actions of the Association were arbitrary and capricious, in violation of Ark. Code Ann. § 23-3-114, which prohibits a utility from subjecting any corporation to any unreasonable prejudice or disadvantage, in violation of the statutes of the United States, and in violation of the rules and regulations of the United States Farmers Home Administration. The appellees alleged that they had no adequate remedy at law, and they sought a mandatory injunction requiring the Association to furnish them water service.

In its answer, the Association alleged that the appellees did not need water because they were being supplied water from the appellant, Sebastian Lake Public Utility Company, Inc. (Public Utility). The answer provided that the Public Utility purchased its water from the Association pursuant to a water-purchase contract dating from November 18, 1968. The Association admitted that it sells surplus water to the Public Utility which then sells water to individual consumers in the Sebastian Lake community.

On May 26, 1995, the Public Utility filed a motion to intervene, alleging that it had a franchise recognized by the Public Service Commission (PSC) to supply water in the area where the appellees' convenience store and apartment complex were located, and that its contract with the Association would be contravened if the Association was ordered to supply water directly to the appellees. The trial court granted the Public Utility's motion to intervene.

On July 6, 1995, the appellees moved for summary judgment. They asserted that it was undisputed that the Association refused to supply water to them and that the Association's water lines were within close proximity to their businesses. The appellees further contended that the Public Utility was no longer regulated by the PSC, that the Public Utility had not been awarded an exclusive franchise, and that they were entitled to judgment as a matter of law.

Subsequently, the Public Utility also moved for summary judgment, asserting that it was undisputed that the PSC granted it a certificate of convenience and necessity to provide water to the area known as Sebastian Lakes in which the appellees' property was located. The Public Utility contended that it was granted an exclusive right to construct, operate, and maintain a waterworks system in the area pursuant to the certificate. The Public Utility further asserted that even though its rates were no longer subject to approval by the PSC, the certificate of convenience and necessity remained in effect because it had never been revoked by the PSC.

In granting summary judgment, the chancellor concluded that the Public Utility did not have an exclusive franchise to provide water service within the geographic area of Sebastian Lake Estates. The trial court further concluded that it was undisputed that the Public Utility was a Class C public utility which was no longer regulated by the PSC by virtue of Act 37 of the First Extraordinary Session of 1987. The trial court stated that if it held that the Public Utility had an exclusive and unregulated franchise, the appellees would be left in the untenable position of having neither bureaucratic redress for their complaints nor the ability to seek better service in the market place. The trial court also found that when the General Assembly deregulated Class C water utilities in 1987, it nullified by implication any exclusive franchise which may have otherwise been in existence for such a utility pursuant to a certificate of public convenience and necessity.

1. Standing

We first consider whether the Public Utility has standing to bring this appeal. The appellees contend that because the chancellor did not order the Public Utility to do anything, or prohibit it from doing anything, it consequently does not have standing to appeal the decision of the trial court. We hold, however, that the Public Utility is an aggrieved party, and as such, has standing to raise an issue on appeal. *See McDonald's Corp.* v. *Hawkins*, 315 Ark. 487, 868 S.W.2d 78 (1994). In reaching its decision, the trial court interpreted the Public Utility's certificate of public convenience and necessity and held that it did not have an exclusive franchise. Although the Public Utility was not "ordered" to do anything, the trial court's decision impaired its economic interests. Further, the Public Utility was allowed to intervene, and the appellees have not appealed that decision.

2. Summary Judgment

The standard for appellate review of a summary judgment is whether the evidentiary items presented by the moving party in support of the motion left a question of material fact unanswered and, if not, whether the moving party is entitled to judgment as a matter of law. *Baker* v. *Milam*, 321 Ark. 234, 900 S.W.2d 209 (1995). We view all proof in the light most favorable to the party opposing the motion, resolving all doubts and inferences against the moving party. *Id.* However, when the movant makes a prima facie showing of entitlement to summary judgment, the respondent must meet that proof with proof showing a genuine issue as to a material fact. *Id.*

In determining that the appellees were entitled to summary judgment as a matter of law, the trial court considered certain provisions of Title 23 of the Arkansas Code, which addresses Public Utilities and Regulated Industries. Chapter 3 of Title 23 is entitled "Regulation of Utilities and Carriers Generally." Arkansas Code Annotated § 23-3-201(a) (1987) provides:

> No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the commission a certificate that public convenience and necessity require, or will require, such construction or operation.

Commission is defined as "the Arkansas Public Service Commission or the Arkansas Transportation Commission with respect to the particular public utilities and matters over which each commission has jurisdiction." Ark. Code Ann. § 23-1-101(6) (Supp. 1995).

On October 9, 1964, the PSC entered an order regarding an application for a certificate of convenience and necessity filed by the Public Utility. The order provided that the Public Utility sought the certificate to

> construct, maintain and operate a waterworks system in order that it *may offer water for sale to the public in an area within the boundaries of a project known as Sebastian Lake Estates*, which is being developed by Sebastian Lake Developments, Inc. . . .

(Emphasis added.) Ultimately, the commission ordered that:

> Sebastian Lake Public Utility Company, Inc. be, and it is hereby, granted a certificate of public convenience and necessity to construct, operate and maintain a waterworks system in the area described hereinabove, and it is hereby charged with the responsibility of rendering adequate water service to the public in the area *at rates for such service as may be hereafter approved by this Commission.*

(Emphasis added.)

On appeal, the Public Utility contends that this certificate of public convenience and necessity grants it an exclusive franchise to provide water service in the specified geographic area. The Public Utility further contends that the certificate has never been revoked by the PSC and, therefore, remains in effect.

The trial court found that when the General Assembly deregulated Class C water utilities in 1987, it also nullified by implication any exclusive franchise which may have otherwise been in existence for such a utility pursuant to a certificate of convenience and necessity. Arkansas Code Annotated § 23-1-101 (Supp. 1995), Definitions, provides in part:

> (4)(A) "Public utility" includes persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities for:
>
> (i) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or another agent for the production of light, heat, or power to, or for, the public for compensation;
>
> (ii) Diverting, developing, pumping, impounding, distributing, or *furnishing water to or for the public for compensation.* However, nothing in this subdivision shall be construed to include water facilities and equipment of cities and towns in the definition of public utility. Further, *the term "public utility" shall not include* any entity described by this subdivision which meets any of the following criteria:
>
> (a) All property owners' associations whose facilities are enjoyed only by members of that association or residents of the community governed by that association; or

> (b) *All entities whose annual operating revenues would cause them to be classified as Class C or lower water companies* pursuant to the uniform system of accounts adopted by the Arkansas Public Service Commission. However, the term "public utility" shall include any water company which petitions, or a majority of whose metered customers petition, the Arkansas Public Service Commission to come under the commission's jurisdiction, provided that the water company must have had combined annual operating revenues in excess of four hundred thousand dollars ($400,000) for the three (3) fiscal years immediately preceding the date of filing the petition; or
>
> (c) All improvements districts.

(Emphasis added.) Act 37 of the First Extraordinary Session of 1987 amended the definition of public utility to provide that the definition did not include an entity whose annual operating revenues would cause them to be classified as a Class C or lower water company. The Emergency Clause of Act 37 provided in part:

> It is hereby found and determined by the General Assembly that regulation of small water and sewer utilities as "public utilities" under the jurisdiction of the Public Service Commission generally imposes heavy regulatory costs upon the consumers . . .

Act 21 of the Fourth Extraordinary Session of 1988 further amended the definition to provide that a water company or its customers could petition the PSC in order to come under its jurisdiction if the company had sufficient revenues. In the instant case, it is uncontested that the Public Utility is a Class C utility which is not regulated by the PSC.

It is significant that a certificate of public convenience and necessity is issued by the PSC as part of its regulatory power. *See* Ark. Code Ann. § 23-3-201(a) (1987). Section 23-3-201(a) provides that "[n]o new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the commission a certificate. . ." It is also significant that the order of the PSC granting the Public Utility's certificate of public convenience and necessity provided that the Public Utility was charged with the responsibility of

"rendering adequate water service to the public in the area at rates for such service as may be hereafter approved by this Commission." However, because the Public Utility is no longer subject to regulation, the provisions of the certificate have no force.

In short, the Public Utility was required to obtain a certificate in order to operate as a public utility; however, it is no longer a public utility. Because it is no longer regulated, the Commission's rules and regulations are no longer applicable. Consequently, we hold that the trial court correctly determined that the certificate has been nullified. We therefore need not consider whether the certificate granted the Public Utility an exclusive franchise to provide water service in the area of Sebastian Lakes Estates.

3. Due Process

The Public Utility also contends that if its certificate has been revoked by legislation or by the trial court's interpretation of this legislation, it has been deprived of its property without due process of law in violation of the United States and Arkansas Constitutions. The Public Utility submits that the statute is unconstitutional because it makes no provision for any proceeding by which it could protect its interest.

This argument, however, was never presented to the trial court. We have repeatedly stated that an argument which is raised for the first time on appeal is not properly preserved for appellate review and will not be addressed. *Marsh & McLennan of Arkansas* v. *Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995); *see also Smith* v. *Quality Ford*, 324 Ark. 272, 920 S.W.2d 497 (1996); *Technical Services of Arkansas* v. *Pledger*, 320 Ark. 333, 896 S.W.2d 433 (1995). Even constitutional arguments are waived on appeal if they are not raised at trial. *Hodges* v. *Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995).

Affirmed.

DUDLEY, J., not participating.

Billy OWENS *v.* STATE of Arkansas

CR 95-1187 924 S.W.2d 459

Supreme Court of Arkansas
Opinion delivered June 17, 1996

Craig Lambert, for appellant.

No response.

PER CURIAM. Appellant Billy Owens filed a petition in the trial court pursuant to Criminal Procedure Rule 37, challenging his convictions on four counts of delivery of a controlled substance. The petition was denied, and appellant appealed to this court. We affirmed the order of the trial court on the ground that the petition filed in the trial court was not timely. *Owens* v. *State*, CR 95-1187 (May 28, 1996). In determining the timeliness of the petition, we relied on the abstract of the record in the appellant's brief.

Appellant Billy Owens now seeks a rehearing on the ground that the original Rule 37 petition was timely. He states that the original petition was not included in the abstract in the appellant's brief because the original petition, which was pro se, was "cleaned up by the filing of amended petitions and the oral amendments that were made in open court."

The petition for rehearing is denied. It was the responsibility of the appellant to provide an abstract of the record such that this court could determine without examining the record that the Rule 37 petition was timely. We have said repeatedly that the record on appeal is confined to that which is properly abstracted because it is not feasible for the seven justices of this court to each examine the record. *Pogue* v. *State*, 316 Ark. 428, 872 S.W.2d 387 (1994); *Brown* v. *State*, 316 Ark. 724, 875 S.W.2d 828 (1984); *Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991). When an abstract is deficient, the lower court's judgment or order must be affirmed. *See Fruit* v. *State*, 304 Ark. 457, 802 S.W.2d 930 (1991). We will not explore the record for prejudicial error. *Pogue* v. *State*, 316 Ark. 428, 872 S.W.2d 387; *Watson* v. *State*, 313 Ark. 304, 854 S.W.2d 332 (1993); *Bowers* v. *State*, 292 Ark. 249, 729 S.W.2d 170 (1987).

Petition denied.

BROWN, J., would grant.

DUDLEY, J., not participating.

Earnest YOUNG *v.* STATE of Arkansas

CR 96-632 923 S.W.2d 871

Supreme Court of Arkansas
Opinion delivered June 17, 1996

Robert F. Morehead, for appellant.

No response.

PER CURIAM. Appellant Earnest Young, by his attorney, has filed for a rule on the clerk.

His attorney Robert F. Morehead, admits that the failure to file the record in time was due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Lamont BOWDEN *v.* STATE of Arkansas

CR 95-1258 925 S.W.2d 158

Supreme Court of Arkansas
Opinion delivered June 21, 1996

PER CURIAM. Appellant, Lamont Bowden, has been convicted of capital murder and sentenced to life imprisonment without parole. His attorney, Ronald Carey Nichols, requested and was granted a thirty-day extension to February 14, 1996, to file appellant's brief. On February 14, 1996, he was given a second thirty-day extension, making the brief due on March 15, 1996. On March 19, 1996, appellant's attorney was granted a third extension to April 14, 1996. A final extension to April 28, 1996, was then given to file the appellant's brief, but no brief has been filed.

Ronald Carey Nichols is therefore ordered to appear before this court on the 1st day of July, 1996, at 9:00 a.m., to show

cause why he should not be held in contempt of this court for his repeated failures to file appellant's brief.

Lynn O. DAVIS *v.* STATE of Arkansas

CR 95-645 925 S.W.2d 768

Supreme Court of Arkansas
Opinion delivered June 24, 1996

[redacted]

Larry Dean Kissee, for appellant.

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

BRADLEY D. JESSON, Chief Justice. Shortly after midnight on March 4, 1994, the appellant, Lynn Davis, and his girlfriend, Michelle Wilson, arrived at the emergency room of the Cleburne County Memorial Hospital. With them was Michelle's twenty-three-month-old son, Michael. Michael was in a state of cardiac arrest and was not breathing. His heartbeat was initially revived by use of CPR but he never regained consciousness. Two days later, he died. The medical examiner ruled Michael's death a homicide. In particular, he noted that Michael showed signs of having been shaken and otherwise abused.

The authorities began to search for Wilson and Davis but the couple had left the state and their whereabouts were unknown. With the assistance of the FBI, they were apprehended in California on March 16, 1994. They returned to Arkansas to face capital murder charges in Michael's death. Wilson was tried in Independ-

ence County. She was convicted of second-degree murder and received a sentence of eighteen years. The appellant was tried in Fulton County.[1] He was convicted of capital murder and sentenced to life without parole.

In this appeal, the appellant challenges the sufficiency of the evidence to support his conviction, challenges two of the trial court's evidentiary rulings, and argues that the court should have granted his petition for a writ of error *coram nobis*. After a careful review of the issues, we find no error and affirm. Additionally, in accordance with Arkansas Supreme Court Rule 4-3(h), we have examined the full record for rulings on objections or motions which were adverse to the appellant. None involves prejudicial error.

Sufficiency of the Evidence

Our review of the sufficiency of the evidence requires a detailed recitation of the facts. Lynn Davis and Michelle Wilson began dating seriously in December of 1993. Wilson had two children: Kaite, age four, and Michael, almost two. She and Davis maintained separate residences, but spent virtually every night at Davis's apartment. Michael was almost always with them. Kaite often spent the night with her grandparents. Davis had worked for seven-and-a-half years at the same company. Wilson was temporarily unemployed.

Davis and Wilson, together with Michael, spent the night at Davis's apartment on Wednesday, March 2, 1994. The next morning, Davis dropped them off at Wilson's residence and went to work. Wilson and her next-door neighbor, Ruby Holt, spent the day running errands with Michael in tow. Michael, normally an active, temperamental child, was uncharacteristically sleepy during the day.

Later that afternoon, the errands completed, Holt, Wilson and Michael returned home. At some point, Kaite returned home as well. Wilson was cooking dinner in Holt's apartment when Davis arrived between 4:00 and 5:00 p.m. According to Holt, Michael was lying on the floor whining and crying. Davis was sitting at the

[1] The case originated in Cleburne County. Wilson and Davis each received a change of venue.

table with Holt and said to her, "I hate that kid." Holt was sure he was referring to Michael. Davis, Wilson, and the two children left shortly thereafter to go to Davis's apartment.

What happened next is known only to Davis and Wilson. According to them, they watched television with the children. Kaite fell asleep on the couch. At approximately 11:00 p.m. (according to Wilson) or 11:30 p.m. (according to Davis), they decided to take a shower. They noticed that Michael had a dirty diaper. Wilson went ahead and got in the shower. Davis followed, holding Michael, intending to clean him up in the shower. Michael began struggling and "throwing a fit" because he didn't want to be in the shower. Davis took him out of the shower, laid him on the bedroom floor, and told him to go ahead and throw his fit. He was preparing to diaper the boy when he noticed his eyes were staring fixedly. Davis "popped him on the butt" a couple of times, thinking Michael was holding his breath on purpose, but Michael did not move. Davis checked Michael's heartbeat and it was faint. He called to Wilson to get out of the shower. They grabbed the children, threw their clothes on and headed for the hospital.

Michael presented at 12:10 a.m. in a state of cardiac arrest. He was not breathing, and his color was blue. The physician on duty, Dr. Parker Jain, developed the impression that Michael had suffered a subdural hematoma and possibly had been the victim of abuse. Based upon his suspicion, he notified the authorities.

Detective Mark Baugh of the Heber Springs Police Department arrived at the hospital at 1:34 a.m. He learned from Dr. Jain that Michael had suffered not only a head injury but had bruises and sores on his body. He obtained a statement from Wilson in which she attempted to account for Michael's injuries. She attributed Michael's bruises to fighting with his sister. The sores, she claimed, were from shoes that fit too tight. The head injury, she explained, was the result of Michael slamming his own head against the refrigerator during one of his "fits."

Arrangements had been made for a helicopter to transport Michael to the Arkansas Children's Hospital in Little Rock. It arrived shortly after 2:00 a.m. Wilson and Davis made arrangements to have Ruby Holt take care of Kaite. They then drove to Children's Hospital, arriving about 4:00 to 4:30 a.m. Michael had a heartbeat, but was still not breathing on his own. Davis and Wilson

stayed at the hospital until approximately 12:00 noon that day then drove back to Heber Springs to shower and pick up a change of clothes. They returned to Little Rock later that afternoon. Upon their return, Davis was refused entry to the hospital. Security personnel told Davis that Michael's father was on the premises and they wanted to avoid trouble. Wilson stayed at the hospital while Davis returned to Heber Springs. He was en route when he received a call from Wilson on his mobile phone. She informed him that she was being accused of inflicting Michael's injuries, that the Department of Human Services had taken custody of her children, and that she had been "kicked out" of the hospital. Davis immediately returned to Little Rock and picked her up.

The two then decided, for reasons unexplained, to go to Conway, where they spent the night in a motel. They spoke by phone with Ruby Holt who informed them that the police were looking for Wilson. The next day, Saturday, March 5, 1994, they left the state of Arkansas.

In the meantime, Detective Baugh continued his investigation. During the day on March 4, he spoke with the physicians at Children's Hospital and discovered the full extent of Michael's injuries. Dr. Michael Avant, a pediatric intensive care physician at Children's, would later testify that he made note of twenty-seven injuries, including a subdural hematoma, massive brain swelling caused by trauma and oxygen depletion, retinal hemorrhaging, a pulmonary contusion, a broken rib, burns consistent with being inflicted by a cigarette and a car cigarette lighter, a swollen and bruised testicle and scrotal sac, including a bruise in this area which was just a few hours old. Upon receipt of this information, Baugh attempted to locate Davis and Wilson. He was unsuccessful.

Michael died on March 6. Baugh received an autopsy report from Dr. Frank Peretti which concluded that Michael's death was the result of homicide. Causes of death were listed as craniocerebral trauma and chest injuries with the contributing factors of thermal burns and testicular contusions. Based upon this information, charges were filed against Wilson and Davis for capital murder.

Baugh continued to search for Davis and Wilson. He became convinced that they were no longer in the state, and enlisted the assistance of the FBI in locating them. Davis and Wilson were, in fact, on the run. After leaving Conway, they had driven to Louisi-

ana, through Texas, and into New Mexico. When they learned that Michael had died, they abandoned Davis's car at the El Paso airport and flew to San Diego. There, they took a train to Los Angeles where they visited the beach, the zoo, and planned to visit Disneyland. Their trip had been financed with Davis's credit cards.

On March 16, 1994, the FBI caught up with Davis and Wilson in Los Angeles. They were turned over to the Santa Monica Police Department. There, they were interviewed at length by Detective Steve Rosenfeld. The interviews were videotaped and were admitted into evidence at trial. In her interview, Wilson once again attempted to explain Michael's injuries in ways that did not implicate either herself or Davis. She said that on the Tuesday before Michael was admitted to the hospital, he had become angry because she wouldn't let him have a piece of cake. He began to slam his head against the refrigerator and the wall. The next day, which was Davis's day off, the three of them went to the mall and to eat pizza. Michael became angry again and hyperventilated to the extent that he made himself sick. Wilson said that the sores on Michael's toes were from tight shoes. When confronted with the possibility that the sores were in fact cigarette burns, she admitted that she may have accidentally burned Michael. She explained the injuries to his testicles by saying that, two months previously, he had fallen from a small bicycle, and six days before his death, he had fallen in the bathtub. But ultimately, after a lengthy interrogation, she admitted that, on the Wednesday before Michael's death, she had shaken him hard and "probably" caused his death.

Wilson claimed that Davis was not involved in Michael's death. Detective Rosenfeld questioned her intently on whether Davis had merely laid the boy on the floor after getting out of the shower, or had thrown him to the floor. He asked her to demonstrate Davis's actions. Her demonstration indicated that Davis was upset and, at the least, dropped Michael to the floor with some force.

In Davis's interview, he denied any involvement in Michael's death and denied awareness of any abuse which may have been inflicted by Wilson. Both his story and Wilson's were remarkable for their presentation of detail. For example, both mentioned, without being asked, the number of crackers Michael ate on Thursday evening. Additionally, both of them asked, without prompting, if they might begin their explanation of events starting with the Tuesday before Michael's death. The stories also contained some

inconsistencies. In Wilson's statement to Baugh, she was clear that the three of them began their shower just after 11:00 p.m. In the Rosenfeld interviews, Davis and Wilson indicate that the time is 11:30 p.m. Wilson told Baugh that she did not see Davis spank Michael after he was taken out of the shower. She told Rosenfeld that she did. Both Wilson and Davis said that Michael hated to take a bath or get his hair wet. Yet when Davis was explaining that Michael's testicle was injured while getting out of the bathtub, he stated that both kids loved playing in the water.

Further evidence was presented to the jury in the form of Dr. Peretti's testimony, complete with autopsy pictures. The photographs revealed with disturbing clarity the scars and sores on the child's belly button, calf, thigh, and toes which Dr. Peretti characterized as cigarette burns. They also revealed bruises around the child's neck and head and the fact that the child's scrotal sac was obviously bruised and very swollen. Dr. Peretti testified that some of the cigarette burns were less than ten days old. Other injuries characterized by the doctor as "recent" were the subdural hematoma, the hemorrhaging along the optic tracks, the fractured rib, and the bruised scrotal sac. The doctor testified that Michael's injuries and were consistent with being shaken and, two days later, being subjected to a significant trauma within a short time before his admission to the hospital. Dr. Avant concurred that Michael had been subjected to significant trauma prior to being admitted to the hospital. He stated that the trauma would had to have been caused by something more than the child banging his head against a wall or being hit by his sister. He characterized the type of trauma necessary to inflict such a head injury as a "violent force." He said the brain swelling was of the type that might be seen in a car accident.

Finally, the jury was presented with the testimony of Angel Attendorn, Davis's ex-wife. Attendorn testified that in June of 1993, Davis had administered severe beatings to her four-year-old daughter. She produced four photographs which revealed serious bruising on the child's back, buttocks, and upper thighs.

The appellant was charged with committing capital murder in the manner described by Ark. Code Ann. § 5-10-101(a)(9) (Supp. 1995):

> A person commits capital murder if:
>
> Under circumstances manifesting extreme indifference to the

> value of human life, he knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed, provided that the defendant was eighteen (18) years of age or older at the time the murder was committed.

The State was required to prove four elements to convict the appellant: that Michael was age fourteen or younger, that the appellant was age eighteen or older, that the appellant knowingly caused Michael's death, and that Michael's death was caused under circumstances manifesting extreme indifference to the value of human life. The third and fourth elements are in controversy.

At the close of the state's evidence and at the close of all evidence, the appellant moved for a directed verdict on the ground that the state had not proven he acted knowingly or under circumstances manifesting extreme indifference to the value of human life. A directed-verdict motion is a challenge to the sufficiency of the evidence. Sufficient evidence means substantial evidence to support the jury's verdict. Substantial evidence is that which is forceful enough to compel a conclusion one way or another and which goes beyond speculation and conjecture, We review the evidence in a light most favorable to the appellee and consider only that evidence which supports the verdict. *Misskelley* v. *State*, 323 Ark. 449, 915 S.W.2d 702 (1996).

A person acts "knowingly" with respect to his conduct or attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. He acts "knowingly" with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result. Ark. Code Ann. § 5-2-202(2) (Repl. 1993). A person acts "under circumstances manifesting extreme indifference to the value of human life" when he engages in deliberate conduct which culminates in the death of some person. *Burnett* v. *State*, 295 Ark. 401, 749 S.W.2d 308 (1988); *Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985).

The appellant, citing *Midgett* v. *State*, 292 Ark. 278, 729 S.W.2d 410 (1987), argues that the State did not meet its burden of proof. He implies that the State was required to prove premeditation and deliberation, but that is not so. A brief historical review is helpful at this point. We decided *Midgett* in 1987. The case involved

the death of an eight-year-old boy at the hands of his father. The father was convicted of first-degree murder, which required proof of premeditation and deliberation. We recognized that state law, at that time, did not permit a conviction of first-degree murder for child abuse or torture in the absence of premeditation and deliberation. We therefore reduced Midgett's conviction to second-degree murder.

Approximately one month later, the legislature responded to our decision in *Midgett*. The definition of first-degree murder was amended to include knowingly causing the death of a person age fourteen or younger under circumstances manifesting cruel and malicious indifference to the value of human life. See Act 52 of the First Extraordinary Session of 1987. In 1991, the legislature, with a slight revision in language, converted that definition of first-degree murder into a type of capital murder. The words "under circumstances manifesting cruel and malicious indifference to the value of human life" were deleted from the first-degree murder statute. A category of capital murder was created which exists today as Ark. Code Ann. § 5-10-101(a)(9) (Supp. 1995). See Act 683 of 1991.

The *Midgett* case, thus, is not applicable here. The crime charged does not require proof of premeditation and deliberation. More on point is the case of *Porter* v. *State*, 308 Ark. 137, 823 S.W.2d 846 (1992). Although it was a first-degree murder case, the offense was committed at a time when the first-degree murder statute contained language virtually identical to today's § 5-10-101(a)(9). In *Porter*, we held that substantial circumstantial evidence of a cruel, malicious and continuous course of child abuse culminating in a violent act that causes the child's death is sufficient to sustain a conviction for knowingly causing the death of a person age fourteen or younger under circumstances manifesting a cruel and malicious indifference to human life. As in *Porter*, we hold in this case that the evidence, though circumstantial, is sufficient to support the appellant's conviction. It is clear that the jurors did not embrace Davis's and Wilson's explanation of the events surrounding Michael's death. They might well have found their testimony so totally at odds with the medical evidence as to be a fabrication. See *Porter* v. *State*, *supra*. Additionally, the obvious and graphic nature of Michael's injuries as depicted by the autopsy photos belies Davis's claim that he was unaware that Michael had been abused. A jury is not required to believe all or any part of a defendant's or witness's

statement, *Patterson* v. *State*, 306 Ark. 385, 815 S.W.2d 377 (1991), and is entitled to draw upon common sense and experience in reaching its verdict. *Owens* v. *State*, 283 Ark. 327, 675 S.W.2d 834 (1984). The State's proof contained evidence that Davis threw Michael to the floor in a forceful manner; strong medical testimony of recent, significant head trauma and other serious abuse; Ruby Holt's testimony regarding Davis's animosity toward Michael; Davis's abuse of another child, see *Limber* v. *State*, 264 Ark. 479, 572 S.W.2d 402 (1978); and Wilson's and Davis's flight to avoid arrest (which included stringent efforts to hide from the authorities, abandonment of Davis's automobile, and the fact that Davis, in order to flee, left a job of long standing). See *Cooper* v. *State*, 317 Ark. 485, 879 S.W.2d 405 (1994). These facts, along with all others set forth in this opinion, constitute sufficient evidence of Davis's guilt of capital murder.

Evidentiary Errors

Prior to trial, Davis moved in limine to prohibit the State from mentioning a charge of battery filed against him in 1993. The charge stemmed from his alleged beating of the child of his ex-wife, Angel Attendorn.[2] In a pretrial hearing, the State agreed that the motion should be granted and agreed not to mention the charge in their case-in-chief. Without further discussion, the trial court granted the motion.

During opening statements, the prosecutor told the jury that, in Davis's videotaped statement, Davis would admit that battery charges had previously been filed against him. Davis moved for a mistrial and an *in camera* hearing was conducted. The prosecutor explained that, since Davis had agreed to let his videotaped statement come into evidence in its entirety, the *in limine* order was no longer operative. The trial judge, considering the merits of the issue for the first time, decided to allow admission of the evidence. He agreed to give a cautionary instruction, which was done just before Davis's videotape was played.

Davis argues on appeal, as he did at trial, that admission of the evidence violated A.R.E. Rule 404(b) and Rule 403. Rule 404(b)

[2] The charge was *nolle prossed*, according to Angel Attendorn, because she was fearful of pursuing the case.

reads as follows:

> Other Crimes, Wrongs, or Acts. 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.

Davis cites *Diffee* v. *State*, 319 Ark. 669, 894 S.W.2d 564 (1995) in support of his argument. In *Diffee*, the State was attempting to prove that the method used by the appellant to commit murder — an ice pick — was her "method of operation." In doing so the state offered evidence of another ice-pick attack committed by the appellant. We held that the evidence was inadmissible and set forth a test for using prior acts to show method of operation. But *Diffee* is not applicable in this case. Davis's prior crime was admitted here to show absence of mistake or accident, not method of operation.

The trial judge cited *Limber* v. *State*, *supra*, in ruling that Davis's 1993 battery charge was admissible. *Limber* is representative of a number of cases involving child victims in which we have permitted evidence of crimes committed by the defendant against other children. See *Clark* v. *State*, 323 Ark. 211, 913 S.W.2d 297 (1996); *Fry* v. *State*, 309 Ark. 316, 829 S.W.2d 415 (1992); *George* v. *State*, 306 Ark. 360, 813 S.W.2d 792 (1991), all involving sexual abuse. In *Limber*, the appellant and his wife were charged with the murder of the wife's son. They claimed, as did Davis and Wilson, that the child's injuries resulted from accidents. Evidence was admitted that another child in the appellants' household had suffered two broken arms. We allowed the evidence as being probative of absence of mistake or accident. The case is virtually on point with the case at bar. Davis attempts to distinguish it by arguing that, in *Limber*, the appellant and the two abused children were members of the same household. While Michael might not have been an official or legally recognized member of Davis's household, the evidence shows that he was a *de facto* member. Michael and his mother routinely spent every night with Davis. Davis was an omnipresent adult in Michael's life, much as he might have been if they had been living under one roof.

The trial judge is accorded discretion in ruling on

404(b) questions. *Fry* v. *State*, *supra*. A mistrial is a drastic remedy which should be resorted to only when there has been error so prejudicial that justice cannot be served by continuing the trial. *Stewart* v. *State*, 320 Ark. 75, 894 S.W.2d 930 (1995). A trial judge's denial of a mistrial will not be disturbed on appeal absent an abuse of discretion. *Weaver* v. *State*, 324 Ark. 290, 920 S.W.2d 491 (1996). We hold that the trial judge did not abuse his discretion in denying a mistrial in this case. We also hold that the probative value of the evidence was not outweighed by the danger of unfair prejudice. A.R.E. 403.

Davis also attacks the judge's ruling on the ground that the original order *in limine* should have been honored. To support his argument, he relies on the law-of-the-case doctrine. That doctrine is inapplicable here. It ordinarily arises in the case of a second appeal and requires that matters decided in the prior appeal be considered concluded. See *Fairchild* v. *Norris*, 317 Ark. 166, 876 S.W.2d 588, *cert. denied*, 513 U.S. 974 (1994). During the course of a single trial, the judge is at liberty to reconsider his or her prior rulings. *Hill* v. *State*, 276 Ark. 300, 634 S.W.2d 120 (1982).

The second evidentiary ruling challenged by Davis is related to the first. As we have already mentioned, during the course of Angel Attendorn's testimony, four photographs of her daughter were introduced into evidence. The photos depicted a badly bruised child. Davis argues that the photos were irrelevant or, alternatively, unfairly prejudicial because they depicted injuries suffered by the child in the course of her daily activities. He bases this claim on Attendorn's testimony on cross-examination. Attendorn had apparently told the police that some of her child's bruises were from normal activity. However, on the witness stand, she said that any old bruises visible in the pictures were the result of Davis's beatings. She said that her child had bruises on the front of her legs from ordinary activity. The photographs did not depict the front of the legs.

The admission of photographs is within the trial court's discretion. *Williams* v. *State*, 322 Ark 38, 907 S.W.2d 120 (1995). The mere fact that photos are inflammatory will not render them inadmissible. If they enable a witness to testify more effectively or tend to corroborate testimony, they have evidentiary value which outweighs their inflammatory effect. *Weger* v. *State*, 315 Ark. 555, 869 S.W.2d 688 (1994). Our examination of Attendorn's testimony

shows that she sufficiently explained her statement to the police or, at the least, presented the jury with a question as to her credibility. The photographs themselves illustrated to the jury the extent of the abuse in a way that Attendorn's words could not. In addition, they corroborated Attendorn's accusations. We hold that the trial court did not abuse its discretion in admitting the photos. See *Van Sickle* v. *State*, 16 Ark. App. 143, 698 S.W.2d 308 (1985).

Error Coram Nobis

Two months after his notice of appeal was filed, Davis petitioned the court for a writ of error *coram nobis*. He claimed that the jury foreman, William Newton, had been misleading in his responses during voir dire. A hearing was held and the trial judge denied the writ.

Error *coram nobis* is a rare remedy. It is available only where there is an error of fact extrinsic to the record, such as insanity at the time of trial, a coerced guilty plea, or material evidence withheld by the prosecutor, that might have resulted in a different verdict. *Taylor* v. *State*, 303 Ark. 586, 799 S.W.2d 519 (1990). The writ has also been used in cases in which a third party confessed to the crime during the time between conviction and appeal. *Smith* v. *State*, 301 Ark. 374, 784 S.W.2d 595 (1990). We decline to extend the use of the error *coram nobis* remedy to a case involving a juror's allegedly misleading responses during voir dire.

Affirmed.

DUDLEY, J., not participating.

Gary Dean OWENS and Judy Christine Owens *v.*
STATE of Arkansas

CR 95-1272 926 S.W.2d 650

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Rush , Rush & Cook, by: *Craig L. Cook*, for appellant Gary Dean Owens.

William M. Pearson, for appellant Judy Christine Owens.

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

BRADLEY D. JESSON, Chief Justice. The appellants are husband and wife. They were initially convicted in November of 1994 of manufacture of methamphetamine, for which they each received a sentence of twenty-five years; possession of methamphetamine with intent to deliver, for which they each received a sentence of twenty-five years; and possession of drug paraphernalia, for which they each received a sentence of ten years. After they were convicted, they filed a motion for a new trial based upon the prosecutor's failure to reveal that a State's witness had been offered a negotiated plea in exchange for his testimony. The trial judge granted the motion, and the appellants were tried again in May of 1995. They were convicted again, and, this time, received life sentences on the manufacturing and possession with intent to deliver charges, and twenty years on the paraphernalia charge.[1]

In all, seven issues are presented on appeal. We find no error on any point and affirm the convictions.

Sufficiency of the Evidence

Gary Dean Owens challenges the sufficiency of the evidence to support his possession with intent to deliver conviction. We are required to address sufficiency-of-the-evidence questions before all others. *Misskelley* v. *State*, 323 Ark. 449, 915 S.W.2d 702 (1996).

At the close of the State's evidence, and at the close of all evidence, Gary Dean Owens moved for a directed verdict on the possession with intent to deliver charge. He argued that there was no evidence he had transferred drugs in exchange for money or something of value. The trial court denied the motion. A directed-

[1] The appellants were subject to double the normal punishment because they had previously been convicted of violating the Controlled Substances subchapter of the Arkansas Criminal Code. Ark. Code Ann. § 5-64-408(a) (Repl. 1993).

verdict motion is a challenge to the sufficiency of the evidence. *Durham* v. *State*, 320 Ark. 689, 899 S.W.2d 470 (1995). The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the jury's verdict. Substantial evidence is that which is forceful enough to compel a conclusion one way or another and which goes beyond speculation or conjecture. *Davis* v. *State*, 317 Ark. 592, 879 S.W.2d 439 (1994). We review the evidence in the light most favorable to the appellee and consider only that evidence which supports the verdict. *Misskelley* v. *State*, *supra*.

The record reveals the following pertinent facts. At 12:55 a.m. on December 29, 1993, a warrant was issued allowing a search of the appellants' residence. The warrant was served at 1:15 a.m. Authorities recovered two packets which were later revealed to contain methamphetamine. One packet, found in the west bedroom of the house, contained 909 milligrams of a substance which was seventy-eight percent methamphetamine (approximately 709 milligrams). The other packet, found in the bedroom where Gary Dean Owens was apprehended, contained 1.57 grams of a substance which was fifty-three percent methamphetamine (approximately 832 milligrams). In addition, the search revealed glass jars containing cloudy liquid, all of which contained traces of methamphetamine; a metal spoon and a plastic scoop with traces of the drug; a container which held scales, syringes, spoons and plastic baggies; a container with 13.1 grams of ephedrine, a base ingredient in the manufacture of methamphetamine; and various other items which experts would later testify were consistent with the manufacture of methamphetamine such as Sunshine Super Blend B Vitamins, Liquid Fire, Red Devil Lye, coffee filters, baking soda, a funnel, and salt. Police also seized a gas mask, a paperback book on prescription drugs, and a police scanner which was on when the search took place. This evidence was introduced at trial through David Hyden, an Arkansas State Police officer who participated in the search and Norman Kemper, a forensic drug chemist with the State Crime Lab. The State presented other evidence, including the testimony of Barbara Sparks, which will be discussed later in this opinion. However, the physical evidence is all that is necessary to our consideration of this issue.

The argument that Owens makes on appeal is the same narrow argument he made in his directed-verdict motions — the

State failed to show that he actually transferred or delivered methamphetamine. It is true that the evidence in this case does not reveal an actual sale or transfer of methamphetamine by Gary Dean Owens. However, such evidence is not necessary to obtain a conviction of possession with intent to deliver. The key element of the crime is the *intent to deliver*, not actual delivery. See *People* v. *Wolfe*, 440 Mich. 508, 489 N.W.2d 748 (1992).

Substantial proof of Gary Dean Owens's *intent* to deliver *was* presented by the State. We need look no further than the amount of the drug recovered from the Owens residence. In executing the search warrant, officers seized over 1,500 milligrams of unadulterated methamphetamine. Possession of more than two hundred milligrams of methamphetamine gives rise to a presumption of intent to deliver.[2] Ark. Code Ann. § 5-64-401(d) (Repl. 1993); *Sanchez* v. *State*, 288 Ark. 513, 707 S.W.2d 310 (1986). The jury was instructed that they could consider the quantity of the drug possessed in determining Owens's intent. Since Owens possessed methamphetamine in an amount in excess of the statutory presumption, the evidence is sufficient to support his conviction. *Kilpatrick* v. *State*, 322 Ark. 728, 912 S.W.2d 917 (1995); *Sanchez* v. *State*, *supra*.

Validity of the Search Warrant

The search warrant, which led to the seizure of the items listed above, was executed at 1:15 a.m. on December 29, 1993. It was obtained upon the application of Steve Brown, coordinator of the Fifth Judicial District Drug Task Force. The appellants argue that Brown failed to establish a factual basis to support a nighttime search.

In reviewing a trial court's ruling on a motion to suppress because of an alleged insufficiency of the affidavit, we make an independent determination based on the totality of the circumstances. We reverse the trial court's ruling only if it is clearly against the preponderance of the evidence. *Coleman* v. *State*, 308 Ark. 631, 826 S.W.2d 273 (1992).

The facts are as follows. Near midnight on December 29,

[2] Owens does not argue on appeal, nor did he argue below, that the state failed to present sufficient evidence of possession of the drugs.

1993, Brown submitted his affidavit and the affidavit of one Gary King for the purpose of obtaining the search warrant. Brown's affidavit is a detailed, handwritten document which contains, in paragraph six, a list of factors which he relied on in asking for a nighttime search warrant. The paragraph reads as follows:

> Access to the Dean Owens residence can be made only by a one lane dirt road which is filled with potholes, currently very muddy and the approach of vehicles can be observed from the residence. Vehicles can approach only within approximately two hundred and fifty (250) yards [twenty five (25) yards had been marked through] due to the condition of the driveway and curtilage.
>
> Informant information has revealed that Dean and Christie (Judy) Owens have been under the constant influence of methamphetamine for the past six (6) months and have because of this use exhibited characteristics consistent with a fear of being watched and approached by law enforcement authorities at their residence. Information addressed in Paragraph Four of this affidavit supports the possibility of automatic firearm(s) being in the possession of the occupants of the Dean Owens residence. Therefore, safe and speedy access to the Dean Owens residence by authorities can only be obtained under the cover of darkness and during an hour when it would be reasonable to believe that occupants of the residence would be less attentive to approaching officers. Speedy access is necessary both for the protection and safety of approaching officers as well as occupants of the residence and to ensure that objects to be seized are not destroyed or removed in that the residence is equipped with indoor plumbing which could easily facilitate the flushing or washing of methamphetamine out of the residence.
>
> Due to the above information and facts officers will be forced to approach the residence in their vehicles at a reduced or slow rate of speed, exit their vehicles approximately two hundred fifty (250) yards from the residence and approach the residence on foot causing dangerous exposure to themselves to detection and therefore officers need to approach the residence with the inherent protection of the cover of darkness.

> Affiant further states that he has gathered intelligence that the occupants, Dean and Christine (Judy) Owens customarily sell methamphetamines out of the residence throughout the nighttime hours therefore removal of contraband by distribution is highly likely.

The information referred to from paragraph four was a report from the Franklin County Sheriff's Office that, during the previous forty-five days, a concerned citizen living within one mile of the Owens house reported what sounded like the firing of an automatic weapon from the Owens residence.

The judge issued the warrant. On the face of the warrant, he checked the appropriate blanks which indicated that the place to be searched was difficult of speedy access, that objects to be seized were in danger of imminent removal, and that the warrant could only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy. Prior to trial, both appellants moved to suppress the fruits of the search on the basis that the warrant was defective. The trial court denied the motion.

Ordinarily, a search warrant may only be executed between the hours of 6:00 a.m. and 8:00 p.m. However, a warrant may be executed at any time, day or night, if the issuing judicial officer has reasonable cause to believe that:

> 1) the place to be searched is difficult of speedy access; or
>
> 2) the objects to be seized are in danger of imminent removal; or
>
> 3) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.

Ark. R. Crim. P. 13.2(c). The use of the word "or" makes it clear that the existence of any one of these factors may justify a nighttime search.

Mere conclusions in an affidavit will not support the issuance of a nighttime warrant. A factual basis is a prerequisite to obtaining such a warrant. See *Richardson* v. *State*, 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner* v. *State*, 307 Ark. 353, 820 S.W.2d 446 (1991). The affiant in this case presented specific data and fact-based

conclusions regarding the difficulty of access, the possible removal of evidence, and the dangers presented to the officers. We hold that there was a sufficient factual basis for a nighttime search.

Judy Owens raises two additional points with regard to the validity of the warrant. First, she claims that the information contained in Steve Brown's affidavit was not shown to be reliable. The state argues that this issue was not before the trial court. However, during the suppression hearing, appellant's counsel questioned Steve Brown extensively concerning the reliability of his information and the court stated, "I'll let him go into that." This convinces us that the trial judge was aware that the appellant was raising the issue of reliability.

Steve Brown relied on various sources of information in the preparation of his affidavit. A person described as "Informant A" had been arrested by the Franklin County Sheriff's office on November 2, 1993, for public intoxication. While in custody, he told the authorities that on three occasions in the previous two weeks, he had been given methamphetamine by Gary Dean Owens while at the Owens residence. In his affidavit, Brown set forth the following factors bearing on the reliability of Informant A: his statement against penal interest in admitting he had possessed and used methamphetamine, the fact that he had provided information in the past to the Sheriff's office, and the fact that his physical characteristics, method of conversation and mannerisms were consistent with methamphetamine use. Brown also relied on information provided by Gary King. King was arrested on a traffic charge on December 28, 1993. When officers searched his vehicle, they discovered equipment of the type used in the manufacture of methamphetamine. King was arrested and gave a statement to the authorities in which he detailed his involvement with the appellants in the manufacture of methamphetamine. According to King, the manufacturing was accomplished both at his home and the appellants' home. He drew a map giving directions to the appellants' home and filled out an affidavit containing the information he had provided. Brown set forth the following factors bearing on the reliability of Gary King: his statement was against his penal interest, he swore to his testimony in the form of an affidavit, and he provided information which was substantiated by the authorities' intelligence files. Brown also relied on information provided by Franklin County Sheriff Kenneth Ross that access to the Owens

residence was difficult and that a citizen had reported the sound of automatic gunfire in the area.

When an affidavit in a search warrant is based, in whole or in part, on hearsay, the affiant must set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. Ark. R. Crim. P. 13.1(b). In deciding whether to issue the warrant, the magistrate should make a practical, commonsense determination based on the totality of the circumstances set forth in the affidavit. *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983). Steve Brown's affidavit noted that the informants' statements tended to incriminate them, that their statements were based on personal observations of recent criminal activity, and that, in the case of Gary King, his statement could be corroborated. These are all factors which indicate reliability. *James* v. *State*, 280 Ark. 359, 658 S.W.2d 382 (1983); *Baxter* v. *State*, 262 Ark. 303, 556 S.W.2d 428 (1977). Regarding the information provided by Sheriff Ross, it was not necessary for the affidavit to establish the reliability of a public official. *Haynes* v. *State*, 314 Ark. 354, 862 S.W.2d 275 (1993). We hold that the affidavit in this case met the requirements of Rule 13.1(b).

Finally, Judy Owens argues that the search warrant itself was facially deficient. At issue is the following part of the warrant:

> YOU ARE HEREBY COMMANDED to search the place named for the property specified, serving this warrant and making the search (at any time in the day or night) (between the hours of 6:00 A.M. and 8:00 P.M.). . . .

Even though the judge found that circumstances existed to justify a nighttime search, he neglected to circle or otherwise mark one of the alternatives set forth in parenthesis above. We addressed this issue in *Holloway* v. *State*, 293 Ark. 450, 742 S.W.2d 550 (1987) (Supp. opinion on denial of rehearing), and refused to declare the warrant invalid. We noted that such technical attacks on warrants are not favored. As in *Holloway*, we are satisfied that the warrant showed a nighttime search was authorized.

Testimony of Barbara Sparks

Barbara Sparks was a State's witness who testified that she had known the appellants for seven years. She said that, approximately

two months before the appellants were arrested, she worked with them in manufacturing methamphetamine. Six months prior to the arrests, she purchased chemicals for the appellants to use in the manufacturing process. She said that, primarily, Gary Dean Owens made the drug while Judy Owens handled business. She had purchased methamphetamine from Judy Owens about one month before the arrests, in a bedroom of the Owens home. In the year before the arrests, she had observed others going back to the bedroom and leaving a short time later. She also stated that she had observed the appellants using methamphetamine and that their preferred method was to inject the drug.

Prior to trial, the appellants filed a motion in limine to prohibit the introduction of this testimony. They argued at trial, as they do on appeal, that the evidence violated A.R.E. 404(b) and A.R.E. 403. The trial court allowed Ms. Sparks to testify as to her knowledge of the appellants' activities, so long as they were not too remote in time.

A.R.E. 404(b) reads as follows:

> Other Crimes, Wrongs or Acts. 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.

Generally, evidence of other crimes, wrongs, or acts is not admissible merely to prove the bad character of the defendant and to show that his actions conformed to that character. However, if the evidence is relevant to the main issue of the case, in the sense of tending to prove some material point rather than to prove the defendant is a criminal, the evidence may be admissible with a proper cautionary instruction by the court. *Lindsey* v. *State*, 319 Ark. 132, 890 S.W.2d 584 (1994).[3] In *Sullivan* v. *State*, 289 Ark. 323, 711 S.W.2d 469 (1986), we said the following:

> We interpret Rule 404(b) as meaning that if the evidence of

[3] The appellants did not ask the court to give the jury a cautionary instruction on the limited purpose of the evidence so we will not consider that issue. *Sasser* v. *State*, 321 Ark. 438, 902 S.W.2d 773 (1996).

prior bad acts is relevant to show the offense of which the appellant was accused occurred, and is thus not being introduced to show only bad character, we will not exclude it.

Barbara Sparks's testimony falls within the "independent relevance" concept enunciated in *Sullivan* and *Lindsey*. The jury in this case had the task of deciding whether the appellants engaged in the manufacture of methamphetamine, possessed methamphetamine with the intent to deliver, and possessed drug paraphernalia. Barbara Sparks's testimony was relevant to the issues of whether, in this case, the appellants were actually manufacturing methamphetamine, were actually using certain ordinary household items in the manufacturing process, merely possessed the drug or possessed it with the intent to deliver, and whether the items found in the house could be used as drug paraphernalia. See Ark. Code Ann. § 5-64-101(v) (Repl. 1993). Her testimony was relevant to show that these offenses of which the appellants were accused occurred. Thus, Rule 404(b) was not violated.

The appellants cite *Rios* v. *State*, 262 Ark. 407, 557 S.W.2d 198 (1977) in support of their argument. In that case, the appellant was charged with delivery of marijuana. The State presented evidence that, after the sale of marijuana occurred, the appellant sold another drug later that day. We held that the admission of the other drug sale was reversible error. In *Rios*, the subsequent sale was not independently relevant, nor did it pertain to the offense actually charged, nor was it useful in shedding any light on the appellant's intent.

In several recent cases, we have recognized that when a defendant is legitimately charged with possession with intent to deliver, evidence of prior drug sales, if not too remote in time, are admissible to show intent. *Scroggins* v. *State*, 312 Ark. 107, 848 S.W.2d 400 (1993); *Holloway* v. *State*, 293 Ark. 438, 738 S.W.2d 796 (1987); *Lincoln* v. *State*, 285 Ark. 107, 685 S.W.2d 166 (1985). While Barbara Sparks testified to more than prior drug sales, the cases are analogous because they recognize the value of such evidence to the jury in those drug cases in which intent or purpose is an issue.

A trial court is accorded broad discretion in ruling on Rule 404(b) questions. *Larimore* v. *State*, 317 Ark. 111, 877 S.W.2d 570 (1994). In light of the foregoing, we find no abuse of discretion in

admitting the testimony of Barbara Sparks. A trial court is likewise entitled to great discretion in ruling on issues which arise under A.R.E. 403. *Robinson* v. *State*, 314 Ark. 243, 861 S.W.2d 548 (1993). We are convinced that, although Ms. Sparks's testimony was detrimental to the appellants, its probative value was not outweighed by the danger of unfair prejudice.

Failure to Give Proffered Jury Instruction

Both appellants proffered a jury instruction on the manufacturing of methamphetamine charge which included the following language:

> Except that "manufacturing" does not include the preparation or compounding of a controlled substance by an individual for his own use.

That language is contained in AMCI 2d 6405 as a bracketed part. The appellants claim that, since there was some evidence at trial that the amount of methamphetamine and the drug paraphernalia found in the house was consistent with personal use, the proffered instruction was warranted.

At the outset, we address the State's contention that the appellants' argument is procedurally barred due to their failure to abstract the manufacturing instruction which was actually given by the court. Since the appellants did abstract the proffered instruction and their presentation of the issue to the court, and since this is a case involving life imprisonment which requires us to review the record for all errors, see Ark. Sup. Ct. R. 4-3(h), we will, out of an abundance of caution, address the merits of this issue. See *Chenowith* v. *State*, 321 Ark. 522, 905 S.W.2d 838 (1995).

The record reflects that the jury was instructed on the manufacturing charge as follows:

> Gary Dean Owens and Judy Christine Owens are charged with the offense of manufacturing methamphetamine. To sustain this charge, the State must prove the following things beyond a reasonable doubt [:] that Gary Dean Owens and/or Judy Christine Owens knowingly or purposely produced or prepared or propagated or compounded or converted or processed methamphetamine directly or indirectly by means of chemical synthesis or by a combination of extraction and chemical synthesis.

The appellants claim that this instruction should have contained the "personal-use exemption" language from the bracketed portion of AMCI 2d 6405. Implicit in the appellants' argument is their contention that a person cannot be charged with manufacture of methamphetamine if that substance is manufactured for the person's own use. This is incorrect. As we explained in *Patty* v. *State*, 260 Ark. 539, 542 S.W.2d 494 (1976) and *Bedell* v. *State*, 257 Ark. 895, 521 S.W.2d 200 (1975), *cert. denied*, 430 U.S. 931 (1977), the personal-use exemption applies only to the *preparation* or *compounding* of a controlled substance. It is not applicable when other means of manufacture have been used. In *State* v. *Childers*, 41 N.C. App. 729, 255 S.E.2d 654 (1979), the North Carolina court made this cogent observation:

> The plain meaning of the exception is to avoid making an individual liable for the felony of manufacturing a controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (i.e., rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (i.e., making the so-called "Alice B. Toklas" brownies containing marijuana).

Other courts have recognized that the personal-use exception does not apply to the *creation* of the controlled substance, but to the preparation or compounding of a substance already in existence. *State* v. *County Court for Columbia County*, 82 Wis. 2d 401, 263 N.W.2d 162 (1978); *People* v. *Pearson*, 157 Mich. App. 68, 403 N.W.2d 498 (1987).

There is abundant evidence in this case that, irrespective of whether the appellants made personal use of their product, they created the product, manufacturing it by means other than mere preparation or compounding. Thus, the personal-use exception is not applicable, and the trial court was correct to refuse the instruction.

The appellants also argue that the trial court failed to express its reasons for modifying AMCI 2d 6405. Without deciding whether the refusal to give the bracketed portion of an AMCI constitutes a modification, we note that this issue was not raised below until after the trial was completed. The appellants' objection on this ground was not timely and therefore will not be considered. See *Houston* v. *State*, 293 Ark. 492, 739 S.W.2d 156 (1987).

Failure to Limit Sentencing Range

The appellants asked the court to limit the sentencing range to the term of years received in the first trial: twenty-five years on the manufacturing and possession with intent to deliver counts and ten years on the possession of paraphernalia count. They also proffered verdict forms on the manufacturing and possession with intent to deliver counts which reflected that range of sentences. The trial court allowed the jury to consider the full range of punishment available on all offenses. As a result, the appellants received greater sentences on retrial than they had in the first proceeding.

The imposition of a harsher sentence upon retrial is not, in and of itself, constitutionally offensive. When appellants are retried by a jury, a greater sentence is not prohibited so long as there is a properly controlled retrial in which the jury is not informed of the prior sentences. *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973). The appellants point to the voir dire portion of the trial and note that there were at least two instances when the panel, through the responses of venirepersons, was informed that a previous trial had occurred. However, the record is bereft of any evidence that the jury was informed of the *result* of the previous trial. The Court recognized in *Stynchcombe* that, while the jury might be aware of a prior trial, it does not follow that the jury will be aware of its result. In the absence of any evidence that the jury was informed of the outcome of the appellants' first trial, there is no need to delve further into this issue. See *Smith* v. *State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

Evidentiary Errors at Sentencing Hearing

The appellants were tried in a bifurcated proceeding. During the sentencing phase, the prosecutor made this remark in the rebuttal portion of his closing argument:

> they got up here and they tried to give you this song and dance because they don't want to go to prison. I can assure you I would have let them go to prison and I want them to go to prison.

The appellants moved for a mistrial on the ground that the prosecutor was making reference to a plea offer. The trial judge denied the motion.

The appellants claim this purported reference to a negotiated plea violates A.R.E. Rule 410. That rule prohibits the mention of, *inter alia*, offers to plead to the crime charged or any other crime. The evil to be avoided by Rule 410 is the use of a plea offer against a defendant as an admission against interest. *Brown* v. *State*, 288 Ark. 517, 707 S.W.2d 313 (1986). Even if the prosecutor's remark can be characterized as a reference to a plea offer, and there is some doubt that it can, the remark was made during the sentencing phase of the trial. The appellants had already been convicted. We cannot say that they were so prejudiced that they were entitled to a mistrial.

Judy Owens raises an additional argument regarding an occurrence during the sentencing phase. During cross-examination of court clerk Janice Morris, the prosecutor asked, "Do you have knowledge that [the appellants] have been tried on possession of a controlled substance with intent to deliver and that they've been found guilty of that?" The appellants asked for a mistrial, asserting that the prosecutor was making a reference to the *first* trial. The prosecutor explained that he was talking about "this trial. They have been found guilty today." The judge denied the mistrial motion and asked the prosecutor to make it clear that he was referring to the present trial. The prosecutor then asked Ms. Norris, "Are you familiar with the jury's decision today on the trial we've had?"

A mistrial is an extreme remedy that should only be granted when justice cannot be served by continuing the trial. *Clayton* v. *State*, 321 Ark. 602, 906 S.W.2d 190 (1995). Such an extreme remedy was not warranted in this instance. Nothing in the prosecutor's first question expressly or impliedly referenced the first trial. In his second question, the prosecutor made it clear that he was referring to the verdict just handed down.

Finally, in the conclusion to his brief, Gary Dean Owens urges us to consider the cumulative error in the record as a basis for reversal. As we have found no errors, there is no need to address that point.

Compliance with Rule 4-3(h)

The record has been reviewed in accordance with Arkansas Supreme Court Rule 4-3(h), and it has been determined that there

were no errors with respect to rulings on objections or motions prejudicial to the appellants not discussed above.

Affirmed.

DUDLEY, J., not participating.

Max H. PEARSON *v.* FIRST NATIONAL BANK of DeWitt

95-1084 924 S.W.2d 460

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Hoofman & Pike, P.A., by: *George E. Pike, Jr.*, for appellant.

Russell D. Berry, for appellee.

BRADLEY D. JESSON, Chief Justice. This is an intervention case. Appellee First National Bank of DeWitt ("First National"), a secured creditor of a company that owned and operated a federally licensed radio station, successfully sought an ex parte order appointing it receiver for purposes of furthering its claim before the Federal Communications Commission ("FCC") that it was entitled to the radio license. In this appeal, appellant Max H. Pearson, who also claims he is entitled to the license, contends that he should have been allowed to intervene in the cause of action as a matter of right. We agree and reverse and remand.

On April 5, 1994, First National initiated a receivership action against Quadras Corporation, which owned and operated KDEW, an AM/FM radio station in DeWitt. According to First National's petition, it was a creditor of Quadras, whose stockholders personally guaranteed the debt. The debt was secured by a pledge of all outstanding common shares. First National had perfected its security by taking actual possession of the stock certificates. When Quadras defaulted, First National in a separate action sought and obtained a judgment in Lonoke County Circuit Court against Quadras and its sole stockholder, Willie R. Harris. First National was awarded all outstanding common stock of Quadras.

Thereafter, Quadras filed applications with the FCC to sell and transfer the license to operate the station. According to First National, the FCC failed to recognize its interest as creditor and owner of Quadras's stock, yet indicated that it would recognize its status if it were appointed receiver. The bank thus petitioned for the appointment "to make appropriate appearances before the FCC for the purpose of preserving assets and licenses in connection with Quadras and to ultimately liquidate same in an orderly fashion." Pearson was not given notice of the proceeding.

On April 6, 1994, the day after First National filed its petition, the trial court entered an ex parte order appointing the bank as receiver. The order expressly provided that First National "is authorized to prepare, execute and file with the Federal Communications Commission the forms necessary, including FCC form 316, to effect the involuntary transfer of control and assignment of license and/or construction permits held by Quadras, Inc., to the receiver, and to undertake any other action with the Federal Communications Commission as it deems fit and proper."

Pearson filed a motion to intervene on June 20, 1994, which is the subject of the present appeal. He claimed that, in July of 1993, he had entered into a contract, subject to FCC approval, to purchase the Quadras license and other property. Claiming that First National had a vested interest in the outcome of any receivership proceeding and that it had obtained the ex parte order for the exclusive purpose to interfere with his attempt to perfect an assignment of the radio license, Pearson requested to intervene for the purpose of setting aside the order.

In its response to Pearson's motion, First National asserted that Pearson's contract was void because it had not been authorized or approved by Quadras officers; rather, it had been signed by Lucille Harris, the wife of Willie R. Harris, whom the bank maintained had no authority to act on behalf of the corporation. The trial court denied Pearson's motion to intervene. When Pearson asked the court to reconsider its ruling, the trial court conducted a hearing and again denied intervention. In so ruling, the trial court reasoned that Pearson had not shown that First National's appointment as receiver would damage him, and that Pearson's contract claim could be litigated in a separate action. It is from this order denying intervention that Pearson appeals.

The rule governing intervention as a matter of right in a civil case is Arkansas Civil Procedure Rule 24(a). It reads:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that

> interest, unless the applicant's interest is adequately represented by existing parties.

We have articulated three requirements that an applicant must meet in order to intervene as a matter of right: (1) that he has a recognized interest in the subject matter of the primary litigation; (2) that his interest might be impaired by the disposition of the suit; and (3) that his interest is not adequately represented by existing parties. *Billabong Prods., Inc.* v. *Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983). *See also Bradford* v. *Bradford*, 52 Ark. App. 81, 915 S.W.2d 723 (1996). Intervention as a matter of right cannot be denied. *Schacht* v. *Garner*, 281 Ark. 45, 661 S.W.2d 361 (1983). However, we have also held that, if a party seeking intervention will be left with his right to pursue his own independent remedy against the parties in the primary proceeding, regardless of the outcome of the pending case, then he has no interest that needs protecting by intervention of right. *Billabong Products, Inc.* v. *Orange City Bank, supra.*

At first glance, it would appear that the trial court's denial of intervention was correct for the reason that Pearson could have filed a primary action in state court and was thus not left without a remedy. While the receivership proceeding was an ancillary one, it was nevertheless a significant step that can affect the rights of the parties. *Boeckmann* v. *Mitchell*, 322 Ark. 198, 909 S.W.2d 308 (1995) In *Boeckmann*, we recognized the significance of appointments of receivers and emphasized that such appointments should be made with restraint and caution:

> The power to appoint a receiver is, of course, a harsh and dangerous one. *Kory* v. *Less*, 180 Ark. 342, 22 S.W.2d 25 (1929). "The cases in which receivers ordinarily will be appointed are confined to those in which it can be established to the satisfaction of a court that the appointment of a receiver is necessary to save the property from injury or threatened loss or destruction, or that the claimants in possession are excluding another party from rights which the latter has in the land." *Saylor* v. *Hilton*, 190 Ky. 200, 226 S.W.2d 1067 (1921).

322 Ark. at 203, *citing Chapin* v. *Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985). In *Talbot* v. *Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988), we described a receiver as a "fiduciary representing the

court and *all* parties in interest" and an "*embodiment* of the creditors standing as an agent for them." (Emphasis added.)

In this case, First National did not seek receivership so it could represent all interested parties. To the contrary, as First National suggests in its complaint, the primary purpose of the receivership was to augment its own position in the proceedings before the FCC, as the FCC indicated it would only recognize the bank's status if it were so appointed. While First National suggests that Pearson is not entitled to the license because his contract with Quadras is void, this is not the issue before us. In the final analysis, the FCC makes radio license determinations, as the Commission is the entity charged with safeguarding the public interest in granting such licenses. *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945).

The significance of the appointment in this case is thus demonstrated in the trial court's order authorizing First National to prepare, execute, and file with the FCC the necessary forms to effect the voluntary transfer of the radio license to the receiver, First National. When examining the scope of the trial court's order, we must conclude that it affected Pearson's claim to the FCC that he is entitled to the radio license. *See Beavers* v. *Espinoza*, 803 P.2d 1111 (N.M.App. 1990)(appellate court concluded that the trial court's order setting aside conveyance of radio station license due to lack of notice of probate proceedings enhanced the FCC's power and responsibility by allowing interested parties, including plaintiff and defendants, an opportunity to assert any arguments regarding the assignment of the radio license).

■ We cannot overlook the fact that First National had itself appointed receiver even though it has an interest in the matter, an appointment which was in apparent violation of Ark. Code Ann. § 16-17-207 (1987). Basic fairness dictates that Pearson be allowed to contest the appointment of First National as receiver under these circumstances. Because we conclude that the trial court's order of receivership affected Pearson's claim, we hold that the trial court erred in refusing to allow Pearson to intervene as a matter of right.

Reversed and remanded.

NEWBERN, CORBIN, and ROAF, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The sole issue in this appeal is whether the Trial Court erred in denying the petition of

Max H. Pearson to intervene in the action of the First National Bank of DeWitt seeking to be declared a receiver.

Intervention as a matter of right is governed by Ark. R. Civ. P. 24(a). The rule requires a party seeking to intervene as a matter of right to show that "disposition of the action may as a practical matter impair or impede his ability to protect [his] interest." There has been no such showing in this case, so we should not reverse the Trial Court's order which denied Mr. Pearson's petition.

We have no record of that which has occurred with respect to the Quadras, Inc., license before the Federal Communications Commission. We do, however, have before us the allegations of the Bank that it owns the Quadras stock and thus its assets, and that the FCC has declined to recognize the Bank's interest in the license owned by Quadras, Inc., unless the Bank becomes a "receiver." Mr. Pearson does not dispute any of those allegations.

Mr. Pearson's argument is stated in his brief before this Court as follows:

> But FNB admitted in its pleading that the FCC had refused to recognize FNB's application for transfer of the license as a creditor and stockholder, but would recognize FNB's *application* if it was a receiver.
>
> Thus, Max Pearson's rights are effectively terminated since, without the receivership, FNB cannot proceed before the FCC and if FNB is permitted to act as receiver, it will naturally act in its own self interest, and declare Max Pearson's contract with Quadras, Inc., void. [Emphasis supplied.]

Allowing the Bank to be a receiver will not terminate Mr. Pearson's rights. It will only put before the FCC another party who also has a claim to the license. There is no evidence the FCC will do anything, if both parties' claims are before it, until the merits of the issues of the corporate ownership and the validity of the contract between Mr. Pearson and the corporation have been litigated elsewhere.

Mr. Pearson does not say how his rights before the FCC may be affected other than that he would have a competitor. If there is to be any effect upon his interest in the license or if, in the language of Rule 24(a), his ability to protect his interest is to be impeded or impaired, that will come about as a result of whatever the weak-

nesses of his own case before the FCC may be, and not because another party is present to expose them.

Mr. Pearson argues that if the Bank is allowed to be the receiver it will "declare Max Pearson's contract with Quadras, Inc., void." While that might well occur, Mr. Pearson has cited no authority whatever indicating such a declaration would affect his interest in the license. He either has such an interest or does not, and that issue will not be decided by a declaration by the Bank but will have to be decided in a court or before the FCC, the latter probably after litigation.

While the majority's inability to resist going beyond the intervention issue and commenting on the merits with respect to the legality of the receivership by referring to Ark. Code Ann. § 16-17-207 (1987) is understandable, it is improper. Again, the sole issue before us is the propriety of the refusal of the Trial Court to permit Mr. Pearson to intervene in the receivership proceeding and not the propriety of the order granting the receivership. He has failed to demonstrate that the receivership will affect his claim of an interest in the license, so the Trial Court's decision should be affirmed.

I respectfully dissent.

CORBIN and ROAF, JJ., join.

HAWKINS CONSTRUCTION COMPANY *v.* Richard MAXELL and Second Injury Fund

96-298 924 S.W.2d 789

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Bethell, Callaway, Robertson, Beasley & Cowan, by: *John R. Beasley*, for appellant.

Thompson & Lewellyn, P.A., by: *James M. Lewellyn, Jr.*, for appellee.

DAVID NEWBERN, Justice. This is a workers' compensation case. Richard Maxell's back was injured in the course of his employment with Hawkins Construction Company (Hawkins) in late 1992, but he continued to work until he again suffered a back injury in January, 1993. Surgery was performed after the 1993 injury, and Mr. Maxell was found to have a permanent disability of 10% to the body as a whole.

Hawkins contended before the Workers' Compensation Commission that it had no responsiblity because the injury was only a recurrence of an injury suffered by Mr. Maxell in 1990 while working for a different employer. The Commission ruled against Hawkins and held the 1993 injury amounted to a compensable aggravation of the 1990 injury. The Second Injury Trust Fund was a party to the proceeding before the Commission. It was held that the Fund had no liability because the evidence was insufficient to show

that the two injuries, when combined, produced a disability greater than that resulting from the 1993 injury alone. Hawkins appealed.

The Arkansas Court of Appeals affirmed the decision of the Commission. *Hawkins Const. Co.* v. *Maxell,* 52 Ark. App. 116, 915 S.W.2d 302 (1996). In seeking review in this Court, Hawkins does not again argue that Mr. Maxell's condition is entirely attributable to the 1990 injury. The only issue presented in this review is whether it was error to hold the Fund was not responsible for any portion of the compensation to be paid to Mr. Maxell. We hold the evidence was insufficient to support that decision.

After his 1990 injury, Mr. Maxell was treated conservatively. He was able to do the same sort of labor he had previously done. Dr. Standefur, the surgeon who operated after the 1993 injury, testified the 1990 injury played a role in the severity of the injury suffered in 1993. He said the earlier injury was responsible for 7% of the 10% permanent disability rating. He said the disc material he removed in 1993 was extruded in the 1990 injury, and a part of Mr. Maxell's current disability is the result of nerve root damage caused by the disc protrusion from the 1990 injury as shown in a 1991 magnetic resonance image.

The Fund was created by the General Assembly to see to it that a subsequent employer, such as Hawkins, does not become responsible for disability of an employee when a part of his or her condition results from an injury which occurred in previous employment with a different employer. Ark. Code Ann. § 11-9-525(a)(1) (Repl. 1996). The only evidence before the Commission which might be considered as contrary to the medical testimony is that which showed that, from the 1990 injury, Mr. Maxell suffered no disability or impairment which kept him from continuing to do the same sort of labor he had done previously.

In *Mid State Const. Co.* v. *Second Injury Fund,* 295 Ark. 1, 746 S.W.2d 539 (1989), we stated the critera for determining whether the Fund was to share liability for compensating an injured worker:

> First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment

> must have combined with the recent compensable injury to produce the current disability status.

We said an "impairment" was a condition which need not be work-related and gave the example of a person who loses one eye, thus becoming impaired, but not disabled in a wage-loss sense, and then loses the other eye to become disabled. One may be impaired without being disabled. In *Second Injury Trust Fund* v. *POM, Inc.*, 316 Ark. 796, 875 S.W.2d 832 (1994), we said an "impairment" may or may not be work-related, meaning that it may or may not have an effect on the injured worker's ability to perform. The fact that Mr. Maxell suffered no wage-loss disability after the 1990 injury has no necessary bearing on the issue whether he suffered an impairment from that injury which contributes to his present disability.

The unrebutted testimony of Dr. Standefur is that the impairment suffered in the 1990 injury contributes to the compensable injury. As there was nothing before the Commission to rebut that evidence, we cannot say that the evidence presented was sufficient to support the Commission's decision. We remand the case for orders consistent with this opinion.

Reversed and remanded.

DUDLEY, J., not participating.

Allen WHITTLE *v.* WASHINGTON COUNTY CIRCUIT COURT

CR 96-189 925 S.W.2d 383

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Doug Norwood, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

DAVID NEWBERN, Justice. Bradford Allen Whittle seeks a writ of prohibition to prevent the Washington County Circuit Court from trying him on charges of misdemeanor offenses which were brought against him in 1991. We grant the writ because Mr. Whittle has been denied a speedy trial.

Mr. Whittle stole a truck on August 12, 1991. A subsequent high-speed chase resulted in a collision with a police car. He pleaded guilty to a felony charge of theft of the truck and to two other unrelated charges and was convicted and sentenced to eight years imprisonment on September 9, 1991. He was incarcerated and failed to appear on October 25, 1991, in the Springdale Municipal Court for trial on misdemeanor traffic charges stemming from the incident.

On April 1, 1994, a warrant for Mr. Whittle's arrest was issued by the Municipal Court. He was released from prison on April 28, 1995, and shortly thereafter moved to dismiss the misdemeanor charges pursuant to Ark. R. Crim. P. 30.1(a) because he had not been given a speedy trial. The motion was overruled, and Mr. Whittle was convicted of the misdemeanor charges on August 18, 1995.

Mr. Whittle appealed to the Washington County Circuit Court. An appeal to a circuit court of a municipal court judgment results in a trial *de novo*. *Bussey* v. *State*, 315 Ark. 292, 867 S.W.2d 433 (1993). Mr. Whittle again moved to dismiss for failure to provide a speedy trial, claiming violations of the Sixth and Fourteenth Amendments, Ark. Const. art.2, § 10, and Ark. R. Crim. P. 27-30. The motion was denied.

In his petition and brief before this Court, Mr. Whittle relies on our decision in *Stephens* v. *State,* 295 Ark. 541, 750 S.W.2d 52 (1988). Ms. Stephens was charged with driving while intoxicated on June 28, 1984. She was tried and convicted in a municipal court on January 23, 1986. She appealed to a circuit court where she moved to dismiss for lack of a speedy trial. Although there was no record of Ms. Stephens having moved to dismiss on speedy-trial grounds in the municipal court, we held that did not pose an impediment to raising the issue in circuit court because the proceeding was *de novo.* Our holding was that a municipal court speedy-trial violation may be raised in the circuit court proceeding although Rule 28.1, which now sets the speedy-trial limit at one year, only refers to trial in a circuit court.

In his letter opinion denying the motion to dismiss in the case now before us, the Circuit Judge relied on *Cook* v. *State,* 321 Ark. 641, 906 S.W.2d 681 (1995), and *McBride* v. *State,* 297 Ark. 410, 762 S.W.2d 785 (1989). In the *McBride* case, we held that a circuit court proceeding does not violate the speedy-trial rule, although it occurs outside the time limit set by the rules, if the municipal court trial being appealed was timely. We said in that situation the time for the trial in the circuit court begins to run when the appeal from the municipal court conviction is filed. We followed that decision when presented with similar facts in the *Cook* case.

In its response to Mr. Whittle's petition for prohibition and in

its brief the State acknowledges that the case now before us is like the *Stephens* case in that, if Rule 28.1 applies, the municipal court trial was held after the time prescribed by the rule had expired. It is unlike the *McBride* and *Cook* cases in which the municipal court trials were not in violation of the rule.

The State asks that we overrule the *Stephens* decision on one of the grounds stated by the dissenting opinion in that case, *i.e.,* that Rule 28.1 states it applies to circuit court trials and does not refer to municipal court trials.

Rule 1.2. of the Arkansas Rules of Criminal Procedure states:

> These rules shall govern the proceedings in all criminal cases in the Supreme Court and in circuit courts of the State of Arkansas. They shall also apply in all other courts where their application is practicable or constitutionally required.

The primary discussion in the opinion in the *Stephens* case was of the constitutional right to a speedy trial. We cited *Barker* v. *Wingo,* 407 U.S. 514 (1972), and applied a "balancing test" of factors leading to a decision that a violation of the Sixth Amendment right to a speedy trial had occurred. Upon concluding that a violation had occurred, we then said, "Rule 28 would likewise require a similar result." We have been given no more reason to decline to apply our speedy-trial rule in this case than we had in the *Stephens* case, and we decline to overrule that decision.

Writ granted.

DUDLEY, J., not participating.

GLAZE, J., dissents.

Robert Neal HELTON Jr. *v.* STATE of Arkansas

CR 96-106 924 S.W.2d 239

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Etoch Law Firm, by: *Louis A. Etoch*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen. and Senior Appellate Advocate, for appellee.

DONALD L. CORBIN, Justice. Appellant, Robert Neal Helton Jr. was found guilty by a jury of rape in 1994 and sentenced to life in the Arkansas Department of Correction. This court affirmed. *Helton* v. *State*, 320 Ark. 352, 896 S.W.2d 887 (1995). Helton now appeals the ruling of the Saline County Circuit Court denying him postconviction relief under Rule 37.1 of the Arkansas Rules of Criminal Procedure. Jurisdiction is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(5). In support of his claims on appeal, appellant argues that he was denied effective assistance of trial counsel during the guilt phase as well as the sentencing phase of the trial. We find no error in the denial of postconviction relief, and therefore we affirm.

We see no need to repeat the facts of this case as they are fully stated in our prior decision. *Helton*, 320 Ark. 352, 896 S.W.2d 887 (1995). Suffice it to say that appellant was convicted of rape and sentenced by the jury to life imprisonment. During appellant's trial, the state called five witnesses, including the victim, the couple with whom the victim resided, the victim's boyfriend, and the police detective assigned to the case. The state introduced no physical or documentary evidence, nor any medical evidence during the guilt phase of the trial. Appellant did not take the stand in his own behalf; however, three alibi witnesses, appellant's fiancée and her parents, testified in his defense. Appellant presented no physical or medical evidence during either phase of the trial. Following appellant's conviction, direct appeal was taken, and this court affirmed the judgment of conviction.

Appellant argues on appeal that his trial counsel was ineffective during both the guilt phase and the sentencing phase of the trial. Specifically, appellant asserts that trial counsel was ineffective during the guilt phase in failing to call three additional witnesses for the

defense and in failing to secure independent DNA testing. Appellant claims that trial counsel was ineffective during the sentencing phase for not calling any witnesses nor presenting any argument in mitigation. We conclude there is no merit to either of appellant's claims.

I. Standard of Review

This court will reverse a trial court's denial of postconviction relief only if its findings are clearly erroneous or clearly against the preponderance of the evidence. *Vickers* v. *State*, 320 Ark. 437, 898 S.W.2d 26 (1995). In order to succeed on a claim of ineffective assistance of counsel, a petitioner must show that counsel's conduct was outside the range of reasonably professional assistance and sufficiently deficient to have denied petitioner a fair trial. *Neff* v. *State*, 287 Ark. 88, 696 S.W.2d 736 (1985). There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and a petitioner has the burden of overcoming this presumption by identifying specific acts or omissions of trial counsel which, when viewed from counsel's perspective at the time of the trial, could not have been the result of reasonable professional judgment. *See, e.g., Wainwright* v. *State*, 307 Ark. 569, 823 S.W.2d 449 (1992); *Dumond* v. *State*, 294 Ark. 379, 743 S.W.2d 779 (1988). Furthermore, matters of trial tactics and strategy are not grounds for postconviction relief. *Vickers*, 320 Ark. 437, 898 S.W.2d 26; *Leasure* v. *State*, 254 Ark. 961, 497 S.W.2d 1 (1973).

This court has expressly adopted the criteria for establishing a claim of ineffective assistance of counsel set forth by the United States Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984). *See Crockett* v. *State*, 282 Ark. 582, 669 S.W.2d 896 (1984). In *Strickland*, the Supreme Court held:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to

> deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

Because there is a strong presumption that a duly licensed attorney is competent, a court deciding an ineffectiveness claim must consider the totality of the evidence that was before the jury and judge the reasonableness of the challenged conduct on the facts of the particular case at the time of counsel's actions. *Dumond*, 294 Ark. 379, 743 S.W.2d 779. But, under the *Strickland* standard, even professionally unreasonable errors by counsel do not warrant reversal of a conviction if the errors were not prejudicial to the defendant and had no effect on the judgment. *Noble* v. *State*, 319 Ark. 407, 892 S.W.2d 477 (1995). In other words, a petitioner must show that but for counsel's errors at trial, the outcome of the case would have been different. *Rowe* v. *State*, 318 Ark. 25, 883 S.W.2d 804 (1994); *Pruett* v. *State*, 287 Ark. 124, 697 S.W.2d 872 (1985). In reviewing appellant's claims, we must first determine whether any of counsel's alleged errors fall outside the range of professionally reasonable assistance, and if so, whether there is a reasonable probability that the outcome of appellant's case would have been different. We address each of the allegations separately.

II. Omission of Additional Witnesses

Appellant first argues that he was denied effective assistance of counsel because his attorney failed to call three additional witnesses on his behalf: (1) Edward Vollman, Chief Serologist at the Arkansas State Crime Laboratory; (2) Michael Melson, an additional alibi witness; and (3) Tommy Bittle, a friend of appellant. With respect to Mr. Vollman, appellant argues that trial counsel should have called him to testify about the medical evidence submitted by the state upon which he conducted tests. Appellant asserts that this testimony could have changed the outcome of the trial as it would have cleared him of the charge of rape.

Pursuant to court order, blood and hair samples from appellant were submitted to the state crime laboratory for comparison with the semen found on vaginal swabs included in a rape kit performed on the victim and semen found in the victim's underpants. During the hearing conducted on the Rule 37 petition, Mr. Vollman testified that both appellant and the victim had the same blood type ("O"); that both were secretors (persons who secret their ABO

blood grouping into all their body fluids); and that both possessed the PGM Type-1 enzyme. Mr. Vollman stated that the results of the testing of the vaginal swabs revealed the presence of the "H" blood group substance and the PGM Type-1 enzyme. According to Mr. Vollman, the "H" substance could have been deposited by any person who is a secretor (about eighty percent of the population), no matter what the person's ABO blood type. Mr. Vollman further stated that the "H" substance and the PGM Type-1 enzyme found on the vaginal swabs could have come from either the victim or appellant.

As for the semen discovered in the victim's underpants, Mr. Vollman stated that he found the presence of the "H" substance, as well as the presence of the "B" blood group substance. Again, Mr. Vollman stated that the "H" substance could have been deposited in the underpants by either appellant or the victim. In contrast, however, Mr. Vollman stated that because the "B" substance could only have been deposited by a person having blood type "B," someone other than appellant or the victim must have deposited the "B" substance found in the underpants. Appellant thus asserts that Mr. Vollman's testimony demonstrates that none of the serology tests could connect him to the victim in any way, and that trial counsel was ineffective for failing to put this witness on the stand.

Appellant's argument is flawed because he assumes that the serologist's testimony would have completely eliminated him as the perpetrator. Mr. Vollman testified that the semen found on the vaginal swabs taken from the victim could have been deposited by either the victim or appellant, and that the tests he performed did not exclude appellant as the perpetrator. As for the semen found in the victim's underpants, Mr. Vollman stated that the "H" substance could have been deposited by appellant, but that the "B" substance could not have come from him. The fact that a blood group substance different from appellant's was detected in the semen found in the victim's underpants did not rule out that appellant committed the crime, as the victim testified that she had had sexual intercourse with her boyfriend during the same time frame. The jury could have found that the medical evidence was thus consistent with appellant's guilt. It is certainly possible that the victim's boyfriend was responsible for the presence of the "B" substance found in the victim's underpants. It would appear then, that had Mr. Vollman

been called as a defense witness, his testimony would not have been entirely favorable to appellant's case.

During the Rule 37 hearing, appellant's trial counsel, Joe Kelly Hardin, explained his reasons for not calling Mr. Vollman as a witness. Mr. Hardin stated that he felt that the medical testing done by the state crime laboratory was inconclusive and that it could have hurt the defense as much as it could have helped. Mr. Hardin stated that he had heard the prosecution argue those types of results, whether positive or negative, "a thousand times." Mr. Hardin stated he felt the tests were inconclusive and that the victim's testimony that she had sex with her boyfriend on the night of the rape may have explained those findings. Mr. Hardin stated that he felt that appellant's best chance of being acquitted was to present an alibi defense and then argue that the state had not met its burden of proof since it was only the victim's word against appellant's.

The state did not attempt to bolster its case by presenting Mr. Vollman's testimony or any other medical evidence. In this way, Mr. Hardin's defense strategy seems logical, as he could and did argue to the jury that the victim's testimony was not corroborated by any medical evidence linking appellant to the crime. In light of the fact that the medical evidence could have harmed the defense just as easily as it could have helped, we cannot say that the decision not to call Mr. Vollman as a witness for the defense amounted to ineffective assistance of counsel.

Trial counsel's decision not to present Mr. Vollman's testimony was a tactical one within the realm of counsel's professional judgment. This court has previously held that an attorney's decision not to call a particular witness is largely a matter of professional judgment, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not itself proof of counsel's ineffectiveness. *Dumond*, 294 Ark. 379, 743 S.W.2d 779 (1988); *Tackett* v. *State*, 284 Ark. 211, 680 S.W.2d 696 (1984). Moreover, Rule 37 does not provide a forum to debate trial tactics or strategy, even if that strategy proves improvident. *Watson* v. *State*, 282 Ark. 246, 667 S.W.2d 953 (1984).

The second witness appellant argues should have been called to testify was Michael Melson. Michael Melson is the brother of petitioner's fiancée, Deborah Melson. Appellant argues that Mr. Melson would have been the best witness for his alibi defense,

and that trial counsel was ineffective for not calling him to testify. During the Rule 37 hearing, Mr. Melson testified that on the night of the rape, appellant spent the night at Melson's house; that they worked on appellant's truck until about 11:00 p.m.; that they went inside the house around 11:00 p.m. and each took a shower and went to sleep; that he was awake until 1:00 or 1:30 a.m.; and that when he got up the next morning, appellant was still on the couch. Appellant asserts that Mr. Melson's testimony would have been better received by the jury than the testimony of Deborah Melson, because of her relationship to appellant, and the testimony of her parents, because their testimony was confusing to the jury.

Had Mr. Melson testified at trial as he did at the Rule 37 hearing, his testimony would have been inconsistent with that of his sister, Deborah Melson, as Deborah Melson testified that appellant had been asleep with her in her bedroom that night, not asleep on the couch as Michael Melson would have claimed. When questioned about the decision not to put Michael Melson on the witness stand, Mr. Hardin stated that his decision was based on the fact that the other three members of the Melson family had testified so badly that he felt it was best not to submit an additional bad witness, especially one who would testify to essentially the same things the other three had described. We cannot say that the decision not to call Mr. Melson was anything other than trial strategy, and thus counsel's decision is not grounds for granting postconviction relief.

During the hearing below, both Mr. Hardin and Mr. Melson indicated that Melson would testify essentially the same as appellant's other three witnesses. We are, therefore, satisfied that Mr. Melson's testimony would have been cumulative, and as such, counsel's decision not to call this witness was neither erroneous nor prejudicial to the defense. The omission of a witness when his or her testimony is cumulative does not deprive the defense of vital evidence. *Dumond*, 294 Ark. 379, 743 S.W.2d 779.

Appellant's reliance on *Farmer* v. *State*, 321 Ark. 283, 902 S.W.2d 209 (1995) is misplaced. In *Farmer*, this court held that trial counsel was ineffective because he failed to subpoena the only witness who could corroborate the defendant's version of the events, and because counsel did not request a continuance when the witness did not appear at trial. Because Mr. Melson was not the only witness who could corroborate appellant's alibi, this case is distinguishable from *Farmer*. In the present case, three alibi witnesses

were presented to the jury.

The third witness appellant asserts should have been called in his defense is Tommy Bittle. Tommy Bittle testified at the hearing below to a prior inconsistent statement made to him by the victim. Specifically, Mr. Bittle stated that he had spoken to the victim and that she had told him that appellant had made advances toward her and that when she declined the last advance, appellant grabbed her by the throat until she screamed, and that appellant then let her go. Mr. Bittle stated that during their conversation, he had stated to the victim, "So, nothing really happened," and that the victim had responded by saying that, "What he did was he scared me real bad." Mr. Bittle stated that the victim had told him that she had been raped before. Appellant argues that this testimony by Mr. Bittle would have demonstrated that the victim was lying about the act of rape. Mr. Bittle stated that he had told appellant about this conversation with the victim, and that he had also told appellant's mother and another individual. On cross-examination, however, Mr. Bittle admitted that he had not reported this conversation to the police.

Mr. Hardin testified that the first time he had ever heard about Tommy Bittle's conversation with the victim was at the Rule 37 hearing. Mr. Hardin stated that to the best of his recollection, appellant had never told him about Tommy Bittle's conversation with the victim, and that if appellant had told him about this evidence, he would have remembered it. In contrast, during his testimony at the Rule 37 hearing, appellant claimed that he had told Mr. Hardin about Tommy Bittle's conversation with the victim prior to the trial.

Appellant asserts that had counsel properly investigated the case, he would have discovered the existence of Mr. Bittle's prior conversation with the victim. As it appears to be appellant's word against Mr. Hardin's concerning counsel's knowledge of the witness, we are unable to determine whether counsel's omission fell outside the range of professionally reasonable assistance. However, even if we assume that it was error for counsel not to have discovered Mr. Bittle's testimony, we cannot say that such an error prejudiced appellant's defense. Appellant's counsel had strategically developed an alibi defense and had presented witnesses in support of that strategy. Mr. Bittle's testimony would have been in direct conflict with this strategy. On the one hand, appellant would have been claiming through his alibi witnesses that he was never with the

victim that night, while on the other hand, through Mr. Bittle's testimony, it would have appeared that appellant was admitting that he was with the victim that night, that he made advances toward her, that he became violent when she rejected his advances, but that she was lying about the occurrence of sexual intercourse. We cannot say that counsel's omission was prejudicial to appellant's case, even though it may have tended to somewhat discredit the victim's testimony. Further, we are not prepared to go so far as to say that counsel omitted this testimony at all, since counsel testified that he had never been informed of the information before trial. Because this conflicting testimony was potentially damaging to the defense, we hold that the failure of counsel to call Tommy Bittle as a defense witness, even if counsel had been aware of his testimony, did not amount to ineffective assistance of counsel.

In his brief, appellant relies on this court's decision in *Wicoff* v. *State*, 321 Ark. 97, 900 S.W.2d 187 (1995), for the proposition that counsel's omission of these additional witnesses is grounds for granting him relief. In *Wicoff*, this court granted postconviction relief on the bases that counsel failed to present additional witnesses to the jury, witnesses which counsel admitted would have provided vital information to the jury and would have tended to raise doubt in the minds of the jurors. This court held that the omitted testimony was prejudicial to Wicoff's defense, and necessarily deprived him of a fair trial. In contrast, trial counsel in the present case has denied the vitality of the omitted testimony from Mr. Vollman and Mr. Melson, has denied knowledge of the testimony of Mr. Bittle, and has given full explanations as to his reasons for not presenting their testimony to the jury. Given counsel's reasonable explanations, we are satisfied that the omitted testimony was not in fact prejudicial to appellant's case. Appellant also relies on *Russell* v. *State*, 302 Ark. 274, 789 S.W.2d 720 (1990). In *Russell*, this court held that because counsel failed to call the two witnesses who could cast doubt on the defendant's guilt, witnesses of whom counsel admitted he was aware, counsel's trial performance fell below an objective standard of competence, and that the defendant was prejudiced as a result. Again, for the reasons outlined above, *Russell* is distinguishable from the present case.

III. Omission of Independent DNA Testing

As part of his first point on appeal, appellant argues that trial counsel was ineffective in failing to secure DNA testing on the

semen samples collected from the victim and appellant. Appellant argues that had counsel sought DNA analysis he would have been completely cleared as the perpetrator.

Appellant submits that at the time of his trial, DNA analysis was widely accepted as a means of scientific testing. The state does not dispute this. At the Rule 37 hearing, Mr. Vollman testified that DNA testing was both widely accepted and available to defendants. Mr. Vollman indicated that if appellant had not had sexual intercourse with the victim, the results of a DNA test would likely have excluded him as the perpetrator. On the other hand, Mr. Vollman stated, if appellant had engaged in sexual intercourse with the victim, a DNA test could likely identify him as the perpetrator.

In defense of his decision not to seek independent DNA testing, Mr. Hardin stated that, although he was aware of the availability and acceptance of DNA testing, he did not seek a DNA test because he was concerned that once he had requested the test, he would have been obligated to provide the results to the state, and if the results had "nailed" appellant as the perpetrator, there would have been no possibility of getting him acquitted. As it was, the evidence against appellant consisted of the testimony of the victim and those persons she told about the rape. Mr. Hardin stated that he felt appellant had a better chance at acquittal with the alibi witnesses he had prepared, especially if they would have been better witnesses, and with his argument attacking the state's case for lack of evidence.

We are convinced that the decision not to seek independent DNA testing was a decision clearly within the realm of counsel's professional judgment and trial strategy. In *Dumond*, this court observed:

> There are numerous scientific tests which could be conducted on physical evidence in a criminal trial and failure of counsel to seek a particular test will not amount to a denial of the counsel guaranteed by the sixth amendment unless it can be concluded that the test was one *which any competent attorney under the same circumstances* would have sought.

294 Ark. 379, 386, 743 S.W.2d 779, 782-83 (emphasis added).

We cannot say that any competent attorney defending a client on a charge of rape would necessarily have sought independent

DNA testing in an attempt to bolster the client's defense. This is especially true in a situation where the evidence against a defendant consists solely of the victim's testimony. The decision whether or not to seek such a test is a big gamble in that the evidence is likely to be conclusive one way or the other — either eliminating the defendant as the perpetrator or implicating him as such. Mr. Hardin's explanation of his decision not to seek DNA testing is reasonable, especially in light of the fact that had the test been completed and the results were unfavorable to appellant, the state would have been able to use that evidence against appellant in its case-in-chief.

Appellant offers no proof that any competent attorney in Mr. Hardin's situation would have sought such a test, let alone any proof that but for counsel's failure to request a DNA test, there is a reasonable probability that the outcome of his trial would have been different. This court is unwilling to view counsel's conduct in hindsight, and we are not convinced that the results of any scientific testing would have altered the outcome of appellant's trial. This is especially true in light of this court's previous determination that a victim's testimony alone provides substantial evidence to support a conviction of rape. *See Bishop* v. *State*, 310 Ark. 479, 839 S.W.2d 6 (1992). Furthermore, since we do not know what the outcome of the tests would have been, we cannot gauge whether DNA testing would have caused the jury to have a reasonable doubt of appellant's guilt. Thus, we cannot hold that the trial court was clearly erroneous in finding that trial counsel was not ineffective in failing to seek independent DNA testing.

IV. Mitigation in Sentencing

For his final point appellant argues that counsel was ineffective during the sentencing phase of the trial because he did not present any mitigating evidence or argument in an attempt to persuade the jury to be lenient in sentencing appellant. Appellant has failed to identify with any specificity what mitigating evidence counsel omitted during sentencing, and instead provides us with only bare allegations. This is his burden under the standard provided in *Strickland*. Since appellant cannot even prove that any mitigating evidence existed, we hold that trial counsel's conduct did not deprive petitioner of effective assistance of counsel. *See Swindler* v. *State*, 272 Ark. 340, 617 S.W.2d 1 (1981). It is for this reason, as well as those stated above, that we affirm the trial court's ruling denying appellant postconviction relief.

Affirmed.

NEWBERN and BROWN, JJ., dissent.

DUDLEY, J., not participating.

ROBERT L. BROWN, Justice, dissenting. I would grant a new trial solely on the basis that trial counsel failed to call the crime lab serologist, Edward Vollman. Vollman testified at the Rule 37 hearing that his tests confirmed that the victim and Helton had the same blood type which was "O." Seminal stains found on the victim's underpants, however, confirmed a "B" blood type, which was not Helton's blood group. That was a crucial piece of medical evidence. In my judgment, that evidence could have changed the outcome of the trial by creating a reasonable doubt of culpability. It certainly denied Helton a fair trial.

It is true that Helton is a "secretor," and evidence of a secretor's semen was found. But 80 percent of the population are secretors and the inescapable fact is Helton's blood type was not found. A third party was involved. This is how the serologist put it:

> DEFENSE COUNSEL: And Robert Helton, could he have left that fluid or item in her underpants with the B group?
>
> VOLLMAN: No.
>
> DEFENSE COUNSEL: Could not have have (sic) occurred?
>
> VOLLMAN: No.
>
> DEFENSE COUNSEL: So really then Robert Helton is excluded from depositing the bodily fluid or substance that was found in Rebecca Shyrock's undepants (sic) the very next day in the rape kit that you tested?
>
> VOLLMAN: He is excluded from the "B" substance. There's also the "H" substance that was present, which he is not excluded from.
>
> DEFENSE COUNSEL: Let me ask about the "B" and the "H" substance. Could the same person that deposited the "B" substance, that person being someone other than Robert Helton, could that person also have deposited the "H" substance?

VOLLMAN: Yes, because a person can deposit the "H" substance no matter what their ABO type is if they are a secretor.

DEFENSE COUNSEL: So the "B" and the "H" could have been deposited by the same person and that person would not have been Robert Helton, correct?

VOLLMAN: That's a possibility.

DEFENSE COUNSEL: The "H" substance could have been deposited by Rebecca Shyrock because she was a type "O", is that correct?

VOLLMAN: Yes.

DEFENSE COUNSEL: But there's no way that "B" substance could have been deposited either by Robert Helton or Rebecca Shyrock?

VOLLMAN: That's correct.

DEFENSE COUNSEL: It came from some third person?

VOLLMAN: Yes.

Trial counsel urged at the Rule 37 hearing that he did not call the serologist as a witness because he wanted to argue that the State produced no corroborative medical evidence. That argument might have some appeal but for the fact that the serologist had exculpatory evidence that would have aided the defense. The State, of course, did not call Vollman for obvious reasons.

In *Wicoff* v. *State*, 321 Ark. 97, 900 S.W.2d 187 (1995), we granted a new trial due to counsel's failure to call the defendant's grandmother who would have testified that the eleven-year-old victim told her she fabricated the rape story. The exculpatory evidence in this case, as it relates to blood type, is even more persuasive and less subject to challenge than a grandmother's testimony.

In 1992, the Missouri Supreme Court reversed a rape conviction due to trial counsel's failure to obtain requested blood tests and granted a new trial. *Moore* v. *Missouri*, 827 S.W.2d 213 (Mo. 1992) (en banc). Those tests would have shown that the source of the semen found on bed sheets could not have been the defendant. The

Supreme Court held that counsel's failure to obtain the results fell below reasonable and customary standards and that there was at least a reasonable probability that the trial results would have been different. The *Helton* case is certainly analogous to these facts.

The jury should have been privy to this important piece of medical evidence in reaching its verdict. I respectfully dissent.

NEWBERN, J., joins.

Corinthian McCOY *v.* STATE of Arkansas

CR 96-6 925 S.W.2d 391

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Joe Kelly Hardin, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

DONALD L. CORBIN, Justice. Appellant, Corinthian McCoy, was convicted by a jury of first-degree murder and attempted second-degree murder, and sentenced by the Saline County Circuit Court to life in the Arkansas Department of Correction. McCoy appeals the circuit court's judgment of conviction, and this court has jurisdiction of the appeal pursuant to Ark. Sup. Ct. R. 1-2(a)(2). McCoy raises two points on appeal: (1) The trial court erred in allowing the prosecution to introduce items seized in an illegal search of appellant's vehicle; and (2) the trial court erred in allowing the prosecution to introduce appellant's custodial statement, as it was involuntary and taken without regard to appellant's request for an attorney. We affirm.

In the early-morning hours of August 6, 1994, a shooting occurred at Jimmy Dirden's Club in Benton, Arkansas, which resulted in the death of Willie Mills and the injury of Raymond Lewis. Benton Police officers discovered a piece of metal in the club's parking lot that was similar to a .22 caliber bullet. Raymond Lewis, who suffered a gunshot wound to the leg, told officers that a black male driving a light-colored big car, such as an Oldsmobile or a Buick, left Dirden's and began shooting from inside his vehicle into a crowd of people standing outside the club. Lewis told the officers that the vehicle driven by the shooter had no license plate,

and that the man who did the shooting was kin to Demetrius Woods.

Officers spoke to Demetrius Woods, who stated that he was present when the crime occurred and that it was his cousin Corinthian who did the shooting. Woods told police that he did not know Corinthian's last name, but that he did know that Corinthian had recently received a traffic ticket for no vehicle license in Alexander or Bryant, Arkansas. Woods also stated that at the time of the incident, Corinthian was driving a big, light-colored car, possibly an Oldsmobile, which had no license plate.

Investigating officers subsequently located the Arkansas State Police officer who issued the traffic ticket to the individual known to the officers only as "Corinthian." A copy of the traffic citation, which was written for no vehicle license, revealed that the driver of the vehicle was identified as Corinthian McCoy and that the vehicle driven was a white Oldsmobile. Upon having identified appellant as the suspect, officers located appellant's residence in Little Rock, Arkansas, and arrested him later that same day of the shooting. Officers also located the vehicle in question at appellant's residence and identified it as a 1980 light gray Oldsmobile Delta 88 bearing no license plate. Upon his arrest, appellant was interviewed by a police detective and denied any involvement in the shooting. Officers seized the vehicle from appellant's residence and later conducted a search of its contents pursuant to a search warrant. The only evidence of the crime found during the search of the vehicle was a .22 caliber bullet.

Prior to appellant's trial, a hearing was conducted on the motions to suppress appellant's statement and the evidence recovered in the search. After hearing the testimony presented, the trial court denied appellant's motion to suppress the physical evidence, stating that there was sufficient identification of the vehicle in the affidavit to support application for the search warrant. After reviewing the contents of the statement itself, the trial court also denied appellant's motion to suppress the custodial interview.

I. Search of the Vehicle

Appellant argues that the trial court erred in failing to suppress the evidence found in a search of the vehicle appellant was driving on the night of the shooting. Specifically, appellant argues that the affidavit for search warrant insufficiently identified the proper vehi-

cle to be searched, and that the trial court erred in allowing a witness to testify beyond the information contained in the affidavit. The state argues that appellant lacked standing to challenge the search as he did not present any proof that he owned or legally possessed the automobile. We agree.

It is well settled that a proponent of a motion to suppress bears the burden of establishing that his Fourth Amendment rights have been violated. *Rockett* v. *State*, 319 Ark. 335, 891 S.W.2d 366 (1995) (citing *Rakas* v. *Illinois*, 439 U.S. 128 (1978)). Fourth Amendment rights are personal in nature. *Rockett*, 319 Ark. 335, 891 S.W.2d 366; *State* v. *Hamzy*, 288 Ark. 561, 709 S.W.2d 397 (1986). The pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Littlepage* v. *State*, 314 Ark. 361, 863 S.W.2d 276 (1993), (citing *United States* v. *Erwin*, 875 F.2d 268 (10th Cir. 1989)). This court will not reach the constitutionality of a search where a defendant has failed to show that he had an expectation of privacy in the object of the search. *Littlepage*, 314 Ark. 361, 863 S.W.2d 276. A defendant has no standing to question the search of a vehicle owned by another person, unless he can show that he gained possession from the owner or from someone who had authority to grant possession. *Id.*; *State* v. *Barter*, 310 Ark. 94, 833 S.W.2d 372 (1992).

In the hearing below, appellant presented no proof whatsoever that he had a legitimate expectation of privacy in the car. Appellant's argument to the trial court attacked the search warrant on the basis that there was no evidence linking the car found at his residence with the car involved in the crime; however, counsel's questions and remarks indicated a different line of attack, specifically, that the car was not appellant's. Through cross-examination of Officer Jimmy Holiman, appellant's counsel elicited testimony to the effect that the officer had no evidence to indicate that appellant was the actual owner of the vehicle and that a check of the car's VIN (vehicle identification number), showed the owner as Irma L. Brooks. Through this line of questioning, appellant's counsel all but admitted that appellant had no expectation of privacy in the vehicle.

Appellant took the stand during the suppression hearing, but his testimony was limited to the subject of his custodial statement. Appellant offered no proof that the car was his or that he

lawfully possessed it. Because appellant failed to establish lawful possession of the car, we conclude he had no standing to challenge the search of the car. For that reason, we do not reach the merits of his argument on appeal, and we affirm the trial court's ruling.

II. Custodial Statement

For his second point, appellant argues that the police obtained a custodial statement from him in violation of his rights under the Fifth and Sixth Amendments. Appellant asserts that his waiver of *Miranda* rights was not made voluntarily, that his request for counsel was denied, and that he made the statement under duress and threats from the officer. We do not find any of these arguments persuasive, and therefore we affirm.

When voluntariness of a statement is an issue, we make an independent determination based on the totality of the circumstances surrounding the statement. *Misskelley* v. *State*, 323 Ark. 449, 915 S.W.2d 702 (1996). We will reverse the ruling of the trial court only if that ruling was clearly against the preponderance of the evidence. *Magar* v. *State*, 308 Ark. 380, 826 S.W.2d 221 (1992). A custodial statement is presumed involuntary, and the burden is on the state to show that the statement was voluntarily given. *Misskelley*, 323 Ark. 449, 915 S.W.2d 702. A confession based on threats of harm is inadmissible. *Duncan* v. *State*, 291 Ark. 521, 726 S.W.2d 653 (1987). In making a determination of whether a statement was voluntarily made, this court will consider many factors, among which are the age, education, and intelligence of the accused; the length of questioning; the advice or lack of advice on constitutional rights; the repeated or prolonged nature of questioning; and the use of mental or physical punishment. *Misskelley*, 323 Ark. 449, 915 S.W.2d 702.

During the suppression hearing, appellant and Sergeant Dan Garner of the Benton Police Department were the only persons to testify, and their testimony was conflicting. This court has previously held that conflicts in testimony are for the trial court to resolve, as it is in a superior position to determine the credibility of the witnesses. *Duncan*, 291 Ark. 521, 726 S.W.2d 653. The issue of whether appellant was threatened is a credibility issue. *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 102 (1986). Based on the testimony presented, we cannot say the trial court's determination that the statement was voluntary was clearly against the preponderance of

the evidence.

Appellant testified that he was twenty-one years old at the time of the interview, that he was advised of his rights, and that he asked for an attorney but the officer told him he would get one when he went to court. Appellant further testified that he felt threatened when the officer informed him that there was a warrant for his arrest and that appellant would be arrested at the conclusion of the interview. On cross-examination, appellant conceded that he had previously been interviewed by the police on two occasions, and that during both those interviews he was read his rights and he understood them. Appellant admitted that during the present interview he understood that he did not have to say anything at all without a lawyer present, but that he went ahead and gave a statement because he felt threatened. Appellant maintained that he only gave a statement because the officer told him "you're going to jail anyway," and that by the officer's statement, he assumed that if he made a statement the officer would let him go.

The officer's testimony and the transcript of the taped interview contradict appellant's version of what took place. Sergeant Garner testified that he read appellant his *Miranda* rights from a statement of rights form prior to questioning appellant. Garner stated that appellant signed the form and appeared to understand his rights. Garner stated that before the interview began, appellant asked if Garner thought appellant needed an attorney, and that Garner responded by telling appellant that it was up to him (appellant) to decide whether he felt like he needed an attorney. Garner stated that he informed appellant that he had an arrest warrant for appellant, and that he was going to arrest appellant whether he made a statement or not.

The state introduced into evidence the statement-of-rights form signed by appellant as well as the transcript of the taped interview. The statement-of-rights form reflects that appellant not only signed his name at the bottom of the document, but that he also responded "Yes" to each of the rights read to him and that he put his initials by each response. The transcript of the interview reflects that Garner informed appellant that there were enough statements and enough witnesses to obtain the bench warrant, and that he was going to arrest appellant regardless of whether appellant gave a statement. The transcript also reflects that Garner stated that he wanted to hear appellant's side of the story and that appellant had

the right to talk to an attorney before giving a statement, but that appellant would be arrested and charged whether he talked to the officer or not. Appellant then gave a statement denying any involvement in the shooting and, furthermore, denying that he had even been in Benton on that night. At no point during the interview, which lasted only twelve minutes, did appellant inculpate himself in the crime.

After careful consideration of the matter, we find that appellant voluntarily waived his *Miranda* rights, that he gave the statement voluntarily without the presence of an attorney, and that no threats or coercion were used on appellant. We find it particularly persuasive that appellant had been in this situation twice before and that, by his own admission, he understood he did not have to give a statement without an attorney present. There was no evidence that appellant was so lacking in either education or intelligence that he did not understand what he was doing. In fact, appellant was twenty-one years old at the time of the interview, hardly an age at which he was incapable of making such a decision. Moreover, the duration of the interview itself was a mere twelve minutes.

As for the allegations of threats or duress, we find that the officer's statement that he was going to arrest appellant regardless of whether appellant told his side of the story does not rise to the level of being a threat. To the contrary, it indicates to us that the officer had already planned to arrest appellant and that appellant's actions in choosing either to give a statement or not to give a statement would not have changed the officer's plans. There is no evidence at all to support appellant's claim that he thought that if he gave a statement the officer would release him without arresting him. Appellant's claim that he felt threatened or pressured into giving a statement is especially unpersuasive in light of the fact that his statement was exculpatory in nature and amounted to nothing more than a blanket denial of the allegations. Based on all of the foregoing, we find that the statement was voluntarily given and that the trial court did not err in denying appellant's motion to suppress the statement.

In accordance with Rule 4-3(h) of the Arkansas Supreme Court Rules, the record has been reviewed for adverse rulings objected to by appellant but not argued on appeal, and no error was found. For the aforementioned reasons, we affirm the judgment of conviction.

Affirmed.

DUDLEY, J., not participating.

Rick GANSKY *v.* HI-TECH ENGINEERING; ITT Hartford

96-335 924 S.W.2d 790

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Lane, Muse, Arman & Pullen, by: *Donald C. Pullen*, for appellant.

Anderson & Kilpatrick, by: *Randy P. Murphy*, for appellees.

ROBERT L. BROWN, Justice. This matter comes to us on review of a decision by the Court of Appeals in which that court was divided by a vote of three to three. *Gansky* v. *Hi-Tech Eng'g*, 52 Ark. App. 147, 916 S.W.2d 124 (1996). Because the vote in the Court of Appeals was evenly split, the decision by the Workers' Compensation Commission to deny additional benefits to appellant Rick Gansky was affirmed. We granted review of the decision of the Court of Appeals pursuant to Ark. Sup. Ct. R. 1-2(f). Gansky now raises two issues to this court on review: (1) the Commission erred in refusing to find a need for continued medical treatment, and (2) the Commission was in error when it decided the issue of temporary total disability before a functional capacity assessment was completed and Gansky was released from a physician's care. We agree that the Commission erred in its decision, and we reverse that decision and remand.

On October 31, 1992, Rick Gansky suffered a work-related injury while working as a machinist for Hi-Tech Engineering (Hi-Tech). It was stipulated by the parties that Hi-Tech accepted the claim and paid medical and disability benefits from the date of the injury until February 22, 1993, after which time Hi-Tech disputed Gansky's need for continued medical treatment.

On December 13, 1993, a hearing was held before the Administrative Law Judge on the issue of additional medical treat-

ment for Gansky. At the time of the hearing, Gansky was thirty-four years old. He testified that he began working for Hi-Tech in June of 1991. He admitted that he had sustained a previous work-related injury to his lower back in February of 1990 while working for another company. As a result of that injury, he received a 5% permanent partial disability rating, and the claim was settled through a joint petition for approximately $4,000. Gansky stated that he did not have any physical problems when he started working for Hi-Tech. According to Hi-Tech's Industrial Injury Reports, Gansky injured his back on March 10, 1992, and missed time from work. Over seven and one-half months later, he experienced the injury that is the subject matter of this claim.

Gansky described the October 31, 1992 injury at Hi-Tech in testimony before the Administrative Law Judge:

> I was lifting parts that weighed about—I'd say anywhere from 150 pounds, maybe 200. They were 15 inch in diameter, solid steel, and I was lifting them and putting them in the lathe. I was doing the same parts all day, and finally my back just gave out, and I ended up with pains going from my shoulders into my neck and down my back and into my legs. At that time I had to quit and Joe had to put my shoes—change my shoes for me so I could go to the hospital.

Gansky stated that a subsequent MRI procedure revealed bulging discs in his lower back. He was referred by Dr. Jeffrey Reinhart to Dr. Allan Gocio, a neurosurgeon, and to Cleveland Smith, a physical therapist. Gansky stated that after his injury, he had been feeling better and that he had tried to go back to work at Hi-Tech several times. In fact, he did return to work on January 12 and 13, 1993, but began to feel pain in his neck and upper back and a tingling sensation in both arms. After a week or two, the pain worsened and, according to Gansky, he had returned to Dr. Gocio. Gansky testified that on Friday, February 19, 1993, before he was to see Dr. Gocio on Monday, February 22, 1993, Hi-Tech told him that he could consider himself laid off. He expected Dr. Gocio to release him on February 22, 1993, but Dr. Gocio recommended the functional capacity assessment instead. Hi-Tech, however, contested the need for continued medical treatment and refused to pay for this evaluation. Gansky testified that he has not seen a physician since that time and that he has not gone back to work. He stated that he has been "[a]t home sitting in a chair watching TV." He testified

that since February 22, 1993, he has had headaches that are caused by his neck pain. He also reported continued lower back pain that is less severe. He added that his neck pain and lower back problems prevented him from either standing or driving an automobile for long periods of time. For example, he stated that he could not raise his arms over his head without pain to his neck. The reason, he testified, that he did not seek further medical treatment was because "workmen's comp quit paying the bills and [he] just [couldn't] afford it. They won't see [him] until the bills are paid." He has taken prescription muscle relaxers, pain medication, and Advil since he last saw Dr. Gocio.

On cross-examination, Gansky admitted that he had been off work "about a year" after his first back injury in 1990. He also admitted that he initially complained of low back problems before complaining of neck problems and headaches. Although he testified that he could not pay for his medical bills, he admitted that he spent a weekend at the theme park, Six Flags, with his girlfriend and children but claimed that his girlfriend paid for the trip. He also admitted that he owns his home, a boat, and a riding lawn mower, and that he is able to do housework and to mow his yard while riding the mower. He stated that he had not been back to work at Hi-Tech because his doctor had not released him.

Under examination by the Administrative Law Judge, Gansky admitted that Dr. Gocio had not refused to treat him. He also advised the judge that he was told that he was being laid off due to a lack of work. It was stipulated that Gansky had an above average work performance record at Hi-Tech.

Also presented at the hearing before the Administrative Law Judge was a letter to the company physician, Dr. Jeffrey Reinhart, from Cleveland Smith, the physical therapist, which was dated January 25, 1993. That letter related that as of January 11, 1993, Gansky's "symptoms have been all but alleviated, except for a minimal amount of soreness in the lumbar region" and that Gansky had gone back to work but returned two days later complaining of cervical spine pain and paresthesia in both upper extremities. The letter concluded: "Symptomatology has reduced during this period of treatments, but continues at a minimal level. Symptoms will increase with activities." On February 25, 1993, Smith wrote Dr. Reinhart that Gansky's symptomatology consisted only of a minimal headache, and after concluding that all physical therapy goals

had been achieved, Gansky was released from further therapy sessions.

At the hearing, it was revealed that Dr. Gocio concluded on January 27, 1993, that Gansky had "cervical and lumbar herniated disc with nerve root compression." A cervical and lumbar myelogram was performed on that same date. The test revealed a normal lumbar myelogram, but Dr. Gocio concluded that a CT scan procedure was needed to better evaluate the cervical spine. That examination showed no evidence of herniation but did show some stenosis. On January 29, 1993, Dr. Gocio ordered continued physical therapy.

According to Dr. Gocio's handwritten progress notes dated February 22, 1993, Gansky was doing better with less pain. However, on that date he wrote to the Levi Work Capacity Center and directed an appointment for Gansky to be evaluated in the functional capacity assessment program. Eight months later, Dr. Gocio wrote to the attorney for Hi-Tech on October 21, 1993, as follows:

> Mr. Rick Gansky was last seen by me on 02-22-93, and at this time the patient was improving significantly from a suspected cervical strain syndrome. Work up did not reveal a significant disc herniation either on MRI scan or myelography and my diagnosis at the time of the patient's last visit was that of a cervical strain which was resolving satisfactorily with medical treatment. The patient was referred to the Levi Work Capacity Center for a functional capacity assessment and return to work if feasible after the functional assessment. This is the last contact that I had with the patient. I must assume that he has resolved his symptomatology or sought care from another physician.
>
> I did not feel that the patient's injury was permanent in nature or that he is likely to have any impairment. I believe that his diagnosis of cervical strain would resolve without significant impairment or long term symptomatology.

In his opinion filed on February 28, 1994, the Administrative Law Judge ordered Hi-Tech to pay Gansky's medical expenses including the cost of the functional capacity assessment and any warranted treatment thereafter. The judge specifically reserved ruling on Gansky's entitlement to temporary total disability benefits, pending further development of the medical evidence.

The Administrative Law Judge's decision was appealed to the Workers' Compensation Commission. In an opinion filed October 17, 1994, the Commission by a vote of two to one, reversed the Administrative Law Judge and determined that Gansky had failed to prove that further medical treatment was reasonable and necessary and that as a result, he was not entitled to temporary total disability benefits. Focusing on the report by the physical therapist, Cleveland Smith, the Commission concluded that Gansky's healing period for the temporary aggravation to his lower back had ended by at least February 22, 1993. The Commission stated:

> Furthermore, we also find that a preponderance of the evidence establishes that the October 31, 1992, injury only temporally aggravated the claimant's preexisting back condition. The physical therapy reports establish that the claimant was essentially symptom free by January 11, 1993. Although he did experience another recurrence of symptoms, the physical therapy reports establish that he was again essentially symptom free by at least February 25, 1993. Also, Dr. Gocio has opined that the claimant's injury was not permanent in nature. While the claimant may continue to need periodic medical treatment due to episodes of back pain related to the degenerative condition, the need for that treatment is not causally related to the compensable injury. Therefore, we find that the claimant failed to prove by preponderance of the evidence that additional medical care is reasonably necessary for treatment of the compensable injury, and we find that the administrative law judge's decision in this regard must be reversed.

The issue now before us is whether the Commission erroneously denied Gansky benefits in the wake of the decision by the Administrative Law Judge to continue medical treatment. This court reviews a workers' compensation case as though it had originally been filed here. Ark. Sup. Ct. R. 1-2 (f); *Kuhn* v. *Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996); *Plante* v. *Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994). The issue then is whether medical treatment after February 22, 1993, was reasonable and necessary. Ark. Code Ann. § 11-9-508 (a) (1987). What constitutes reasonable and necessary treatment under this section is a question of fact for the Commission. *Arkansas Dep't of Correction* v. *Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994); *see also Morgan*

v. *Desha County Tax Assessor's Office*, 45 Ark. App. 95, 871 S.W.2d 429 (1994). The answer to this issue naturally turns on the sufficiency of the evidence.

This court views the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's decision and affirms that decision when it is supported by substantial evidence. *Kuhn* v. *Majestic Hotel, supra*; *Plante* v. *Tyson Foods, Inc., supra*; *Morgan* v. *Desha County Tax Assessor's Office, supra*. The Commission's decision will be affirmed unless fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Kuhn* v. *Majestic Hotel, supra*; *Plante* v. *Tyson Foods, Inc., supra*; *Morgan* v. *Desha County Tax Assessor's Office, supra*; *Tracor/MBA* v. *Baptist Medical Center*, 29 Ark. App. 198, 780 S.W.2d 26 (1989). Credibility of the witnesses is a matter exclusively within the province of the Commission. *See Kuhn* v. *Majestic Hotel, supra*.

The Commission found that Gansky had temporarily aggravated a pre-existing condition. That is a compensable injury. *See, e.g., Curry* v. *Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). The Commission admitted this in its opinion and order. But then the Commission concludes that the aggravation was over by February 25, 1993, and that Gansky was essentially symptom-free. In doing so, the Commission discounted the fact that Dr. Gocio had ordered a functional capacity assessment for Gansky and had refrained from releasing him from his care until that examination was completed and he could decide whether Gansky could return to work. At that juncture, Hi-Tech intervened and refused to pay for additional medical care, including the functional capacity assessment. Hence, that essential examination ordered by Dr. Gocio was never performed, and a final evaluation by the neurosurgeon was never made. The Commission appears to have concentrated on the reports of the physical therapist as opposed to those of Dr. Gocio. Under these circumstances when the treating neurosurgeon has prescribed a functional capacity assessment and that was not done because Hi-Tech would not pay for it, we cannot agree with the Commission that additional medical treatment was not reasonably necessary or that the healing period had ended. We conclude that fair-minded persons, viewing the same evidence, could not decide otherwise.

Moreover, the record, as the Commission states, does not

reflect that Dr. Gocio opined that Gansky was rid of all symptomatology or ready to return to work. What Dr. Gocio wrote to Hi-Tech's attorneys some eight months after he directed the functional capacity assessment was that he "assumed" the symptomatology had resolved itself because he had had no further contact with Gansky. The neurosurgeon added that he "believed" Gansky's "diagnosis of cervical strain would resolve without significant impairment or long term symptomatology." It is clear from reading Dr. Gocio's letter that his opinion hinged on the results of the functional capacity assessment, which was not performed.

Having resolved the first issue in this manner, resolution of the second issue falls into place. The Administrative Law Judge appropriately delayed deciding whether Gansky had a temporary total disability until all the medical treatment, that is, the functional capacity assessment, was completed. This did not transpire. We do not view the reservation of a decision on this point as running afoul of the Court of Appeals's decision in *Gencorp Polymer Prods.* v. *Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991). In *Landers*, that court observed that a claimant should not be permitted a second opportunity to offer proof to meet her burden on the issue of her period of temporary total disability. The Court of Appeals further held that the Workers' Compensation Commission had exceeded its authority in permitting her to do so. Here, Dr. Gocio ordered an additional assessment of Ganksy, and Hi-Tech contested the need for this additional treatment. The result is that Gansky's initial medical treatment and evaluation were never completed. Those circumstances are fundamentally different from the facts which resulted in the *Gencorp* decision.

■ We, therefore, reverse the Court of Appeals and the Arkansas Workers' Compensation Commission and remand this matter to the Commission with directions (1) to order payment of continued reasonable and necessary medical treatment, including the functional capacity assessment, and (2) to determine whether payment of additional benefits is warranted.

Reversed and remanded.

DUDLEY, J., not participating.

GLAZE and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Justice, dissenting. The majority cor-

rectly states that the standard of review for a decision of the Workers' Compensation Commission is whether the decision is supported by substantial evidence, and a decision of the Commission will be affirmed unless fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Kuhn* v. *Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996). The standard of review further provides that this Court will view the evidence in the light most favorable to the Commission's decision. *Plante* v. *Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994). On appeal, the issue is not whether this Court might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, the decision must be affirmed. *St. Vincent Infirmary Med. Ctr.* v. *Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The Commission is not bound by medical opinion, although it may not arbitrarily disregard the testimony of any witness. *Crow* v. *Weyerhauser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994). The Commission may also examine the basis for a doctor's opinion in deciding the weight to which that opinion is entitled. *Id.*

With this standard in mind, I do not agree that the decision of the Commission should be reversed in this case. The abstract and record reflect that, in addition to the evidence outlined by the majority, at the time Gansky went to work for Hi-Tech in June of 1991, he completed and signed under oath a pre-employment medical history, in which he denied ever having had trouble with his back and further denied that he had ever received Workers' Compensation benefits. However, the record before the Commission reflects that Gansky suffered a back injury on February 14, 1990, while employed, under the name of Rick George, by Advanced Machine Corporation. He was off work about one year and filed a Workers' Compensation claim as a result of this injury; this claim was settled by joint petition on May 17, 1991, less than *one month prior* to his employment with Hi-Tech. At the hearing on the joint petition, Gansky testified that he continued to experience recurrent episodes of back pain. He received a settlement in the sum of $3,815.78 for a 5% permanent impairment at the time of the joint petition. At Gansky's last visit to the physician who treated him for this injury on March 20, 1991, he related that he experienced weekly episodes of back pain, which he claimed to be due to the physical demands of his employment as a machinist, and that this back pain caused him to sometimes miss work. Although Hi-Tech

ultimately abandoned its *Shippers* defense based on Gansky's misrepresentations at the time of his employment, this evidence certainly had bearing on his credibility in the proceedings before the Commission.

More importantly, it is clear from the evidence that Gansky was advised by Hi-Tech on Friday, February 19, 1993, that he was being laid off due to lack of work. Gansky signed the termination report which contained this information. He testified that when he visited Dr. Gocio three days later on Monday, February 22, 1993, he "thought Dr. Gocio would release him to return to work on that day," but the doctor "decided to do a functional capacity evaluation because Hi-Tech told me prior to seeing the doctor, I could consider myself laid off." This testimony, coupled with the report of Gansky's physical therapist, is substantial evidence that Gansky had completed his period of temporary disability and was ready to return to work. The record further reflects that Gansky made no attempt to either return to employment or seek follow-up medical care after his last visit to Dr. Gocio on February 22, 1993. Although he testified that his neck and back continued to hurt, these were essentially the same complaints that he voiced following his injury of February 1990.

I conclude that this Court has chosen to disregard the standard for review of Commission decisions in reversing the Commission in this instance. Here, reasonable minds could clearly have reached the same conclusion as reached by the Commission; I would affirm its decision.

GLAZE, J., joins in this dissent.

J.T. MONCRIEF *v.* STATE of Arkansas

CR 96-166 925 S.W.2d 776

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Winfred A. Trafford and *Green, Henry & Green*, by: *J.W. Green, Jr.*, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. This appeal involves a charge brought against appellant J.T. Moncrief for violation of Ark. Code Ann. § 16-15-109 (Repl. 1994), which makes it unlawful for a county official to develop an "interest" in a county contract. Following a jury trial, Moncrief was convicted of the charge, a misdemeanor, and fined $500. As a result of the conviction, he was later removed from his office of County Judge of Lincoln County pursuant to § 16-15-109(b). He appeals both the judgment against him and his removal from office. We do not address the merits of the appeal because we find the appellant's abstract of the record to be flagrantly deficient under Ark. Sup. Ct. R. 4-2(b). For that reason, we affirm.

On July 6, 1995, this case was tried to a jury. The testimony at trial was that after an ice storm in Lincoln County, the county

received federal financial assistance (FEMA funds) to make repairs and clean up the roads. Moncrief reviewed bids for the project and chose Hal Garrison as the contractor to perform the work. Garrison, however, needed a performance bond before he could finalize the arrangement with Lincoln County. In order to obtain the bond, Garrison went to the Bank of Star City with Moncrief and Weldon Wynn, a bond writer, and sought a $4,000 dollar loan from the bank to be used for a ten percent cash bond. Moncrief assured a lending officer of the bank, Mark Owen, that he would make sure that the bank got paid and that there would be no risk in the bank's making the loan to Hal Garrison. Moncrief then signed a personal guaranty on July 1, 1994, to repay the $4,000 promissory note made by Garrison, and in return, the bank issued a cashier's check in the amount of $4,000 payable jointly to Garrison and Moncrief.

Moncrief never revealed to the Lincoln County Quorum Court that he had guaranteed the note for Garrison and, in fact, told Quorum Court members when asked that he was not directly responsible for Garrison's obtaining the $4,000. Garrison paid off the note, and the bank employee handling the loan testified that Moncrief never received any money or other benefit from his involvement in the Hal Garrison loan.

The jury returned a guilty verdict and fixed Moncrief's sentence at a fine of $500.00. On July 11, 1995, the trial court entered an order in accordance with the verdict. On that same day, the State filed a petition for removal of appellant as county judge pursuant to Ark. Code Ann. § 16-15-109(b) (Repl. 1994). The following day, the trial court entered an order granting the petition.

Moncrief first contends that there was no evidence that he was "interested" in any contract or transaction made or entered into in Lincoln County as required by § 16-15-109(a)(1), and thus, the trial court erred in not entering a judgment of acquittal. The State responds that this point must be affirmed because Moncrief did not abstract any motion for a directed verdict or the trial court's ruling, all of which is in violation of Ark. Sup. Ct. R. 4-2(a)(6). The State is correct.

In *Taylor* v. *State*, 299 Ark. 123, 771 S.W.2d 742 (1989), this court did not reach the merits of the defendant's challenge to the sufficiency of the evidence to support a guilty verdict in part because the defendant failed to abstract the motion for directed

verdict. We stated:

> We do not reach the merits of Taylor's claim because he failed to abstract his motion for directed verdict and because he never challenged the sufficiency of the evidence below on the grounds the State failed to prove premeditation and deliberation.
>
> Parties have an affirmative obligation to abstract those portions of the record relevant to the points on appeal, and the record is confined to that which has been abstracted. It is equally axiomatic that arguments made for the first time on appeal will not be considered by this court, and parties cannot change the grounds for an objection on appeal.

Id. at 124, 771 S.W.2d at 743 (citations omitted). Following suit, in *Brown* v. *State*, 316 Ark. 724, 875 S.W.2d 828 (1994), we refused to address the merits of a challenge to the sufficiency of the evidence because the defendant's abstract did not sufficiently reflect the content of his motions for directed verdict at the trial court level. We stated:

> Appellant's abstract reflects that at the conclusion of the State's case he "[m]oved for a directed verdict," which was denied, and at the end of the case he "renewed motion for a directed verdict," which was denied. Appellant's record on appeal is limited to that which is abstracted. Thus, we do not know whether the motion to the trial court applied to one, two, or all three of the charges, and we do not know the specific grounds of the motion or motions.

Id. at 727, 875 S.W.2d at 830.

In the instant case, we cannot tell from the abstract that Moncrief actually moved for a directed verdict at all, much less the content and basis of his motions. His Statement of the Facts and Argument do refer to motions for a directed verdict and to a denial of those motions, but this court has explained that such scattered references are not a substitute for a proper abstract. *See, e.g., Franklin* v. *State*, 318 Ark. 99, 884 S.W.2d 246 (1994); *Watson* v. *State*, 313 Ark. 304, 854 S.W.2d 332 (1993).

In his Reply Brief, Moncrief relies on *Fight* v. *State*, 314 Ark. 438, 863 S.W.2d 800 (1993), for the point that since the State does not deny that Moncrief made the motions and that they were

denied, this court should address the merits. The *Fight* case is distinguishable, though. In *Fight*, the defendant's abstract did indicate that the motions for a directed verdict had been made. Indeed, in *Fight* we took pains to distinguish *Taylor* v. *State, supra*, and similar cases which totally failed to abstract motions. Because the abstract in this case does not show in any way that motions for a directed verdict were made, *Fight* v. *State, supra*, is not controlling. We affirm for violation of Ark. Sup. Ct. R. 4-2(a)(6).

Moncrief next asserts that he moved to dismiss the criminal charge before the jury trial on the basis that the criminal information did not set forth sufficient allegations and facts to support a criminal charge and he could not prepare a defense based on the insufficient information and that the information was unconstitutionally vague. The State again responds that Moncrief's abstract is deficient on this point because he failed to abstract any ruling by the trial court on the motion to dismiss.

We agree that the abstract is lacking on this issue. Moncrief did abstract his two motions to dismiss. However, there is nothing in the abstract to show that he ever obtained a ruling by the trial court on his motions, and this court has emphasized time and again that the record on appeal is confined to that which is properly abstracted. *See, e.g., Brown* v. *State, supra.* Moreover, we have held numerous times that the burden of obtaining a ruling is on the movant, and objections and questions left unresolved are waived and may not be relied upon on appeal. *See, e.g., Watson* v. *State, supra*; *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80, (1986). Both the arguments made to the trial court and the trial court's ruling are vital to this court's decision on review. *Watson* v. *State, supra.* Without the trial judge's ruling or order, we have no basis for a decision. *See Johnson* v. *State*, 316 Ark. 509, 872 S.W.2d 400 (1994) (per curiam). Hence, we must also affirm the judgment and order below on this point because Moncrief's abstract is flagrantly deficient. *See* Ark. Sup. Ct. R. 4-2(b).

For his next point, Moncrief asserts that the trial court erred in allowing Betty Dickey, the prosecuting attorney who had been disqualified on her own motion, to sit at the counsel table with the special prosecutor. Moncrief asserts that Wayne Juneau, a deputy prosecuting attorney in Dickey's office, testified for the State, and because of this, allowing Dickey to sit inside the bar amounted to a comment on the evidence. The State responds once again that the

abstract is flagrantly deficient with respect to this issue, and therefore the issue should be decided in the State's favor.

■ We agree. The abstract contains only the motion for appointment of the special prosecutor filed by Dickey and the order granting the motion and appointing a special prosecutor. The abstract contains nothing further regarding Dickey's seat at the counsel table. As we have previously noted, scattering references throughout a Statement of the Case and Argument is not a substitute for a proper abstract. *See, e.g., Watson* v. *State, supra.* Since failure to make a timely objection waives the objection, [*Rockett* v. *State*, 319 Ark. 335, 891 S.W.2d 366 (1995)], and the record on appeal is limited to that which is abstracted, we affirm this point based on Moncrief's failure to abstract any objection and ruling on the objection. *See Stone* v. *State*, 321 Ark. 46, 900 S.W.2d 515 (1995).

■ Moncrief states as his fourth argument that he objected at the trial level to any action being taken by the trial court in Jefferson County on the petition for his removal for a cause of action that was tried in Lincoln County. He makes the additional argument that his removal from office constituted double jeopardy. The State responds that the abstract does not contain any hearing or any objections made by him on this point, and therefore this point should be affirmed. Again, the State is right. In fact, the abstract does not contain any response or objection to the State's petition for removal whatsoever. Based on the previous discussion, we will not address this point.

For his final point, Moncrief urges that Article 5, Section 9, of the Arkansas Constitution provides that a person may be removed from public office if he is convicted of "embezzlement of public money, bribery, forgery, or other infamous crime" and that here he was only convicted of a misdemeanor, which is not listed in Ark. Const. art. 5, § 9. Hence, he argues that his removal from office was unconstitutional. The State responds that Moncrief did not abstract any such argument made to the trial court or any hearing on this point. Accordingly the issue should be resolved in favor of the State. We agree.

■ Again, the record on appeal is confined to that which has been abstracted, and the abstract in the instant case does not reflect that Moncrief raised this constitutional argument before the trial

court. Even constitutional arguments are waived unless raised before a trial court. *Marshall* v. *State*, 316 Ark. 753, 875 S.W.2d 814 (1994). Moreover, without the abstract of the hearing we are left in the dark as to what transpired before the trial court. *See Pogue* v. *State*, 316 Ark. 428, 872 S.W.2d 387 (1994); *Haynes* v. *State*, 313 Ark. 407, 855 S.W.2d 313 (1993). We will not address this argument.

Finally, Moncrief requests in his Reply Brief that if this court determines that his abstract is deficient, he should be allowed time to revise his brief to conform to Ark. Sup. Ct. R. 4-2(a)(6). Ark. Sup. Ct. R. 4-2(b)(2) provides that if the court determines that an affirmance for noncompliance with the abstracting rules is unduly harsh, "the appellant's attorney may be allowed time to revise the brief, at his or her own expense, to conform to Rule 4-2(a)(6)."

In *Harris* v. *State*, 315 Ark. 398, 868 S.W.2d 58 (1993), we affirmed the defendant's convictions on two counts of delivery of a controlled substance on the basis that his abstract was flagrantly deficient. In a footnote, we noted:

> We note that in his reply brief, Harris requested that he be permitted to supplement his abstract, but that request was without a prior timely motion, and as a matter of course, would not (and did not) come to the court's attention until after this case was submitted to the court for decision. It is not permissible to supply a deficiency in the abstract of the record in a reply brief.

Id. at 399, 868 S.W.2d at 59 (citation omitted). Similarly, in the instant case, Moncrief did not file a prior timely motion requesting that he be allowed to revise his brief to provide a sufficient abstract.

In *Young* v. *State*, 308 Ark. 372, 823 S.W.2d 911 (1992), this court allowed an appellant to supplement his abstract and brief. The *Young* case differs, however, from the instant case in that in *Young* the appellant's attorney filed a motion requesting that he be allowed to supplement his abstract and brief. We stated:

> Since the case is not yet ready for submission, we grant the motion and allow the appellant fifteen days within which to file a substituted abstract and brief.
>
> Rule 9(e)(2) of the Rules of the Supreme Court and Court of Appeals provides that, when it does not cause an unreasonable or unjust delay in the disposition of an appeal,

> an appellant's attorney may be allowed time to reprint his brief, at his own expense, to conform to Rule 9(d). Granting the motion in this case will not cause an unjust delay since the case is not yet ready for submission and other cases are ready for submission.

Id at 372, 823 S.W.2d at 911; *see also Dixon Ticonderoga Co.* v. *Winburn Tile Manufacturing Co.*, 322 Ark. 817, 911 S.W.2d 955 (1995).

In short, Moncrief's failure to move to supplement or substitute his abstract prior to the submission of this case for decision is fatal to his appeal. To decide otherwise would unjustly delay the disposition of this matter.

Affirmed.

DUDLEY, J., not participating.

Walter L. YOCUM *v.* STATE of Arkansas

CR 95-1095 925 S.W.2d 385

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Christopher O'Hara Carter, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen. and Senior Appellate Advocate, for appellee.

ANDREE LAYTON ROAF, Justice. Walter L. Yocum, Jr., appeals from his conviction of criminal use of a prohibited weapon and sentence of eight years' incarceration. He contends that the trial court erred in 1) not declaring Ark. Code Ann. § 5-73-104 unconstitutionally vague in it contains no definition of a "bomb"; 2) not suppressing evidence obtained when he was searched after he was arrested, without basis, for public intoxication while he was inside a private residence; 3) giving an overly broad jury instruction which did not fit the allegations against him; 4) refusing to give an affirmative defense jury instruction; and 5) failing to dismiss the charge against him because there was no proof presented of the culpable mental state required for commission of the offense. We affirm.

On December 28, 1994, the Baxter County Sheriff's Office

responded to a call from the mobile home of appellant Yocum's mother. The call indicated that Yocum's mother needed help because Yocum was causing a disturbance at her home and had passed out. Deputy Sheriff John Booker was admitted by Yocum's mother who whispered "don't wake him up." Booker found appellant passed out on the kitchen floor. Booker testified that he detected a strong odor of intoxicants about Yocum, that kitchen utensils were thrown about on the floor, and that there appeared to have been a disturbance at the home. Yocum's mother also told Booker that Yocum had on his person a number of knives. Booker stated that Yocum's mother was very upset, and appeared scared. He further testified that he found four knives on Yocum, one strapped to each leg and two on his belt. After removing the knives, Booker testified that he took Yocum from the home and patted him down prior to placing him in a patrol car. During the patdown search, Booker discovered an object in Yocum's pocket which appeared to be a pineapple-type hand grenade with a fuse cord at one end.

John Miller, a bomb expert from the state police, was called in to examine the object. Miller testified that he broke it open and that it was sealed at both ends, had a fuse, and contained low explosive powder and shotgun type pellets. He further testified that the object had been made by removing the lighter parts from a novelty cigarette lighter, that he considered it a bomb, and that it was functional and capable of exploding and killing people. He also stated that it served no lawful purpose and was "not something for the Fourth of July."

A forensic chemist from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") testified concerning the components of the device. Agent Krista Truss testified that it had a grenade body with a pyrotechnic fuse extending to the outside and was sealed with epoxy. She testified that the fuse extended to the inside of the device, which contained smokeless powder and five shotgun pellets. She further stated that there was enough powder to explode the device. Another ATF agent testified that he classified the device as an improvised explosive grenade under federal law and that it would have exploded had it been lit. He stated that it had an effective range of fifteen feet and that persons within two to three feet could receive life threatening injuries if the device exploded.

Tommy Steen of the Baxter County Sheriff's Office testified that he talked with Yocum on December 30, 1994, two days after

his arrest, after first advising him of his *Miranda* rights. He stated that Yocum told him that the item was "just a cigarette lighter" and that he owned the device that was found in his possession.

Although Yocum was arrested for public intoxication, he was not charged with that offense. Yocum was instead charged by an information filed January 16, 1995 with one count of criminal use of a prohibited weapon, a class B felony, and three counts of carrying a knife as a weapon, a class A misdemeanor. The information provided that at the time of his arrest on December 28, 1994, Yocum had a grenade in his pocket and three knives on his person, and that at a later arrest on January 13, 1995, Yocum also had three knives, a butterfly knife, a knife which had been welded to a pair of brass knuckles, and a hunting type knife with a blade approximately ten inches long.

Yocum's motion to sever the misdemeanor offenses from the felony count was granted by the trial court. He was convicted after a jury trial of the single count of criminal use of a prohibited weapon.

1. Directed Verdict

For his fifth and final point of error, Yocum contends that the trial court erred in not granting his motion for directed verdict. Yocum essentially argues that the state failed to prove that he possessed the culpable mental state required for conviction of the offense of criminal use of a prohibited weapon, because he was passed out at the time of his arrest.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Williams* v. *State*, 321 Ark. 635, 906 S.W.2d 677 (1995). 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. *Davis* v. *State*, 319 Ark. 460, 892 S.W.2d 472 (1995). Consequently, we address Yocum's challenge to the sufficiency of the evidence prior to considering his other assignments of trial error. *Byrum* v. *State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

When reviewing the sufficiency of the evidence on appeal, this court does not weigh the evidence but simply determines whether the evidence in support of the verdict is substantial. *Williams, supra.* Substantial evidence is that which is forceful enough

to compel a conclusion one way or the other and pass beyond mere suspicion and conjecture. *Drummond* v. *State*, 320 Ark. 385, 897 S.W.2d 553 (1995).

In determining whether there is substantial evidence, this court reviews the evidence in the light most favorable to the appellee, and it is permissible to consider only that evidence which supports the guilty verdict. *Williams, supra.* Further, circumstantial evidence may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Nooner* v. *State*, 322 Ark. 87, 907 S.W.2d 677 (1995). Whether a reasonable hypothesis exists is for the trier of fact to resolve. *Id.*

Arkansas Code Annotated § 5-73-104, entitled "Criminal use of prohibited weapons," provides in pertinent part:

> (a) A person commits the offense of criminal use of prohibited weapons if, except as authorized by law, he uses, *possesses*, makes, repairs, sells, or otherwise deals in any bomb, machine gun, sawed-off shotgun or rifle, firearm specially made or specially adapted for silent discharge, metal knuckles, or other implement for the infliction of serious physical injury or death which serves no common lawful purpose.

Ark. Code Ann. § 5-73-104(a) (Repl. 1993)(emphasis added).

This court stated in *State* v. *Setzer*, 302 Ark. 593, 791 S.W.2d 365 (1990), that the "Use of Prohibited Weapons" statute does not create a strict liability offense. Under the provisions of Ark. Code Ann. § 5-2-203(b)(Repl. 1993), where the statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly.

Here, there is substantial evidence, both direct and circumstantial, of Yocum's culpability, that he purposefully and knowingly possessed the prohibited weapon. Officer Booker testified that he discovered Yocum lying on the kitchen floor of his mother's home smelling of intoxicants, and that a disturbance had obviously occurred in the kitchen. Yocum had knives strapped to both legs and two on his belt. He was also in possession of a pineapple-type grenade. The base of the grenade was originally a cigarette lighter. Someone, however, had converted the cigarette

lighter to a grenade. The device had no recreational, industrial or commercial use. The device contained a low explosive filler powder, had a visible fuse sealed with epoxy, could be ignited and was capable of exploding and killing or injuring human beings. Although Yocum did not admit that the object was anything other than a cigarette lighter, he knew that he had it and admitted that he owned the object. Possession of a prohibited weapon is all that is required for commission of the offenses; the State need not show that Yocum used or intended to use the weapon. Consequently, we cannot say that the trial court erred in denying Yocum's motion for directed verdict.

2. Due Process

Yocum contends that the trial court erred by not finding that Ark. Code Ann. § 5-73-104(a) violates the Fourteenth Amendment requirement of procedural due process. He argues that the statute is impermissibly vague because it does not contain the definition of a "bomb" and consequently does not provide adequate warning of the conduct which it seeks to prohibit. This argument is without merit, for it overlooks the fact that Yocum was not charged with, nor convicted of possession of a bomb. He was charged with criminal use of a prohibited weapon. The information which was filed against him set out the statutory language contained in Ark. Code Ann. § 5-73-104(a) in its entirety. The information described the device found in Yocum's possession as a grenade. Although the prosecutor argued that the device was a bomb, and the witnesses for the State identified the object variously as a bomb and a grenade, the testimony of the State's witnesses also clearly established that the object was an "implement for the infliction of serious physical injury that had no common lawful purpose." Arkansas Code Annotated § 5-73-104(a) provides that the offense may be committed by possessing "any bomb, . . . or other implement for the infliction of serious physical injury or death which serves no common lawful purpose." As the testimony of the State's witnesses clearly established that Yocum possessed such an implement, we need not consider Yocum's due process challenge based on the lack of statutory definition of a bomb.

3. Suppression of Evidence

Yocum next argues that because the arresting officer had no basis to arrest him for public intoxication in his mother's

residence, the trial court erred in denying his motion to suppress the evidence seized in the search conducted after his arrest. In reviewing the trial court's ruling on a motion to suppress, this court makes an independent determination based on the totality of the circumstances and reverses only if the ruling is clearly against the preponderance of the evidence. *Nance* v. *State*, 323 Ark. 583, 918 S.W.2d 114 (1996).

Yocum's counsel raised the motion in a pre-trial hearing and again during a bench conference at trial and argued that Yocum was charged with public intoxication when he was not in a public place and that his arrest and search were therefore not valid. The trial court determined that the officers acted appropriately and denied Yocum's motion to suppress.

Arkansas Rule of Criminal Procedure 4.1 provides that "a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed any violation of the law in the officer's presence." In *Crail* v. *State*, 309 Ark. 120, 827 S.W.2d 157 (1992), this court determined that misdemeanor possession was a violation of the law that took place in the presence of the officer and, consequently, the officer had reasonable cause to arrest appellant without a warrant. This court also affirmed the proposition that "an arrest shall not be deemed to have been made on insufficient cause . . . solely on the ground that the officer . . . is unable to determine the particular offense which may have been committed." Ark. R. Crim. P. 4.1; *Crail, supra.*

This court has held that reasonable cause to arrest without a warrant exists when the facts and circumstances within the officers' collective knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant in a man of reasonable caution the belief that an offense has been committed by the person to be arrested. *Williams* v. *State*, 321 Ark. 344, 902 S.W.2d 767 (1995). All presumptions are favorable to the trial court's ruling on the legality of the arrest, and the burden is on the appellant to demonstrate error. *Hudson* v. *State*, 316 Ark. 360, 872 S.W.2d 68 (1994).

We cannot say that the trial court's determination was clearly against the preponderance of the evidence. Officer Booker was summoned to the residence of Yocum's mother because of a

disturbance. He testified that she appeared scared and very upset because Yocum had been violent toward her. Yocum was passed out in the kitchen floor and the kitchen appeared to be in complete disarray. Under these circumstances, the officer had reasonable cause to arrest Yocum for criminal trespass for remaining unlawfully on his mother's premises. *See* Ark. Code Ann. § 5-39-203(Repl. 1993).

4. Overly Broad Jury Instruction

Yocum also argues that the trial court erred in giving the following instruction:

> Walter Yocum, Jr., is charged with the offense of criminal use of a prohibited weapon. To sustain this charge, the State must prove beyond a reasonable doubt that Walter Yocum, Jr., unlawfully possessed any bomb or other implement for the infliction of serious physical injury or death which serves no common lawful purpose.

Yocum objected at trial that the language "or other implement for the infliction of serious physical injury or death which serves no common lawful purpose" should be stricken because that language does not modify a bomb but describes other items not enumerated in the statute and for which Yocum was not charged. We agree that the clause Yocum complains of does not modify a bomb, but do not agree that Yocum was charged with possessing a bomb.

This court has repeatedly stated that if there is some evidentiary basis for a jury instruction, giving the same is appropriate. *Mitchell* v. *State*, 314 Ark. 343, 862 S.W.2d 254 (1993). The instruction given by the trial court in this case comes from AMI Crim. 3104 and mirrors the statutory definition of criminal use of a prohibited weapon set forth in Ark. Code Ann. § 5-73-104(a). The evidence presented by the state clearly supported giving an alternative instruction on the type of prohibited weapon possessed by Yocum.

5. Affirmative-Defense Instruction

Yocum next argues that the trial court erred in not giving an affirmative-defense jury instruction. The instruction he requested reads as follows:

> It is a defense to this statute that the defendant used, possessed, made, repaired, sold, or otherwise dealt in any of the

> above enumerated articles under circumstances negating any likelihood that the weapon could be used unlawfully.

This instruction was taken directly from the Criminal Use of Prohibited Weapons statute, which provides that:

> (b) It is a defense to prosecution under this section that:
>
> . . .
>
> (2) The defendant used, possessed, made repaired, sold, or otherwise dealt in any of the above enumerated articles under circumstances negating any likelihood that the weapon could be used unlawfully.

Ark. Code Ann. § 5-73-104(b)(2)(Repl. 1993).

The law is clear that a party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Davis* v. *State*, 293 Ark. 472, 739 S.W.2d 150 (1987). Where the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction. *Purifoy* v. *State*, 307 Ark. 482, 822 S.W.2d 374 (1991).

In this instance, Yocum presented no evidence whatsoever to warrant the giving of the requested instruction. He suggests that his statement that all he had was a cigarette lighter and the fact that the object was created from a cigarette lighter was evidence that he believed it to be a novelty item and sufficient to justify the instruction. We do not agree. Further, the original commentary to § 5-73-104 states:

> Subsection (b)(2) is designed to permit a legitimate collector to possess a prohibited weapon, *provided he takes steps such as rendering the weapon inoperable to make criminal use unlikely.*

See 1988 Supplementary Commentary to Ark. Code Ann. § 5-73-104 (1995 Commentaries)(emphasis added). We cannot say that the trial court's refusal to give this instruction was in error.

Affirmed.

DUDLEY, J., not participating.

Timothy G. EVANS *v.* STATE of Arkansas

CR 96-649 923 S.W.2d 872

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Davis & Watson, P.A., by: *Charles E. Davis*, for appellant.

No response.

PER CURIAM. Petitioner, Timothy G. Evans, by his attorney, Charles E. Davis, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry v. State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 295 Ark. 964 (1979) (per curiam).

A copy of this per curiam will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

Randolph George HICKS *v.* STATE of Arkansas

CR 96-482 923 S.W.2d 872

Supreme Court of Arkansas
Opinion delivered June 24, 1996

Wayne Emmons and *Chandler Law Firm*, by: *Edward Witt Chandler*, for appellant.

No response.

PER CURIAM. Appellant, Randolph George Hicks, by his attorneys, has filed a motion for a rule on the clerk. Consistent with our direction in *Hicks* v. *State*, 324 Ark. 450, 921 S.W.2d 604 (1996) (per curiam), his attorneys, Wayne Emmons and Edward Witt Chandler, admit by motion and affidavit that the notice of appeal was filed untimely due to a mistake on their part. This court has held that it will treat a motion for rule on the clerk as a motion for belated appeal and grant the motion when counsel admits that the notice of appeal was not timely filed due to an error on his part. *See, e.g., Brown* v. *State*, 321 Ark. 282, 900 S.W.2d 954 (1995) (per curiam). We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion is therefore granted.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DUDLEY, J., not participating.

Robert WATSON *v.* STATE of Arkansas

CR 96-425 923 S.W.2d 871

Supreme Court of Arkansas
Opinion delivered June 24, 1996

John F. Stroud III, for appellant.

No response.

PER CURIAM. Appellant Robert Watson, by his attorney, has filed for a rule on the clerk.

His attorney, John F. Stroud III, admits that the failure to file the record in time was due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DUDLEY, J., not participating.

Gary Duaine DAVIS *v.* STATE of Arkansas

CR 96-251 925 S.W.2d 402

Supreme Court of Arkansas
Opinion delivered July 1, 1996

Ann C. Hill, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

BRADLEY D. JESSON, Chief Justice. The appellant was convicted of robbery and sentenced to forty years in prison. He raises two issues on appeal, neither of which merit reversal.

At the beginning of voir dire, the appellant, who is African-American, observed that none of the forty-two venirepersons assembled were African-American. He moved to quash the jury panel. The judge denied the motion to quash and entered into the record a copy of his order that created the master list from which this panel was drawn. The order directed the county's circuit clerk and computer programmer to create a master list of petit jurors pursuant to Ark. Code Ann. § 16-32-103(a) (Repl. 1994). That statute mandates random selection of prospective jurors from a list of registered voters.

Selection of a jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to trial by jury. The State may not deliberately or systematically deny to members of a defendant's race the right to participate, as jurors, in the administration of justice. *Sanders* v. *State*, 300 Ark. 25, 776 S.W.2d 334 (1989). If a defendant contends that such systematic or deliberate exclusion has taken place, he must prove the following to establish a *prima facie* case: 1) the group alleged to be excluded is a distinctive group in the community; and 2) the representation of this group in the venire from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) this underrepresentation is due to systematic exclusion of this group in the jury selection process. *Duren* v. *Missouri*, 439 U.S. 357 (1979).

There is no requirement that the jury which is chosen mirror the community and reflect the distinctive groups in the population. *Sanders* v. *State*, *supra*. A defendant does not meet his burden of proof by simply showing that the venire is not racially representative of the community. *Mitchell* v. *State*, 323 Ark. 116, 913 S.W.2d 264 (1996). In this case, the appellant presented no proof

regarding the second and third elements set forth in *Duren*. We have noted in particular where proof of a systematic exclusion of the distinctive group is completely lacking, there is no basis for a motion to quash the jury panel. *Walker* v. *State*, 314 Ark. 628, 864 S.W.2d 230 (1993). We have also recognized that where the venire is chosen by computer, using the random-selection process mandated by § 16-32-103, there is no possibility of a purposeful exclusion of African-Americans. *Sanders* v. *State*, *supra*; *Thomas* v. *State*, 289 Ark. 72, 709 S.W.2d 83 (1986). The trial court's denial of the motion to quash is therefore affirmed.

The appellant's second issue concerns the victim's identification of him in a photographic lineup. The photograph of the appellant which was used in the lineup was taken by the Hot Springs Police Department on October 4, 1994. At the time, the appellant was under arrest for aggravated robbery, an offense unrelated to this case. According to the appellant, the arrest on the aggravated robbery charge was ruled invalid by a federal magistrate. Therefore, he argues, the photograph was the product of an illegal arrest and should not have been used in this case. At trial, he moved to suppress the victim's identification of him in the lineup and the victim's identification of him in court. Unfortunately, we are unable to consider this issue. The appellant's abstract is completely devoid of trial testimony. The record on appeal is confined to that which is abstracted. *Sutherland* v. *State*, 292 Ark. 103, 728 S.W.2d 496 (1987). Without an abstract of the trial proceedings, we are unable to assess the impact of the allegedly tainted photograph on the trial or determine whether prejudice resulted.

Affirmed.

DUDLEY, J., not participating.

Wilford Gene JOHNSON, Jr. *v.* STATE of Arkansas

CR 95-1071 926 S.W.2d 837

Supreme Court of Arkansas
Opinion delivered July 1, 1996

James R. Marschewski, for appellant.

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

TOM GLAZE, Justice. Appellant Wilford Gene Johnson, Jr., was convicted of the first-degree murder of Joe Cheek, who was bludgeoned to death on April 25, 1994. He was sentenced to life imprisonment. In this appeal, Johnson raises four points for reversal.

Johnson confessed to killing Cheek, but he argues the trial court erred in denying his motion to suppress the introduction of his confession because police officers failed to comply with Ark. R. Crim. P. 2.3 or to properly advise him of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). We first address his Rule 2.3 argument. That rule provides as follows:

> If a law enforcement officer acting pursuant to the rule requests any person to come to or remain at the police station, prosecuting attorney's office or other similar place, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request.

This court considered Rule 2.3 in *Burnett* v. *State*, 295 Ark. 401, 749 S.W.2d 308 (1988), where the court reversed Burnett's conviction, holding he had been unlawfully seized without probable cause at his home in violation of the Fourth Amendment and Rule 2.3. Specifically, the court held that the six arresting officers had failed to comply with Rule 2.3, which requires that an officer inform a person he is free not to accompany the officer if the officer does not have a warrant. The *Burnett* court set out the following test established in *United States* v. *Mendenhall*, 446 U.S. 544 (1980), when determining whether one has been unlawfully seized:

> We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, the physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.* (Emphasis added.)

The court in *Burnett* further relied upon the following rationale in *Dunaway* v. *New York*, 442 U.S. 200 (1979), where the court held Dunaway's detention amounted to an arrest:

> In contrast to the brief and narrowly circumscribed intrusions involved in those cases [*Terry* v. *Ohio, supra,* and similar decisions], the detention of petitioner was in important respects indistinguishable from a traditional arrest. *Petitioner* was not questioned briefly where he was found. Instead, he *was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go,' indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.* The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. *The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, [cite omitted] obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry* and its progeny. Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause. (Emphasis added.)

Using the foregoing *Mendenhall* test, the *Burnett* court held that a reasonable person in Burnett's position would have thought that he had no choice except to accompany six officers to the police station. The court determined that, although the officers said Burnett was not arrested when he was picked up at his home, he was simply told to get his clothes on and come to the station. None of the six officers informed Burnett he could stay at home.

■ In reviewing a trial judge's ruling on a motion to suppress, we review the evidence most favorable to the appellee, *Beshears* v. *State*, 320 Ark. 573, 898 S.W.2d 49 (1995). Here, the record reflects that, on April 26, 1994, the day after Cheek's murder, Officers Jay Rider and Lanny Reese were at the crime scene, an alley, where they observed Johnson looking for something. The officers talked to him briefly, and asked him if he would come to the police station for an interview. At the station, Johnson was read

his rights, and after giving the officers some general information, he asked if he could leave. He was told that he was free to leave at any time. Johnson then told the officers that, on the night of April 25th, he had been drinking with Cheek and two other guys in the alley where Cheek's body was later found. He said that sometime that night he could not locate his bedroll, and, while he felt Cheek had done something with it, Cheek would not tell him where the bedroll was. Johnson then left Cheek and the other men, and spent the night at the Salvation Army. Johnson explained to the officers that he had returned to the alley the next day to continue his efforts to find his bedroll. After relating his story to Rider and Reese, Johnson asked if he was under arrest, and was told no and was again told he was free to go at any time. A short time later, the officers, once again, informed Johnson that he was free to go, and he left.

On May 1, 1994, Officer Howard testified that he directed an on-duty officer to find Johnson and tell him that "we simply want to talk to him; that he was not under arrest." Officer Smalley located Johnson, asked him if he would come down to the station and was told he was not under arrest. No rights were read to Johnson, and no statement was taken. During his interview, Johnson tracked his earlier story that Cheek was alive when Johnson left him on the night of the 25th. Johnson was told that the officers would like to talk to him again if he would come back the next day, May 2nd. No time was set, but Johnson returned about noon, May 2. Officer Howard advised Johnson that he was not under arrest and said, "you're here of your own free will." The officers did not read Johnson his rights; Johnson's story remained the same — that Cheek and the other two men were present and alive when he left them the night of April 25.

After telling his story again, Officer Reese testified that Johnson was free to leave, but did not do so. Officer Howard further testified that by now [May 2, 1994] Johnson knew where the restrooms, water fountains and coffee pot were, and he was free to come and go as he pleased — "he's been advised of that fact." Shortly after Johnson repeated his story and when Reese expressed his own thoughts that "somebody had gotten in an argument with Cheek" and used a metal bar to murder Cheek, Johnson volunteered, "No, it was a two-by-four." At that point Officer Howard stopped the interview and read Johnson his rights. Johnson then gave an incriminating statement which, at trial and on appeal, he

seeks to have suppressed.

In summary, on April 26, 1994, Officers Rider and Reese were investigating the crime scene when they saw Johnson looking for something in the alley and, as a consequence, they asked him if he would come to the police station for an interview. At the station, Johnson was read his rights, and during his interview, Johnson was told three times that he was not under arrest and was "free to leave at any time." Johnson left shortly after he was told the third time that he was free to go. On May 1, Officer Smalley found Johnson to ask him "if he would come down to the station," and at the same time, he told Johnson he was not under arrest. And lastly, Johnson was asked "if he could return the next day," which he did at a time of his choice, about noon.

Considering the totality of the circumstances, it is clear Johnson was well informed that he was never under arrest, and was free to leave the police station and to come and go when he pleased. He was never threatened verbally or physically by the officers, nor was he ever informed he would be physically restrained if he refused to appear at the station. Rule 2.3 does not provide that a person must repeatedly be advised that he has no legal obligation to come to the police station each time he agrees to appear for an interview or questioning. In fact, even in situations where *Miranda* warnings might have been required, no such constitutional requirement exists that warnings be repeated each time a suspect is questioned. *Bryant* v. *State*, 314 Ark. 130, 862 S.W.2d 215 (1993). We conclude that the officers' actions complied with the requisites of Rule 2.3 and the Fourth Amendment and offer Johnson no valid grounds for suppressing his confession.

Johnson's second argument bears on the officers' failure to advise him of his *Miranda* rights on May 2 before he disclosed Cheek had been beaten by a two-by-four. However, it is settled that the safeguards prescribed by *Miranda* be applicable as soon as a suspect's freedom of action is curtailed to "a degree associated with formal arrest." *State* v. *Spencer*, 319 Ark. 454, 892 S.W.2d 484 (1995). As discussed by us in addressing Johnson's Rule 2.3 argument, the record reflects he was never taken into custody or otherwise deprived of action in any significant way either prior to or at the time he made his incriminating statement on May 2nd. That being so, the officers' repetition of *Miranda* warnings to Johnson on

May 2 before his confession was not required.[1]

Johnson's next point is that his confession should have been suppressed because the state failed to provide all of the material witnesses at the suppression hearing who had been present when Johnson gave his inculpatory statement. *See Griffin* v. *State*, 322 Ark. 206, 213, 909 S.W.2d 625, 629 (1995). He asserts Officer Rider and Detectives Lonetree and Risley were not listed or produced as state witnesses at the Denno hearing even though they were material witnesses who were connected with the controverted confession. As Johnson points out, the court has held that, whenever an accused offers testimony that his confession was induced by violence, threats, coercion, or offer 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. Here, although Johnson by motion challenged the admission of his confession into evidence based upon Rule 2.3 and *Miranda* grounds, he never made a motion or obtained a ruling questioning the voluntariness of his confession. Nor did he argue or testify at the suppression hearing that his confession was coerced or involuntary.[2] Because Johnson failed to make the involuntariness-material witness argument below, he is barred from having it considered for the first time on appeal. *See Harris* v. *State*, 320 Ark. 677, 899 S.W.2d 459 (1995).

In his final argument, Johnson argues the trial court erred in not granting a mistrial because the state violated Rule 17.1(a)(ii) of the Arkansas Rules of Criminal Procedure which requires the state to disclose any written or recorded statements and the substance of any oral statements made by the defendant. Johnson's argument centers on Officer Rider who did not testify at the Denno hearing below, but did testify at trial, relating that he had participated in the

---

[1] We note that Johnson also argues that he had been seized for Fourth Amendment purposes when, during his interview on May 2, an officer saw what he believed to be blood spatters on Johnson's shoes. Johnson consented to the taking of his shoes, but the officer said he was still free to leave. An officer offered to buy Johnson some shoes, but Johnson refused. This testimony was elicited at trial, and not the suppression hearing, so this part of Johnson's argument was not before the trial court at the suppression hearing when the trial court denied Johnson's motion to suppress.

[2] We note that Johnson generally mentioned "Rules 3.1, 4 and 13.1 of the Arkansas Rules of Criminal Procedure and the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 2, Section 8 of the Arkansas Constitution."

earlier questioning of Johnson at the police station. Rider testified that, during his interview of Johnson, he challenged Johnson to swear on a Bible that he did not kill the victim, but when he presented a Bible to Johnson, Johnson declined to do so. Johnson's counsel moved for a mistrial which the trial court took under advisement. In later denying Johnson's motion, the trial court offered Johnson a continuance to which defense counsel responded he did not need a continuance, and stated it was too late to do any "damage control."

The law is settled that a mistrial is a drastic remedy to which resort should be had only when there has been an error so prejudicial that justice cannot be served by continuing the trial. *Reel* v. *State*, 318 Ark. 565, 886 S.W.2d 615 (1994). The decision whether to grant a mistrial is within the sound discretion of the trial court. *Id.* Here, Johnson's argument must fail for several reasons. First, Johnson's abstract fails to reveal he made a discovery request for any oral statements that he may have made. Second, in reviewing Rider's trial testimony, it appears Rider related the Bible incident during direct examination, but counsel first objected when Rider again mentioned the Bible incident on cross-examination. It is clear that an objection must be made at the first opportunity to do so or it is waived. *Watkins* v. *State*, 320 Ark. 163, 895 S.W.2d 532 (1995). But, more important, Johnson fails to argue what manifest prejudice occurred from the Bible-incident reference, especially since that testimonial reference pales in significance to the confession testimony already given by Rider and others that Johnson said he had killed Cheek with a two-by-four. *See Cupples* v. *State*, 318 Ark. 28, 883 S.W.2d 458 (1994). Third, this court has held that when the state violates the pretrial-discovery rule, the court has the following four options under Ark. R. Crim. P. 19.7: (1) The evidence may be excluded; (2) discovery or inspection may be ordered; (3) a continuance can be granted, and (4) an appropriate order may be entered depending upon the circumstances. *Reed* v. *State*, 312 Ark. 82, 847 S.W.2d 34 (1993). Johnson asked for none of the foregoing options, but the trial court offered a continuance which Johnson declined. Under the circumstances described above, we cannot say the trial court abused its discretion in rejecting Johnson's motion for mistrial.

Because we find no merit in Johnson's four points for reversal, we affirm.

NEWBERN and ROAF, JJ., dissent; BROWN, J., concurs; DUDLEY, J., not participating; Special Justice TOM B. SMITH joins this opinion.

ROBERT L. BROWN, Justice, concurring. I concur that the alleged violation of Rule 2.3 does not merit a reversal in this case but write because I have concluded that Johnson was in custody for all intents and purposes on May 2, 1994. This was the third time that he had been questioned by police officers in connection with Cheek's murder. On the first occasion [April 26, 1994], he was given the *Miranda* warnings. On the second occasion [May 1, 1994], he was not advised of his *Miranda* rights. On May 2, 1994, he was not advised of his rights until after he had made the inculpatory statement, "No, it was a two-by-four." After he made that statement, he was read his rights, and he gave a full statement, which included an admission that he had murdered Cheek. The issue then is whether Johnson was denied his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel.

My conclusion that Johnson was in custody is premised on several factors. He was interrogated on May 2 for four hours (from 9:00 a.m. to 1:00 p.m.) by multiple police officers. Sergeant Howard admitted that the investigation had centered on Johnson by May 2, and at trial he testified that there were never less than three police officers present during the interrogation and that there may have been as many as six or seven officers on occasion. Sergeant Howard's testimony also reveals that the grilling was intense and at times the officers called Johnson "a liar." His shoes were removed to conduct tests on what appeared to be blood splatters. Hence, he was barefoot. He was questioned about the blood spots and again called a liar when he denied knowledge of blood on his shoes.

Under these circumstances, Johnson's freedom was curtailed to a degree associated with formal arrest. *See Berkemer* v. *McCarty*, 468 U.S. 420 (1984); *State* v. *Spencer*, 319 Ark. 454, 892 S.W.2d 484 (1995). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or is otherwise deprived of action in any significant way." *Spencer* v. *State*, 319 Ark. at 457, 892 S.W.2d at 485. The test is an objective one of how a reasonable person would view the situation. *Stansbury* v. *California*, 114 S.Ct. 1526 (1994). Johnson was barefoot and undergoing a prolonged and intense interrogation by several officers after

being called to the police station for a third time. This was clearly custodial interrogation in my judgment.

The question then becomes whether he was appropriately *Mirandized* before he made his two-by-four admission. I do not believe he was. His warnings given six days earlier had become stale. We did refuse to suppress a statement in *Barnes* v. *State*, 281 Ark. 489, 665 S.W.2d 263 (1984), where the lapse between *Miranda* warnings and the statement had been three or four days. But in *Barnes*, the lapse of time was not as great, and the defendant was under arrest from the beginning. Also, in *Barnes* the confession was not obtained through interrogation but rather as a compulsion on the defendant's part to repent and confess.

Irrespective of whether the two-by-four statement was given in accordance with *Miranda* requirements, Johnson then made a *complete* statement after being advised of his rights on May 2. Confessions voluntarily made after proper *Miranda* warnings and waivers are not tainted by previous unwarned statements unless those unwarned statements were deliberately coerced or improper tactics were utilized. *Oregon* v. *Elstad*, 470 U.S. 298 (1985); *Weaver* v. *State*, 305 Ark. 180, 806 S.W.2d 615 (1991). Though I believe the questioning leading up to the two-by-four statement was custodial interrogation, I am not convinced that it was so impermissibly coercive and improper as to taint the later, valid confession. For example, Sergeant Howard testified that the two-by-four statement "came almost out of the blue." Accordingly, I concur.

ANDREE LAYTON ROAF, Justice, dissenting. I do not agree that the police officers who interrogated Johnson complied with Ark. R. Crim. P. 2.3. As his incriminating statement was given while he was unlawfully seized, and before he was advised of his Miranda rights, I would reverse.

The majority opinion discusses the circumstances of Johnson's three interrogations on April 26, May 1, and May 2, 1994. I do not dispute the recitation of the facts. However, Johnson made his confession on May 2, not April 26 or May 1. A law enforcement officer requested on May 1 that Johnson come to the police station on May 2; this request triggers the application of Rule 2.3. There is no indication that any further statements were made to Johnson at the time of this request; therefore, the officer failed to comply with Rule 2.3. The majority correctly states that Officer Howard testi-

fied that he advised Johnson on May 2 that he was not under arrest and that he was "there of his own free will." However, we have held that advising a suspect that his cooperation is voluntary does not satisfy the positive duty to make it clear that there is no legal obligation to comply with the officer's request. *Prowell* v. *State*, 324 Ark. 335, 921 S.W.2d 585 (1996); *Addison* v. *State*, 298 Ark. 1, 763 S.W.2d 566 (1989).

The majority further states that Officer Reese testified that "Johnson was free to leave, but did not do so." This is also correct, but this testimony in no way informs us what Reese, or any other officer, told Johnson. The same can be said for the testimony of Officer Howard, who stated that Johnson knew where the restrooms, water fountains, and coffee pot were located, and was free to "come and go" as he pleased, presumably to get water, coffee and to use the restroom during his "interview" on May 2. This testimony again falls short of the standard for Rule 2.3 compliance.

I am most troubled by the majority's conclusion, without authority, that Rule 2.3 need only be complied with at the initial request, when there are repeated requests to come to the police station. This is perhaps a concession that the officers' testimony does not support a holding that the rule was complied with on May 1 or May 2. Although I agree that we are to consider the totality of the circumstances in determining whether Johnson's confession should be suppressed, to do so in this case entails consideration of the entire record, including the officers' testimony at trial. *Hignite* v. *State*, 265 Ark. 866, 581 S.W.2d 552 (1979). At trial, the officers testified that Johnson was interrogated at the police station on May 2 from approximately 9:00 a.m. to 1:00; he was unshod and was only told, for the purpose of Rule 2.3, that "you're here of your own free will."

I respectfully dissent.

NEWBERN, J., joins in this dissent.

Karla THOMSON *v.* Munir ZUFARI, M.D.

96-269 924 S.W.2d 796

Supreme Court of Arkansas
Opinion delivered July 1, 1996

Karr & Hutchinson, by: *Charles Karr*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *R. Ray Fulmer, II* and *Charles R. Ledbetter*, for appellee.

TOM GLAZE, Justice. On March 6, 1992, appellee Munir Zufari, M.D., performed gastric bypass surgery on appellant Karla Thomson, and during the surgery, a portion of Thomson's small bowel was mistakenly stapled. Complications later resulted and Thomson was required to undergo additional surgery. On March 4, 1994, two days short of the two-year statute of limitations provided under Ark. Code Ann. § 16-114-203(a) (Supp. 1995), Thomson filed a pro se complaint for medical malpractice against Zufari and two other parties. While under ARCP Rule 4(1) Thomson had until July 2, 1994, or 120 days after filing her complaint to obtain service and commence her lawsuit, she for some reason was unable to do so. However, on June 23, 1994, within the initial 120-day commencement, Thomson asked for another 120 days, but on July 28, 1994, the trial court granted and entered only a 30-day extension. Still unable to obtain service on Zufari and the other defendants, Thomson, on August 18, 1994, moved to dismiss without prejudice, which the trial court granted on September 14, 1994.

When Thomson refiled her complaint against Zufari on August 11, 1995, Zufari moved for summary judgment, alleging Thomson's claim was barred by the two-year statute of limitations. The trial court granted Zufari's motion from which Thomson brings this appeal. The trial court ruled correctly, and we must affirm.

Arkansas's rules pertaining to commencement of an action require only that the plaintiff complete service upon the defendant within 120 days from filing the complaint. However, if the plaintiff fails to complete service during that period, he or she may still request that the time be extended to complete service in order to protect the plaintiff against the running of a statute of limitations if that extension is requested within the 120-day period. *Hicks* v. *Clark*, 316 Ark. 148, 870 S.W.2d 750 (1994). We have further said that, to toll the limitations period to invoke the one-year savings statute, Ark. Code Ann. § 16-56-126 (1987), a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant. Even where a court later finds the plaintiff's timely completed service was invalid, the plaintiff is not debarred from benefiting from the one-year savings statute. *Id.*

Here, Thomson never obtained completed service upon Zufari within the 120-day period, and while she requested an extension to obtain service within the initial 120 days, she was granted only 30 days, ending on August 1, 1994. Thomson continued to be unable to serve Zufari, and did not obtain a voluntary nonsuit of her complaint until September 14, 1994. As a consequence, Thomson never completed service so as to toll the statute of limitations and invoke the one-year savings statute.

Before leaving the foregoing issue, we mention Thomson's suggestion that the 30-day extension she obtained ran from July 28, 1994, the date her motion was granted. Rule 6 of the Arkansas Rules of Civil Procedure provides that a court may enlarge a period originally prescribed if requested before the expiration of that period. Here, Thomson made a timely request within the 120-day period, but the court's grant of 30 days merely enlarged the originally prescribed 120 days, thereby extending it to August 1, 1994.

Finally, Thomson cites Rule 4 of the Arkansas Rules of Civil Procedure which provides that, upon the filing of the complaint, the clerk shall forthwith issue a summons and cause it to be delivered for service. She asserts the clerk was required to issue a summons and deliver it to the sheriff, and it is not fair for her to be penalized because of the action or inaction of the clerk. Our Rule 4 contemplates placing the summons with the plaintiff's attorney who then is to see that the summons is served by an appropriate official. Reporter's Notes to Rule 4:2 (1996). *Cf. Ottens* v. *State*, 316 Ark. 1, 871 S.W.2d 329 (1994). As we have held many times, *pro se* litigants are held to the same requirements to which attorneys are held. *Jewell* v. *Ark. State Bd. of Dental Examiners*, 324 Ark. 463, 921 S.W.2d 950 (1996).

Affirmed.

DUDLEY, J., not participating.

Jerry ANSLEMO *v.* Charles TUCK

96-156 924 S.W.2d 798

Supreme Court of Arkansas
Opinion delivered July 1, 1996

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

W. Paul Blume, for appellee.

DONALD L. CORBIN, Justice. Appellant, Jerry Anselmo, appeals the jury's verdict in favor of appellee, Charles Tuck, from the Washington County Circuit Court. Because this case involves a question concerning the law of torts, this court has jurisdiction of the appeal pursuant to Ark. Sup. Ct. R. 1-2(a)(16). In support of his appeal, Anselmo argues that the jury's verdict is not supported by substantial evidence and that the trial court erred in denying his motion for judgment notwithstanding the verdict. Because we find no merit to either argument, we affirm.

FACTS

This cause of action arose out of a traffic accident which occurred on September 28, 1992, in Fayetteville, Arkansas, in which a school bus driven by appellee Tuck struck the front of a car driven by Dennis Little as the bus was attempting to negotiate a left turn. Photographs revealed that the accident was relatively minor, and that the damage was confined to the front end of the driver's side of the car. Appellant Anselmo was a passenger in Little's car.

Testimony from both sides agreed on the basic facts of the accident, differing only on the exact location of Little's car and whether the accident was the proximate cause of Anselmo's injuries. Anselmo and Little testified that the car was behind the stop sign at the intersection, while Tuck testified that the car was sitting beyond the stop sign, just inside the intersection, when the impact occurred. Anselmo testified that he suffered neck and foot injuries as a result of the impact of the accident. The proximate cause of Anselmo's injuries was hotly contested at trial.

The officer at the scene of the accident testified that immediately upon reaching the scene of the accident he inquired whether anyone had been hurt, and that no one involved indicated any injury. The officer further stated that he did not observe Anselmo limping in any way.

Dennis Little testified that he observed Anselmo limping "a little bit" at the accident scene, and that Anselmo said he hit his foot and that it hurt. Little further testified that because Anselmo was concerned about whether they could drive the car away from the scene, Anselmo took it upon himself to walk one and a half to two blocks to retrieve his car. Testimony later revealed that Little's car was in fact driven away from the scene. No evidence was elicited from Little concerning the condition of Anselmo's neck at the accident scene. Little stated that it would cost approximately $3,000.00 to repair the damage to the car, but that a custom paint job was included in the price.

Anselmo testified that the impact of the accident was "pretty big," and that as a result, he was thrown into the dash. Anselmo stated that it was the combination of being thrown into the car's dash and bracing himself with his foot that caused him to jam his toe on the car's dash. Anselmo admitted that he did not think much about the injury at the time, and that he was not "hugely limping" at the scene. Anselmo stated that the next morning his neck felt stiff and he had trouble turning his head either direction. Anselmo stated that he saw several physicians concerning his neck injury, and that he had been prescribed physical therapy and some pain medication. Anselmo stated that because of the injury to his foot he had an operation which left him immobile and required six weeks of recovery. Anselmo testified that sometime after the accident and his various medical treatments he began experiencing pain in his left arm, his left eye, his groin area, and the small of his back. He

concluded his testimony by listing all the activities (such as hiking, jogging, and cycling) he used to be able to engage in before the accident, and indicated that he could no longer enjoy these recreations.

On cross-examination, Anselmo admitted that he had not actually been thrown into the dash on impact, but that he was thrown forward and his foot hit the dash. Anselmo stated that he had not been wearing his seat belt at the time of the accident. Anselmo also conceded that there was no damage to the right side of the car, the side where he was seated.

Two doctors testified (via depositions) on behalf of Anselmo. Dr. Paul Doty, an orthopedic surgeon, testified that he treated Anselmo for neck pain. Dr. Doty stated that he diagnosed Anselmo as having a musculoligamentous injury of the neck, which meant that there was no fracture to the bone. Dr. Doty stated that there is rarely any objective manner to verify this type of injury, but that an x-ray would show some separation of bones if the ligament injury is so severe to cause spinal instability. Dr. Doty testified that that type of severe injury was not present in Anselmo. Dr. Doty admitted on cross-examination that his diagnosis of Anselmo's injury was based upon Anselmo's subjective claims of pain and the patient history taken from Anselmo.

Dr. Steven Watson, a podiatrist, testified that when he first examined Anselmo, he was complaining of pain in his left foot in the heel and forefoot area. Dr. Watson stated that an x-ray of Anselmo's foot revealed some degenerative arthritic changes of the joint of the first metatarsal, some osteophytes in and around the joint, as well as a loose piece in and around the joint. Dr. Watson initially prescribed a treatment consisting of injections of anti-inflammatory medication, contrast soaks, elevation of the foot, no physical activity, and jogging shoes for support. In January 1994, Dr. Watson discussed with Anselmo an elective surgical procedure for his foot. Dr. Watson stated that Anselmo elected to undergo surgery, and that the surgery was performed in February 1994. Dr. Watson stated that Anselmo's injuries were not caused by the trauma of the traffic accident, but that the trauma had aggravated the arthritic joint.

On cross-examination, Dr. Watson conceded that the only indication he had of a trauma caused by the traffic accident in

question was from Anselmo himself. Dr. Watson stated that the problems he diagnosed in Anselmo's joint are not conditions which occur within a short period of time, and that activity such as running or jogging is particularly harmful to that joint. Dr. Watson stated that the conditions of Anselmo's joint could not have occurred in the short time since the traffic accident.

Before resting his case, Anselmo presented testimony from three additional lay witnesses, none of which had any first-hand knowledge of the accident or the cause of Anselmo's injuries. The defense called only one witness — appellee Charles Tuck. Tuck testified that immediately after the accident occurred, he stopped the bus and checked to see if anyone was hurt. Tuck stated that he talked to Anselmo and that Anselmo stated he did not think he was hurt. Tuck stated that he observed Anselmo walking around at the scene and that Anselmo did not appear to have a limp.

SUBSTANTIAL EVIDENCE / JUDGMENT NOTWITHSTANDING THE VERDICT

Anselmo argues that there was not substantial evidence to support the verdict, and that the trial court erred in denying his motion for judgment notwithstanding the verdict. In support of his arguments, Anselmo asserts the evidence showed that he and Little did nothing to contribute to the accident and that Tuck's improper left turn resulted in the bus striking Little's car in the car's own lane of travel. While this supposition may be true, Anselmo fails to argue or otherwise demonstrate that Tuck's actions on that date were the proximate cause of his injuries. Because there was substantial evidence to support the jury's verdict in favor of Tuck, we conclude that the trial court did not err in denying judgment notwithstanding the verdict.

This court has consistently held that a trial court may enter a judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict and the moving party is entitled to a judgment as a matter of law. *See, e.g., Dr. Pepper Bottling Co.* v. *Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992); *Dedman* v. *Porch*, 293 Ark. 571, 739 S.W.2d 685 (1987). The trial court may not substitute its view of the case for that of the jury, and the jury's verdict must be clearly against the preponderance of the evidence in order to be set aside. *McLaughlin* v. *Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). On appeal from a denial of judgment notwithstanding

the verdict, this court reviews the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Dr. Pepper Bottling Co.*, 311 Ark. 136, 842 S.W.2d 37. Whether there is substantial evidence to support the jury's verdict is the standard of review for the denial of judgment notwithstanding the verdict. *Croom* v. *Younts*, 323 Ark. 95, 913 S.W.2d 283 (1996).

Substantial evidence is that evidence which is beyond mere suspicion or conjecture and which is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion of the matter one way or another. *Williams* v. *O'Neal Ford, Inc.*, 282 Ark. 362, 668 S.W.2d 545 (1984). In considering sufficiency of the evidence on appeal, we will only consider evidence favorable to the appellee together with all its reasonable inferences. *Dedman*, 293 Ark. 571, 739 S.W.2d 685. In reviewing the evidence, the weight and value to be given the testimony of the witnesses lies within the exclusive province of the jury. *Rathbun* v. *Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

In the present case, Anselmo's complaint alleged a cause of action against Tuck for negligence. The burden of proof is always on the party asserting negligence, and negligence is never presumed. *Morehart* v. *Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995). To make a prima facie case of negligence, a plaintiff must prove that he sustained damages, that the defendant was negligent, and that such negligence was the proximate cause of the damages. *Mason* v. *Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996); *Morehart*, 322 Ark. 290, 908 S.W.2d 331. It is the third prong of this test that is at issue here, as Anselmo's proof as to proximate cause of his injuries was tenuous at best.

We have defined proximate cause as "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Craig* v. *Traylor*, 323 Ark. 363, 370, 915 S.W.2d 257, 260 (1996), (quoting *Williams* v. *Mozark Fire Extinguisher Co.*, 318 Ark. 792, 796, 888 S.W.2d 303, 305 (1994)). Proximate cause is generally a question for the jury, becoming a question of law only if reasonable minds could not differ. *Craig*, 323 Ark. 363, 915 S.W.2d 257. Based on the testimony at trial, reasonable minds could easily differ as to whether Tuck's actions caused Anselmo's injuries and, furthermore, as to whether the injuries even

arose during the accident.

The officer who investigated the accident stated that Anselmo did not indicate to him that he was injured and that he did not see Anselmo limping at the scene. Little, Anselmo's friend, stated that Anselmo was limping a little, but that Anselmo volunteered to walk nearly two blocks to retrieve his own car, even though the testimony revealed that there was no reason why Little's car could not be driven from the scene. Anselmo's own expert medical witnesses could not say that the injuries to his neck and foot were the result of the accident. In fact, Dr. Doty stated that his diagnosis of Anselmo's neck injury was entirely subjective, based only on Anselmo's claims of pain. Dr. Watson similarly testified that as far as an aggravation of the degenerative arthritis in Anselmo's foot was concerned, he had only Anselmo's word that the condition was aggravated by a trauma such as the impact of an automobile accident. Dr. Watson did state with certainty, however, that Anselmo's foot condition could not have been caused by any accident and that the surgery he underwent was an elective procedure.

In short, Anselmo's entire claim that he suffered injuries from the impact of what was revealed to be a minor accident was based solely on his testimony and credibility. As it is within the province of the jury to determine the weight and value of the witnesses' testimony, *Rathbun*, 315 Ark. 264, 866 S.W.2d 403 (1993), we will not attempt to second guess its determinations. Suffice it to say that based on all of the testimony heard by the jury, we cannot say that its verdict was based on mere suspicion or conjecture. Because Anselmo did not meet his burden of proof concerning the proximate cause of his injuries, we conclude there was substantial evidence to support the verdict in favor of the appellee Tuck. For that reason we hold that the trial court did not err in denying Anselmo's motion for judgment notwithstanding the verdict.

Affirmed.

DUDLEY, J., not participating.

LAKEVIEW COUNTRY CLUB, INC. and Don Parker *v.* SUPERIOR PRODUCTS and Innovative Coating Products

95-170 926 S.W.2d 428

Supreme Court of Arkansas
Opinion delivered July 1, 1996
[Petition for rehearing denied September 9, 1996.]

[redacted]

Tona M. DeMers, for appellants.

James W. Tilley, for appellees.

DONALD L. CORBIN, Justice. Appellants, Don Parker and Lakeview Country Club, Incorporated, appeal a judgment of the Pulaski County Circuit Court dismissing with prejudice their claims against separate appellees, Superior Products, Innovative Coating Products, and Don Muse, arising from the application of a coating product to appellants' swimming pool. Appellants raise two points for reversal of the judgment. The court of appeals certified this case to us as one involving a question about the law of torts. Ark. Sup. Ct. R. 1-2(a)(16), and (d)(1). We find no merit to the appeal and affirm.

The judgment from which appellants appeal states that after appellants had rested their case as plaintiffs, the trial court granted motions for directed verdicts to separate appellees, Superior Products, the alleged manufacturer of the coating product at issue, and Innovative Coating Products, the alleged supplier of the coating product. The judgment also states that appellants' cause of action against appellee Don Muse was then submitted to the jury, which returned a verdict for Muse.

Appellants' entire case at trial consisted of only two witnesses: Appellant Don Parker, lessee-owner and manager of appellant Lakeview Country Club, and Stephen G. Littleton, a member of Lakeview Country Club who repaired the pump on the swimming pool. After the trial court granted the directed verdicts, appellee Muse did not present any evidence. Thus, Parker and Littleton were the only witnesses in this case. We relate their testimonies in detail to illustrate the total failure of proof in this case.

Appellant Parker testified to the following. He leased appellant Lakeview Country Club in July 1991 and later became the current owner of the club. His intention to repair the swimming pool became known to appellee Muse. Appellee Muse was a country club member who told Parker that he "had the best product in the world" to coat the pool with, that the product had been used on space shuttles, and that the product could be used on the deck

around the pool because it would not get hot from the sun. Appellee Muse supplied the coating product to appellants. Appellants paid appellee Muse $4,603.75 for the product, and appellee Muse supervised other members of the club who applied the coating.

According to appellant Parker, the following facts occurred after the coating was applied. The pool sat empty for two or three weeks, then the coating began to crack and peel. Appellee Muse went to Kansas City to obtain additional product and applied it to the pool. After the pool was filled with water, the coating again cracked and peeled. Some of the persons who swam in the pool cut their feet on the broken patches. Use of the pool by members declined. Appellant Parker talked with J.E. Pritchett of Superior Products in Kansas. Pritchett sent some people to examine and test the chips. Pritchett then told appellant Parker that the reason the coating chipped was because the pool had previously been coated with a latex base and his product would not stick to a latex base. There was no warning or instruction on the label of the container concerning the fact that the product would not adhere to a latex base. Likewise, there were no instructions provided by appellee Muse stating not to apply the product over latex paint. No one from Superior Products or Innovative Coating Products, including appellee Muse, informed appellants that the coating should not be applied over a latex paint, nor did anyone inquire as to what had been previously applied to the pool. Appellee Mr. Muse portrayed himself as an expert and professional in this field. After the coating chipped, membership dues decreased by $3,000.00 per month.

Mr. Littleton testified that the company he worked for made repairs totaling $308.59 to the pump. He stated that the repairs were needed because pieces of the chipped coating had become lodged in the pump, which prevented the pump from creating a vacuum to pull the water through the filter. Mr. Littleton informed appellants that the problem with the pump would be ongoing as long as there was foreign material in the water coming through the filter system. Mr. Littleton also stated that, as a club member, he did not want his family swimming in the pool because he was concerned about them getting cut.

At the close of appellants' case, appellee Superior Products moved for directed verdict on the bases that appellants had not proven that the product was defective, that the product was rendered unreasonably unsafe because of a defect, and that any defect

was the proximate cause of their injuries. The trial court granted the motion, stating that there was no evidence that appellee Mr. Muse represented appellee Superior Products, that appellee Superior Products was the manufacturer of the coating product, and that the product was defective. In short, the trial court stated, "I see just a complete lack of evidence to support the claim against Superior and I will direct a verdict for Superior[.]" As to the other appellees, Muse and Innovative Coating Products, the trial court stated it would not direct a verdict for appellee Muse. However, because the trial court found that there was no proof of any connection between Muse and Innovative Coating Products, it directed a verdict for appellee Innovative Coating Products. This appeal is from the direction of these two verdicts, the essence of the appeal being that the entire case should have been submitted to the jury.

In reviewing an order granting a motion for directed verdict, we view the evidence most favorably to the party against whom the verdict was directed. *Higgins* v. *General Motors Corp.*, 287 Ark. 390, 699 S.W.2d 741 (1985). If any substantial evidence exists that tends to establish an issue in favor of that party, it is error for the trial court to direct a verdict and take the case from the jury. *Id.*

I. SUPERIOR PRODUCTS

Appellants' first argument for reversal of the judgment is that the trial court erred in directing a verdict for Superior Products on the claims of strict liability, breach of the implied warranty of merchantability, and breach of the duties to instruct and warn. We consider each claim separately.

A. STRICT LIABILITY

Appellants argue their claims for strict liability should have been submitted to the jury because they proved Superior Products was the manufacturer by way of a photograph showing a container of the product bearing a label with the name "Superior Products International II." This photograph was admitted during appellant Parker's testimony, wherein he identified the container as the one containing the product used on his pool. The label on the container states in its entirety:

Superior Products
International II

Product:

#ME-0508 Light Blue
TOTAL-SEAL
Semi-Gloss Epoxy Coating
*BASE

WARNING!
FLAMMABLE LIQUID!
Contains Ketone, and Aromatic Solvents

Manufactured for Superior Products Intl. II
Salinas, KS Batch #051492

Mix Ratio (by Volume):
1 part #913/53 *CURING AGENT
4 parts #ME-0508 *BASE

Induction Period: 15 minutes
Pot Life: 8+ hours @ 75 F

Appellants also rely on that portion of appellant Parker's testimony relating his conversations with Pritchett concerning Pritchett's explanation for the reason the coating chipped. Finally, appellants rely on appellant Parker's testimony that some of the persons who swam in the pool cut their feet on the chips and on Littleton's testimony that the repairs to the pump were required because pieces of the coating product had lodged in the pump.

Appellants' arguments with respect to strict liability are wholly without merit. Granted, the evidence relied on by appellants establishes that the product did not adhere to the pool because it was applied over a latex base and that it caused injury to some people's feet. However, this is not evidence that the product was defective. As appellees point out, if this evidence proves anything, it proves only that the product was misused.

■ Proof that the product was defective is an essential element of a cause of action based on strict liability. Ark. Code Ann. § 4-86-102(a)(2) (Repl. 1966); *Higgins*, 287 Ark. 390, 699 S.W.2d 741. However, proof of a specific defect is not required when common experience teaches that the accident or damage would not have occurred in the absence of a defect. *Id.* Here, we cannot say

that the coating would not have chipped in the absence of a defect because, as the trial court stated, "there [could] be fifty reasons why paint peels[.]" A couple of reasons that come to mind are misuse and improper application. Thus, proof of a defect was required in this case.

Given the absence of any proof that the product was defective, we cannot say the trial court erred in directing a verdict for appellee Superior Products on the strict liability claim. Further, given the absence of proof of defect, we need not determine whether the remaining elements of liability were established.

B. IMPLIED WARRANTY OF MERCHANTABILITY

To sustain a claim for breach of warranty of merchantability, a plaintiff must prove that he sustained damages, that the product was not fit for its ordinary purpose, that the unfitness was the proximate cause of his damages, and that he is someone reasonably expected to use the product. *E.I. DuPont de Nemours and Co.* v. *Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983). We dispose of this argument summarily because there was absolutely no proof whatsoever of the ordinary purpose of this product. On the record before us, we cannot determine whether the purpose of the product was for swimming pools or space shuttles. Moreover, appellants do not even allege what they claim the ordinary purpose of this product to be. Without this proof, we simply cannot determine whether there was any breach of the warranty of merchantability.

Even assuming, as appellees state in their brief, that the ordinary purpose of this product was to coat swimming pools, there was no proof that the product was not fit for that purpose. Again, there was only proof that the product cracked and peeled from appellants' swimming pool which may indicate a problem with the product's application. Thus, we cannot say the trial court erred in directing a verdict for Superior Products.

C. DUTIES TO WARN AND INSTRUCT

Essentially, appellants contend this product should have been accompanied by some warning or instruction not to apply it over chlorinated rubber or latex paint. Appellants merely allege that the duties to warn or instruct existed in this case. They do not cite any authority to support this allegation, nor do they cite authority

stating under what facts and circumstances these duties arise. We will not do appellants' research for them. *Forrest* v. *Ford*, 324 Ark. 27, 918 S.W.2d 162 (1996). The question of what duty is owed is always a question of law. *First Commercial Trust Co.* v. *Lorcin Eng'g, Inc.*, 321 Ark. 210, 900 S.W.2d 202 (1995). In this case, the trial court never determined that appellees owed appellants a duty to warn or instruct. Thus, there is no ruling for us to review even if we had been cited to applicable law.

Appellants do cite authority for the proposition that the *adequacy* of a warning label is generally a question for the jury, *Bushong* v. *Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992). However, according to appellant Parker's testimony, there were no warnings or instructions that accompanied this product. Thus, there were no labels or instructions for the jury to determine the adequacy of, and appellants' reliance on *Bushong* is misplaced.

■ We conclude there was no substantial evidence tending to establish an issue in favor of appellants. Accordingly, we affirm the judgment directing a verdict for appellee Superior Products.

II. INNOVATIVE COATING PRODUCTS

Appellants' second argument for reversal is that the trial court erred in directing a verdict for appellee Innovative Coating Products on their claims of strict liability, breach of warranty of fitness for a particular purpose, and breach of warranty of merchantability. The trial court directed the verdict for appellee Innovative Coating Products because appellants did not offer any evidence that appellee Muse owned appellee Innovative Coating Products or that Muse's conduct was imputed to Innovative Coating Products. In defense of the motion, appellants stated that Muse admitted ownership of Innovative Coating Products in the answer he filed on behalf of both himself and Innovative Coating Products. The trial court stated that such an admission could not be considered as evidence.

■ While we are sympathetic to the essence of appellants' argument, which is that an admission by a party in an answer need not be proven by other evidence in order to create a fact question, *see, e.g., Twin City Corp.* v. *Riggins*, 278 Ark. 411, 646 S.W.2d 10 (1983), we cannot conclude the trial court erred in this respect because the abstract does not indicate that Muse made such an admission in his answer. It is well established that our review on appeal is limited to the record as abstracted in the briefs, not upon

one transcript, because there are seven judges involved in our decision. *Kearney* v. *Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995). On this record as abstracted, there is no evidence of any connection between Muse and appellee Innovative Coating Products. In addition, this record as abstracted does not establish that Innovative Coating Products was the supplier of the product at issue. Thus, we cannot conclude the trial court erred in directing a verdict for appellee Innovative Coating Products.

Given the lack of proof concerning the involvement of appellee Innovative Coating Products in this case, we would only be speculating if we attempted to review appellants' claims of strict liability, breach of warranty of merchantability, and breach of warranty of fitness for a particular purpose. We will not so speculate. Therefore, we cannot conclude the trial court erred in directing a verdict for appellee Innovative Coating Products.

In summary, appellants failed to prove their case, and the trial court did not err in directing verdicts for Superior Products and Innovative Coating Products. Appellants do not challenge the jury's verdict in favor of appellee Muse. Accordingly, the judgment is affirmed.

DUDLEY, J., not participating.

Barbara ROGERS *v.* TUDOR INSURANCE COMPANY

96-177 925 S.W.2d 395

Supreme Court of Arkansas
Opinion delivered July 1, 1996

Karr & Hutchinson, by: *W. Asa Hutchinson*, for appellant.

Wright, Lindsey & Jennings, by: *Harry S. Hurst, Jr.*, for appellee.

ROBERT L. BROWN, Justice. Two points are raised in this appeal. The first is one of jurisdiction and concerns whether appellant Barbara Rogers effected her appeal in timely fashion. We believe that she did, and we deny the motion to dismiss by appellee Tudor Insurance Company. The second point is raised by Rogers and concerns alleged error by the trial court in granting summary judgment in favor of Tudor Insurance on the issue of whether the liability coverage carried by Tudor Insurance permitted a direct

action against that carrier. We conclude that the trial court did err, and we reverse the judgment and remand the matter for trial.

On June 29, 1995, Rogers sued Tudor Insurance as the insurance carrier for PEOPL, Inc., a cooperative nonprofit corporation known as Personal Empowerment of the Psychiatrically Labeled, Inc. (PEOPL).[1] The suit was brought under the Direct Action statute, which is codified at Ark. Code Ann. § 23-79-210 (Repl. 1992). The complaint asserted that Rogers was employed by PEOPL from February of 1994 through January 21, 1995. She received a letter of termination dated January 21, 1995, and signed by PEOPL's president and treasurer. Prior to that letter, she alleged that she had no knowledge of any problems with her employment. She further asserted that the letter implied financial irregularities on her part but did not invite her to present a response to any charges, which was in violation of the organization's rules.

As a result of her termination, Rogers claimed that she was subjected to public embarrassment because the agents, directors, and employees of PEOPL made public comments "about alleged irregularities and financial misdealings on the part of the Plaintiff." According to her complaint, the stories were reported in the *Arkansas Democrat-Gazette* newspaper and on television broadcasts, and the public allegations and unfounded stories damaged her reputation. She sought to recover from Tudor Insurance for the negligence of the "officers, directors and agents" of PEOPL as well as for an intentional infliction of emotional distress. She further claimed a breach of her employment contract.

On August 3, 1995, Tudor Insurance filed a motion to dismiss under Ark. R. Civ. P. 12(b)(6) for failure to state facts upon which relief could be granted. In that motion, Tudor Insurance argued that the Direct Action statute was inapplicable to the facts as set forth in the complaint. According to the carrier, the statute allows direct actions against the insurer of a non-profit entity and does not authorize direct actions against carriers which provide coverage for officers and directors of nonprofit organizations. Thus, because PEOPL was not insured, Tudor Insurance maintained that a direct action could not survive.

---

[1] Though PEOPL's organization status is not entirely clear from the record, its by-laws do refer to it as a corporation.

The trial court treated the motion as one for summary judgment and on October 13, 1995, it entered its order of dismissal. Rogers then filed her notice of appeal on November 13, 1995.[2] Her notice of appeal, however, did not designate the record on appeal or state that a transcript of testimony had been ordered. Tudor Insurance filed a motion to dismiss the appeal in the trial court on grounds that Rogers's notice of appeal was ineffective. On November 27, 1995, which was two weeks after the notice of appeal was filed, Rogers filed a "Designation of Record on Appeal." In that filing, she stated that no transcript was ordered because no testimony was taken and the appeal was only based on a record which included the pleadings, motions, and order on file with the circuit clerk. In an order entered on January 3, 1996, the trial court denied the motion to dismiss for lack of jurisdiction.

I. Notice of Appeal

We first address Tudor Insurance's contention that Rogers's notice of appeal is defective for her failure to designate the record and order a transcript as required by Ark. R. App. P. 3(e). As a corollary point, Tudor Insurance notes that when the Designation of Record was filed, it was outside the 30-day period for filing the notice of appeal and consequently was ineffective.

Rule 3(e) of the Rules of Appellate Procedure states that a notice of appeal:

> [S]hall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been ordered by the appellant.

Tudor Insurance concedes that the November 13, 1995 notice of appeal does name the parties and the order appealed from, but the carrier contends that the notice was fatally deficient nonetheless because of its omissions relating to the transcript and record. Rogers, on the other hand, argues that there was substantial compliance with Appellate Rule 3(e) because the record in this case was obvious and, in any event, a Designation of Record was filed, albeit two

[2] November 12, 1995, which was the thirtieth day from entry of judgment fell on a Sunday, thus allowing filing of the notice of appeal on the thirty-first day.

weeks after the notice of appeal.

This court has held that "[t]he filing of a notice of appeal is jurisdictional but irregularities in the other procedural steps . . . are merely grounds for such action as this court deems appropriate." *Brady* v. *Alken, Inc.*, 273 Ark. 147, 151, 617 S.W.2d 358, 360 (1981), *quoting Davis* v. *Ralston Purina Co.*, 248 Ark. 14, 449 S.W.2d 709 (1970). The procedural steps outlined in Appellate Rule 3(e) require only substantial compliance, provided that the appellee has not been prejudiced by the failure to comply strictly with the rule. *Hudson* v. *Hudson*, 277 Ark. 183, 641 S.W.2d 1 (1982).

For example, in *Hudson* v. *Hudson*, the appellant filed a timely notice of appeal but failed to include a statement that the transcript had been ordered. We recognized the appellant's responsibility in this regard and held that because this rule was totally ignored, the appeal must be dismissed. However, in *Johnson* v. *Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986), appellant's notice of appeal did contain a statement that the transcript had been ordered. Nevertheless, there was a misunderstanding between appellant's counsel and the court reporter about whether the transcript had been requested. Because the attorney had not totally ignored Rule 3(e), we held that there was substantial compliance with the rule. Our holding in *Carpenter* further turned on the absence of any prejudice to the appellee even though there was a minor delay in ordering the transcript.

There is, too, a line of cases where this court has examined situations where language was omitted from the notice of appeal about the designation of the record even though the requirements of the rule were actually met. This court has held that it was not fatal to an appeal when the notice of appeal did not state that the transcript had been ordered, but when in actuality it had been ordered. *See Phillips* v. *LaValle*, 293 Ark. 364, 737 S.W.2d 652 (1987); *Wise* v. *Barron*, 280 Ark. 202, 655 S.W.2d 446 (1983); *see also Johnson* v. *Carpenter*, *supra*. In these cases, we also hinged our holding on the fact that there had been substantial compliance with the rule. We observed that the purpose of the rule had not been frustrated and that the appellee had not been prejudiced by any delay. On the other hand, both this court and the Court of Appeals have held that there is no substantial compliance when the transcript is not actually ordered or when the notice of appeal declares that the transcript has been ordered when, in fact, it has not been.

See DeViney v. *State*, 299 Ark. 471, 772 S.W.2d 607 (1989); *McElroy* v. *American Medical Int'l, Inc.*, 297 Ark. 527, 763 S.W.2d 89 (1989); *Daffin* v. *Seymore*, 14 Ark. App. 163, 685 S.W.2d 539 (1985); *Hudson* v. *Hudson, supra.*

The case before us is most closely akin to *Wise* v. *Barron, supra*, and to *Phillips* v. *LaValle, supra*, because we discern no intent on Rogers's part to disregard Rule 3(e). Moreover, there was no prejudice to Tudor Insurance occasioned by the failure to designate the record or to state that the transcript had been ordered within the 30-day period. The absence of prejudice, of course, does not automatically determine the substantial-compliance question. But here, the Designation of the Record, which designated the pleadings, motions, and order, was filed two weeks after the notice of appeal. Under these circumstances, where the appeal was from an order of summary judgment and where no testimony was involved, we hold that there was substantial compliance with Ark. R. App. P. 3(e). The motion to dismiss the appeal is denied.

II. Direct Action Statute

We turn then to Rogers's sole point on appeal which is that the trial court misconstrued the Direct Action statute, Ark. Code Ann. § 23-79-210 (Repl. 1992). We note initially that although Tudor Insurance moved to dismiss the case under Ark. R. Civ. P. 12(b)(6), the trial court treated the motion as one for summary judgment. This was correct because the court made its decision based in part on the language of the insurance policy which was attached to Tudor Insurance's reply to its motion to dismiss. *See* Ark. R. Civ. P. 12(b) and (c); *see also Rankin* v. *Farmers Tractor & Equip. Co.*, 319 Ark. 26, 888 S.W.2d 657 (1994); *Amalgamated Clothing & Textile Workers Int'l Union* v. *Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994). As a consequence, we review the order as one for summary judgment though it is styled "Order of Dismissal."

The Direct Action statute reads in pertinent part:

> (a)(1) When liability insurance is *carried by* any cooperative nonprofit corporation, association, or organization, . . . and if any person, firm, or corporation suffers injury or damage to person or property on account of the negligence or wrongful conduct of the organization, association, municipality or subdivision, its servants, agents, or employees act-

> ing within the scope of their employment or agency, then the person, firm, or corporation so injured or damaged shall have a direct cause of action against the insurer with which the liability insurance is carried to the extent of the amounts provided for in the insurance policy as would ordinarily be paid under the terms of the policy.
>
> (2) The insurer shall be directly liable to the injured person, firm, or corporation for damages to the extent of the coverage in the liability insurance policy, and the plaintiff may proceed directly against the insurer regardless of the fact that the actual tortfeasor may not be sued under the laws of the state.

Ark. Code Ann. § 23-79-210 (Repl. 1992). (Emphasis added.)

Tudor Insurance contended, and the trial court agreed, that the Direct Action statute was inapplicable in this case because its liability policy covers wrongful acts of the officers and directors of PEOPL and not the wrongful acts of PEOPL itself. Rogers attached the Policy Declarations to her complaint to show that the liability policy was issued to PEOPL. However, the policy language substantiates the fact that the officers and directors are the named insureds under the policy and not the corporation:

> DIRECTORS AND OFFICERS LIABILITY
>
> The Insurer shall pay the Loss of each and every Director or Officer (hereinafter called the Insureds) arising from any claim first made against the Insureds and reported to the Insurer during the Policy Period by reason of any Wrongful Act.
>
> COMPANY REIMBURSEMENT
>
> The Insurer shall reimburse the Company for Loss arising from any claim first made against the Insureds and reported to the Insurer during the Policy Period by reason of any Wrongful Act but only when and to the extent the Company has indemnified the Insureds for such Loss pursuant to law, statutory or common, or pursuant to Charter or By-Laws of the Company.

The insurance policy goes on to define "Insureds" as "all persons who were, now are, or shall be duly elected or appointed Directors

or Officers of the Company named in item 1 of the Declarations." The policy defines "Wrongful Act" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission by the Insureds solely in the discharge of their duties in their capacity as Directors or Officers of the Company. . . ."

Our analysis then must focus on the Direct Action statute itself. The basic rule of statutory interpretation to which all other interpretative guides must yield is to give effect to the intent of the General Assembly. *Pugh* v. *St. Paul Fire & Marine Ins. Co.*, 317 Ark. 304, 877 S.W.2d 577 (1994). In ascertaining legislative intent, we look to the statutory language, subject matter, object to be accomplished, purpose to be served, remedy provided, legislative history, and other appropriate matters. *Omega Tube & Conduit Corp.* v. *Maples*, 312 Ark. 489, 850 S.W.2d 317 (1993).

Under the statute, the following elements must exist for it to apply:

> (1) liability insurance must be carried by a nonprofit corporation;
>
> (2) a person must suffer injury or damage on account of negligence or wrongful conduct; and
>
> (3) the damage or injury must be on account of the negligence or wrongful conduct of "servants, agents, or employees" of the nonprofit corporation acting within the scope of their agency or employment.

In this case, there is no dispute over the fact that PEOPL "carried" the liability insurance on its officers and directors. The issue is whether the General Assembly equated "carrying" liability insurance with "covering" the corporation itself. We decline to give this statute such a narrow interpretation. Direct-action statutes are remedial in nature and are liberally construed for the benefit of injured parties and to effectuate the intended purposes. 12A *Couch on Insurance 2d* §§ 45:798, 45:800, pp. 455, 458 (1981).

Furthermore, we have no hesitancy in holding that the officers and directors of PEOPL fall within the broad category of "servants, agents, or employees" of the nonprofit corporation under § 23-79-210. Certainly, officers and directors who are also employees of the nonprofit corporation qualify. Our statutes further make it clear that the powers of a nonprofit corporation are exer-

cised through its directors. Ark. Code Ann. § 4-33-801(b) (Repl. 1996). In addition, it is the officers of a nonprofit corporation who perform the duties fixed by the corporation's by-laws and prescribed by its directors. *See generally* Ark. Code Ann. § 4-27-841 (Repl. 1996). Officers and directors routinely act as agents for a corporation. See 3 Fletcher Cyc. Corp. § 839, p. 211 (1994). Indeed, a corporate entity can only act through its directors and officers. *See Madison Bank & Trust* v. *First Nat'l Bank of Huntsville*, 276 Ark. 405, 635 S.W.2d 268 (1982); *see also Vogel* v. *Simmons First Nat'l Bank of Pine Bluff*, 15 Ark. App. 69, 689 S.W.2d 576 (1985); *Hill* v. *State*, 253 Ark. 512, 487 S.W.2d 624 (1972); *see also* 2 Fletcher Cyc. Corp. § 505, p. 601 (Perm. Ed.). In the case before us, it was the president and the treasurer of PEOPL who terminated Rogers, which gave rise to this litigation.

Finally, the Direct Action statute does not require that the nonprofit corporation itself be the named insured under the policy. It would have been an easy matter for the General Assembly to have required this. But the Direct Action statute only mandates that the coverage be carried by the nonprofit corporation. PEOPL did carry the coverage in this case, and the corporation's officers and directors were the named insureds. We conclude that under these facts Tudor Insurance is subject to a direct cause of action.

Motion of Tudor Insurance Company to dismiss the appeal is denied. Reversed and remanded.

DUDLEY, J., not participating.

GLAZE AND ROAF, JJ., dissent.

TOM GLAZE, Justice, dissenting. The majority court totally misconstrues the purpose and intent of Arkansas's direct-action statute, Ark. Code Ann. § 23-79-210(a)(1) (Repl. 1992). That statute recognizes that a nonprofit organization, like PEOPL here, is immune from tort liability caused by its agents or employees; but even so, that organization may still opt to obtain liability insurance to provide an avenue of redress to parties sustaining injuries caused by that tort-immune entity's agents or employees. *See Savage* v. *Spencer*, 235 Ark. 946, 362 S.W.2d 668 (1962). In this respect, § 23-79-210(a)(1) provides in pertinent part that a nonprofit organization, *not* subject to tort liability, may carry liability insurance, so that any person who suffers injury on account of the wrongful conduct of the organization shall have a direct cause of action

against the insurance company.[1] Thus, even though the organization itself is immune from suit, the statute authorizes the organization's insurer to be sued directly by the injured party.

Individual board members and officers of nonprofit organizations, on the other hand, have never been afforded tort immunity, and a person may sue a board member or officer individually for his or her negligence causing the plaintiff's injury. Section 23-79-210(a)(1) neither expressly nor inferentially allows the injured person the right to file a direct action against any insurance company carrying tort liability coverage on any board member or officer of a nonprofit entity. *See Savage*, 235 Ark. at 950, 362 S.W.2d at 670.

Because board members and officers of nonprofit organizations can be individually sued, such organizations often feel obliged to arrange for director and officer liability and company reimbursement policies in order to protect those officials who agree, voluntarily usually, to serve or assist the organization. Here, PEOPL indisputably obtained such coverage from Tudor Insurance Company for its board and officer members and, in doing so, those individual members were the designated "insureds" under the policy. PEOPL, as an entity, was *not* designated or qualified as an insured.

In sum, under Arkansas law, a nonprofit organization is immune from tort liability, but if it obtains insurance naming *itself* as an *insured* to cover tort liability caused by its servants, agents and employees, a person injured by the organization's agents or employees may bring his or her suit directly against the organization's insurer. However, the direct-action statute is inapplicable to the nonprofit organization's board members and officers who, under Arkansas law, can be sued in tort and who are named insureds in a liability policy. Simply put, § 23-79-210(a)(1), by its own plain language, in no way is intended to provide direct actions against insurers that issue policies covering insureds like board members and officers who may be found individually liable for tort liability.

---

[1] In this respect, the statute covers the negligence of the organization or its servants, agents, or employees acting within the scope of their employment or agency with such organization.

For the reasons above, I would affirm the trial court's decision.

ROAF, J., joins this dissent.

Carl Stanley TURNER *v.* STATE of Arkansas

CR 96-93 926 S.W.2d 843

Supreme Court of Arkansas
Opinion delivered July 1, 1996

Jim Petty, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Carl Stanley Turner was convicted of burglary and attempted rape. He was sentenced as a habitual offender to terms of 30 years and 50 years, to be served concurrently. Fines of $10,000 for each charge were also assessed. He appeals on four grounds, none of which has merit. We affirm the judgment.

The facts surrounding the convictions are garnered from the jury trial. On Friday night, May 12, 1995, Alexandra Williams, a fourteen-year-old, was home alone with her mother, Deena Ann Darden, in Searcy. She testified at trial that she stayed up late watching television and then went to bed in her room. Early Saturday morning, she awoke and felt someone brushing against her. She first thought it was her boyfriend who was coming over at 10:00 that morning but then realized it was not. She turned and looked into the person's face and recognized Carl Turner, whom she had known for about two years. In fact, he was her boyfriend's uncle. When she first saw Turner, Alexandra noted that he was wearing boxer shorts and a jacket with a hood over his head. She also noticed that he smelled of alcoholic beverages. Alexandra testified that she looked at her clock and saw that it was six o'clock in the morning.

Alexandra then related that Turner put a knife to her throat and told her to be quiet. She was crying and she pleaded with Turner, but he threatened to cut her throat if she was not quiet. She

testified that Turner told her to pull down her underwear so that he could have sex with her. After she said "no," she stated that he pulled the knife away from her and started to get on top of her. As soon as the knife was far enough away from her throat, she jumped up and began screaming for her mother. Turner's reaction was to get up and walk out. Alexandra rushed into the hallway to tell her mother what had happened. Turner was still in the house and was fumbling with the door knob, trying to get out.

Deena Darden testified that after she was awakened by her daughter's screams, she ran to her daughter's door, where Alexandra met her. Darden turned and saw a man trying to unlock the back door to get out but that he was not moving in a hurried fashion. Though he tried to hide his face, she ultimately recognized him as Carl Turner. Alexandra then told her, "Carl tried to rape me." Darden ran to get her gun from her bedroom, and when she returned Turner was attempting to leave through her front door. He left, and Darden called 911. Police officers from the Searcy Police Department arrived a few minutes later.

The 911 tape was played for the jury. On cross-examination, Darden admitted that she had previously told Searcy police officers that the man she saw in her house was Carl Turner. She further testified that she told the 911 operator that "Polli Foo" (Turner's street name) had come through her window, though that name could not be heard on the 911 tape.

The police report by Searcy Police Officer Bob O'Brien stated that Alexandra identified Turner by his voice but not that she identified him visually. It also stated that Alexandra had known Turner a long time. When Alexandra testified at trial that she recognized Turner's face, Turner did not object to this testimony at that time. Rather, he waited until after the State had rested and his motion for directed verdict had been denied to raise the issue. He then moved for a mistrial based on the State's failure to inform him that Alexandra had recognized Turner's face. That motion was denied.

Turner's defense was a partial alibi presented by several friends and his brother for his whereabouts during early Saturday morning. Turner himself took the stand and denied that he was the culprit. Before his cross-examination by the State, a hearing was held to address whether evidence of prior convictions for attempted sexual

abuse in the first degree and burglary could be used against him for impeachment purposes under Arkansas Rule of Evidence 609. Counsel for Turner argued that the burglary and criminal attempt to commit sexual abuse were too prejudicial under Rule 609 because the burglary conviction mirrored the current charge before the jury, and the attempted sexual abuse conviction was unusable as a crime of a sexual nature. The trial court ruled that the prejudicial effect of the convictions was not enough to outweigh the probative effect of impeaching Turner through the use of those convictions. The court ordered the prosecuting attorney not to go into the substance of those convictions and agreed to give a cautionary instruction once the prior convictions came into evidence.

On cross-examination by the State, Turner admitted that he had prior convictions for burglary and felony attempt to commit sexual abuse in the first degree, but he argued that in those cases the trial court had misled him. Immediately following that admission, the court instructed the jury to use this evidence only for the purpose of judging Turner's credibility and not as evidence to determine his guilt.

Following the jury trial, the verdicts of guilty, and the sentences, Turner moved for a new trial on grounds that "he was prejudiced by evidence which was submitted against him which had not been furnished to him before trial despite his having filed [a motion for discovery]." He specifically complained that Officer O'Brien's report showed only that Alexandra could identify his voice. It said nothing about the fact that she visually identified him. Turner expressly requested a hearing on the matter. The trial court denied the motion for new trial without a hearing and concluded that the State had not violated the applicable discovery rule, Ark. R. Crim. P. 17.1, because the rule does not require that a defendant be informed of all possible testimony a witness might give.

I. Rule 609

Turner first advances the argument that the trial court abused its discretion by allowing impeachment for the prior crimes of burglary and attempted sexual abuse.[1] Rule 609 of the Arkansas

[1] Turner actually had three prior felony convictions for attempt to commit sexual abuse, burglary, and theft, and he was sentenced as a habitual offender accordingly.

Rules of Evidence permits the admission of certain convictions to attack the credibility of the witness. For those convictions to be available to impeach credibility, "the probative value of admitting this evidence [must outweigh] its prejudicial effect to a party or a witness...." Ark. R. Evid. 609 (a).

The State has a right to impeach the credibility of a witness with prior convictions under Rule 609. *Robinson* v. *State*, 295 Ark. 693, 751 S.W.2d 335 (1988). But the trial court has considerable discretion in determining whether the probative value of prior convictions outweighs their prejudicial effect, and that decision will not be reversed absent an abuse of discretion. *Thomas* v. *State*, 315 Ark. 518, 868 S.W.2d 85 (1994); *Donald* v. *State*, 310 Ark. 197, 833 S.W.2d 770 (1992); *Griffin* v. *State*, 307 Ark. 537, 823 S.W.2d 446 (1992). The admissibility of the prior convictions must be decided on a case-by-case basis. *Thomas* v. *State*, *supra*; *Pollard* v. *State*, 296 Ark. 299, 756 S.W.2d 455 (1988). When the defendant chooses to testify, this court has consistently permitted prior convictions to be used for impeachment even where those convictions are similar to the charge or charges before the trial court. *See, e.g.*, *Donald* v. *State*, *supra* (burglary conviction used for aggravated robbery and burglary trial); *Griffin* v. *State*, *supra* (kidnapping, theft, and burglary convictions used in burglary and rape trial); *Simmons* v. *State*, 278 Ark. 305, 645 S.W.2d 680, *cert. denied* 464 U.S. 865 (1983) (kidnapping conviction used to impeach in kidnapping trial).

Turner argues that his conviction must be reversed under *Jones* v. *State*, 274 Ark. 379, 625 S.W.2d 471 (1981), *overruled on other grounds*, *George* v. *State*, 306 Ark. 360, 813 S.W.2d 792 (1991). In *Jones*, we reversed Jones's conviction for sexual abuse in the first degree perpetrated against a nine-year-old boy. The allegations were that Jones threw the boy to the ground and forcibly attempted to have anal intercourse with him. Jones did not take the stand but had he done so, the trial court made it clear that it would have allowed the State to impeach Jones's credibility with an earlier rape conviction, also involving a young boy. This court reversed the trial court's decision. In doing so, we recognized that "sexual abuse of a child is a particularly shameful and outrageous crime," and we held that the probative value of permitting impeachment with the prior rape conviction of a young boy had scant probative value as compared to a great potential for prejudice. We concluded that this

reference to a prior conviction for the same crime would all but convict the defendant. However, in *George* v. *State, supra,* we overruled the *Jones* decision as it pertained to prior convictions used as evidence under Arkansas Rule of Evidence 404(b).

In later cases, this court has generally distinguished the *Jones* case on the basis that in *Jones* the crime charged and the prior conviction to be used for impeachment showed a unique perversion that would have unduly tainted the jury. Included in the analysis has been the fact that other, less prejudicial convictions were available for impeachment which did not qualify as crimes of unique perversion. *See, e.g., Schalski* v. *State,* 322 Ark. 63, 907 S.W.2d 693 (1995) (false imprisonment conviction permissible in rape trial); *Kilpatrick* v. *State,* 322 Ark. 728, 912 S.W.2d 917 (1995) (sexual abuse conviction allowed in trial for cocaine possession with intent to sell and felon in possession of a firearm); *Jones* v. *State,* 282 Ark. 56, 665 S.W.2d 876 (1984) (prior convictions for burglary, attempted rape, kidnapping, assault and battery, robbery and larceny could be used in trial for battery and robbery).

■ In the instant case, the proof at trial came from the testimony of Alexandra and her mother. There was no physical evidence introduced to link Turner to the crime, and Turner denied his participation in the crime altogether. Thus, his credibility was a central issue in the case. Viewed in that light, his prior convictions were extremely probative. We hold that the trial court did not abuse its discretion in ruling as it did on this point.

■ We further question the continued viability of the *Jones* exception to Rule 609 impeachment. We have overruled that decision, as already noted in this opinion, for purposes of Arkansas Rule of Evidence 404(b), where the issue was the admissibility of prior convictions by the State to prove motive, intent, lack of mistake, and so forth. To permit the State to introduce convictions for the rape of a child as probative evidence in its case-in-chief under the aegis of Rule 404(b), but to disallow the usage of these crimes for credibility purposes under Rule 609 seems largely inconsistent. We can perceive no justification for this dichotomy in treatment, and we can certainly appreciate the probative impact of these prior convictions on the credibility of the defendant. We overrule *Jones* v. *State,* 274 Ark. 379, 625 S.W.2d 471 (1981).

II. Recusal

We turn next to the trial court's decision not to recuse in this case, which Turner claims was error. We note at the outset that a judge is required to recuse from cases in which his impartiality might reasonably be questioned. Ark. Code of Judicial Conduct, Canon 3E(1). However, there is a presumption of impartiality, and the party seeking disqualification bears the burden of proving otherwise. *Gentry* v. *State*, 47 Ark. App. 117, 886 S.W.2d 885 (1994). The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Reel* v. *State*, 318 Ark. 565, 886 S.W.2d 615 (1994); *Sheridan* v. *State*, 313 Ark. 23, 852 S.W.2d 772 (1993). An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court. *See Reel* v. *State, supra.*

The facts argued to show partiality were that (1) the trial court, Judge Robert Edwards, when serving as prosecuting attorney, had prosecuted Turner in the 1970's for a crime against another judge's wife; and (2) Judge Edwards again prosecuted Turner in 1981 for theft and in 1982 for burglary. Turner further claims that Judge Edwards later sat on the State Board of Pardons and Paroles for the burglary crime and that he (Turner) has filed "numerous lawsuits" against the county. At the pretrial hearing on this issue, Turner admitted, however, that even though the "circuit court" had been named in his lawsuits, Judge Edwards had not been personally named, and there was no proof presented to show that such suits had actually been filed. Furthermore, Judge Edwards stated on the record that he did not participate in parole board decisions where he had been the prosecutor for the prison inmate to be reviewed. The judge also observed that more than ten years had passed since the crimes prosecuted.

We initially observe on this point that there was no showing by Turner that he was treated unfairly in the trial of this matter. In fact, in Turner's reply brief his counsel admitted that Turner was treated fairly at trial. In addition to that fact, in *Cooper* v. *State*, 317 Ark. 485, 879 S.W.2d 405 (1994), we held that a trial judge need not recuse simply because that judge had previously prosecuted the defendant for a separate crime which was to be used for sentence enhancement purposes. We also agree with the judge that considerable time has passed since those earlier prosecutions. We perceive no basis for holding that the trial judge abused his discretion in not recusing under these facts.

III. Discovery Violations

Following entry of judgment, Turner moved for a new trial pursuant to Ark. R. Crim. P. 36.22,[2] and alleged discovery violations. Rule 36.22 states that if a hearing is requested or found to be necessary, a hearing date shall be designated. Here, a hearing was requested but the trial judge made his ruling in the absence of a hearing. Because of this, Turner argues that he was denied the ability to examine Officer O'Brien on why Alexandra's visual identification of Turner was omitted from his police report.

The State's response is that a hearing was unnecessary, and we agree. There is, first, the fact that Turner did not object at the first opportunity to Alexandra's testimony that she recognized Turner's face during the attempted rape. We have held that objections to discovery violations must be made at first opportunity in order to be preserved. *Clark* v. *State*, 323 Ark. 211, 913 S.W.2d 297 (1996). But it was also immaterial that Officer O'Brien omitted her visual identification of Turner from the report while including her voice identification. The fact that she could positively identify Turner was the critical point, and that fact was disclosed.

Turner argues that testimony taken at a posttrial hearing was needed to show improper motive on the part of the State in its failure to disclose, but there is no evidence to show noncompliance with Ark. R. Crim. P. 17.1. Simply put, there was no error committed by the trial court in its refusal to grant a hearing, because the hearing would have been superfluous. *See Allred* v. *State*, 310 Ark. 476, 837 S.W.2d 469 (1992). Finally, although Rule 36.22 states that a hearing is required when it is requested, the rule provides no sanction for when a hearing is not afforded a party. Certainly, a new trial is not contemplated under the terms of the rule for failure to hold a hearing.

As a corollary point, Turner argues that a mistrial for the discovery violation should have been declared. Declaration of a mistrial, of course, is a drastic remedy and is proper only when the error is beyond repair and cannot be corrected by any curative relief. *Goins* v. *State*, 318 Ark. 689, 890 S.W.2d 602 (1995). In addition, the granting of a mistrial is within the sound discretion of

[2] This rule is now contained in Ark. R. Crim. P. 33.3.

the trial court, and the exercise of that discretion will not be disturbed on appeal absent a showing of abuse. *Bradley* v. *State*, 320 Ark. 100, 896 S.W.2d 425 (1995). In this case, the mistrial motion was not timely, as already noted. *See Clark* v. *State, supra.* Any objection should have been made during the testimony of Alexandra. Moreover, Turner's counsel cross-examined both Alexandra and Officer O'Brien on her identification of Turner. Again, we discern no prejudice to Turner. He unquestionably knew that Alexandra had recognized him and would testify to that fact. A mistrial was clearly not warranted.

Affirmed.

DUDLEY, J., not participating.

Johnny Austin BENTON *v.* STATE of Arkansas

CR 96-145 925 S.W.2d 401

Supreme Court of Arkansas
Opinion delivered July 1, 1996

Edgar R. Thompson, Lonoke County Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen. and Senior Appellate Advocate, for appellee.

PER CURIAM. In 1994 Johnny Austin Benton was found guilty of theft of property and sentenced as a habitual offender to twenty years imprisonment. The court of appeals affirmed. *Benton* v. *State*, 50 Ark. App. 90, 901 S.W.2d 858 (1995). The mandate of the appeals court was issued July 18, 1995.

On October 12, 1995, the trial court entered an order which dismissed a petition to reduce sentence pursuant to Ark. Code Ann. § 16-90-111 (Supp. 1995). Appellant Benton brings this appeal from that order.

Appellant concedes that he did not file the petition with the circuit clerk; instead, he "sent" the petition to the circuit judge who ruled on it. Apparently because the petition was never filed-of-record, the record does not contain a copy of it. Nevertheless, the abstract contained in the appellant's brief includes an "Abstract of Stipulation" which consists of items that are not included in the record but which are included in the abstract. Among the items is a synopsis of the petition to reduce sentence pursuant to Ark. Code Ann. § 16-90-111. Appellant argues that the fact that he sent the petition to the judge constitutes substantial compliance with the requirement that a petition for postconviction relief be filed with the circuit clerk. We disagree and dismiss the appeal.

We first note that Ark.Code Ann. § 16-90-111 (Supp. 1995), the statute invoked by appellant, has been found to be in conflict with A.R.Cr.P. Rule 37, our postconviction remedy. We have held that Rule 37.2 (b) requires that all claims for postconviction relief from a sentence imposed by a circuit court must be raised under Rule 37. *Taylor* v. *State*, 324 Ark. 532, 922 S.W.2d 710 (1996). Statutes are given deference only to the extent that they are compatible with our rules, and conflicts which compromise these rules are resolved in favor of our rules. *Reed* v. *State*, 317 Ark. 286, 878 S.W.2d 378 (1994), citing *Hickson* v. *State*, 316 Ark. 783, 875 S.W.2d 492 (1994).

With respect to whether the petition in this case was properly filed, the filing of a petition for postconviction relief with the circuit clerk is critical in that the date of the filing of such a petition determines whether the trial court has jurisdiction to consider the petition on the merits. Delivering an item to a circuit judge is not the equivalent of filing the item with the clerk for the purposes of determining whether an item is timely filed under Rule 37. *See Thompson* v. *State*, 280 Ark. 161, 655 S.W.2d 424 (1983); *see also Grain* v. *State*, 280 Ark. 161, 655 S.W.2d 425 (1983).

Where a judgment has been affirmed on appeal, A.R.Cr.P. Rule 37.2 (c) provides that a petition under the rule is untimely if not *filed* within sixty days of the date the mandate was issued upon affirmance. The time limitations imposed in Rule 37 are jurisdictional in nature, and the circuit court may not grant relief on a petition for postconviction relief that is not properly filed. *See Maxwell* v. *State*, 298 Ark. 329, 767 S.W.2d 303 (1989). As appellant did not file his petition for postconviction relief with the circuit clerk within the sixty-day period set by Rule 37 to file such a petition, the trial court did not have authority to consider it. *See Smith* v. *State*, 321 Ark. 195, 900 S.W.2d 939 (1995).

Appeal dismissed.

DUDLEY, J., not participating.

Terry Lynn CARROLL *v.* STATE of Arkansas

CR 96-770 923 S.W.2d 872

Supreme Court of Arkansas
Opinion delivered July 5, 1996
Dissenting Opinion delivered July 5, 1996

William R. Simpson, Jr., Public Defender, by: *Bret Qualls*, for petitioner.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate, for respondent.

GLAZE and ROAF, JJ., would deny.

DUDLEY, J., not participating.

TOM GLAZE, Justice, dissenting. This court has authority to stay proceedings pending an appeal, *Bowen* v. *State*, 323 Ark. 233, 913 S.W.2d 304 (1996); *Clark* v. *State*, 308 Ark. 453, 824 S.W.2d 345 (1992), and certainly it has done so when a meritorious reason has been shown. In the present case, petitioner Terry Carroll requests this court issue a writ of prohibition, to order the trial court to desist from proceeding with his trial scheduled to begin on July 8, 1996. Carroll's request is assertedly made so that this court might consider his interlocutory appeal from the trial judge's denial of his motion to transfer to juvenile court. From my review of the record, Carroll's writ (or stay) request has no merit and should be denied.

On July 5, 1995, Carroll was charged by information with three counts of capital murder and one count of attempted capital murder. Carroll, along with three others, allegedly participated in the execution-style murder of three children and attempted murder of another on June 4, 1995. At the time of the murder, Carroll was 16 years old.

To support his petition for issuance of a writ of prohibition, Carroll cites *Hamilton* v. *State*, 320 Ark. 346, 896 S.W.2d 877

(1995), where this court held appeals from motions to transfer to juvenile court are to be interlocutory, and any appeal from such an order after a judgment of conviction in circuit court is untimely. This court, however, has held many times that prohibition is an extraordinary writ and is never issued to prohibit a trial court from erroneously exercising its jurisdiction, only where it is proposing to act in excess of its jurisdiction. *Fletcher* v. *State*, 318 Ark. 298, 884 S.W.2d 623 (1994). A circuit court and a juvenile court have concurrent jurisdiction and a prosecuting attorney may charge a juvenile in either court when a case involves a juvenile at least sixteen years old when he engages in conduct that, if committed by an adult, would be any felony. Ark. Code Ann. § 9-27-318(b)(1) (Supp. 1995). Here, the circuit court indisputably has jurisdiction to try Carroll on the four felony charges, so a writ of prohibition clearly does not lie against it.

Although Carroll was charged and counsel appointed almost a year ago on July 17, 1995, and he had filed other motions, he has waited until now to file his motion for transfer to juvenile court. After a hearing was held on the motion to transfer, the circuit court denied the motion, finding the charged offenses were serious and violent in nature. The order denying the transfer was entered on July 2, 1996.

Carroll's petition for writ of prohibition to this court fails to show that his interlocutory appeal has any merit. Carroll merely contends because he was aged sixteen at the time the offenses were committed, his case belongs in juvenile court. Carroll's bare contention is insufficient under the statute to support a transfer, and reflects little, if any, possibility of success on appeal.

The burden is on Carroll, as petitioner, to present a sufficient basis to support his petition and to show that his request to transfer to juvenile court has merit. *Butler* v. *State*, 324 Ark. 476, 922 S.W.2d 685 (1996). Carroll does not have an automatic right to a transfer to juvenile court, and this court should not stay proceedings without a show of merit.

For the foregoing reasons, I would treat Carroll's petition as one for stay of proceedings, and deny it.

Freddie Wayne CHOATE *v.* STATE of Arkansas

CR 95-1327 925 S.W.2d 409

Supreme Court of Arkansas
Opinion delivered July 8, 1996

William R. Simpson, Jr., Public Defender, by: *C. Joseph Cordi, Jr.*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

BRADLEY D. JESSON, Chief Justice. Appellant Freddie Wayne Choate was convicted by a jury of the first-degree murder of Alfred "Pug" McHeran and was sentenced to life imprisonment. His sole allegation on appeal is that the trial court erred in denying his motion for directed verdict. Particularly, he argues that there was insufficient evidence to corroborate the testimony of the victim's widow and State's eyewitness, Francis "Carline" McHeran, whom he claims was an accomplice to the murder. We affirm.

The following evidence, as viewed most favorably to the State, was presented at trial. Carline McHeran testified that she and the victim, Pug McHeran, had been married for two years. Carline, who is white, and Pug, who was black, were homeless. They had been living together in a tent along the Arkansas River for eight years. On the evening of April 13, 1994, the two were at the Greyhound Bus Station in North Little Rock. Pug, an alcoholic, had been drinking whiskey all day. When Carline left the bus station to look for Pug, she found him outside talking to the appellant, who was driving a blue Dodge truck. Carline had never met the appellant before, nor had she seen him with her husband. When she approached the two men, they talked about going to Texarkana. Though Carline did not want to go on the trip, she got in the blue truck, explaining that she followed her husband wherever he went.

Carline sat in the middle of the cab between the two men. Appellant was driving. The three headed toward Texarkana before making a U-turn and proceeding toward Hensley in Pulaski County. Appellant and Pug began fighting over a whiskey bottle that Pug had. During the course of the argument, appellant, claiming to be from the Aryan nation, stated that he "hated niggers" and

interracial couples. According to Carline, appellant repeatedly stated he was "going to shoot that nigger." The argument escalated, and Pug wanted to get out of the truck. Appellant, who had been transferring a gun from one hand to the other, stopped the truck and shot Pug, causing him to fall forward. As Carline was leaning Pug back up, she noticed blood on the right sleeve of the shirt she was wearing. Appellant repeatedly threatened to kill Carline, telling her "I can kill you and get by with it." They proceeded down Cemetery Road in Hensley, where, at appellant's direction, Carline opened the passenger door of the truck, and the two pushed Pug out with their feet.

Michael Scroggins discovered the victim's body shortly after 11:00 p.m. on April 13. Officers from the Pulaski County Sheriff's Office arrived shortly after 11:30 p.m. Desiree Bell, who lived on a gravel road off Cemetery Road, was driving home when she observed the police. Bell testified that, after driving past the scene, she noticed an unfamiliar Dodge truck parked at the end of Cemetery Road. After the police were gone, she saw the truck drive back and forth down Cemetery Road.

Carline testified that, after her husband was pushed out of the pickup, she and appellant got lost on Cemetery Road for approximately three to four hours. On the way to Heber Springs, they stopped at a Shell Station on Sixth Street in Little Rock, where Carline called her daughter, Tanya "Tammy" Moore. Carline pleaded with her daughter to come get her, telling her "it was life or death." She then hung up the phone without giving Tammy the phone number, as she was afraid that if her daughter came to get her, appellant would "get them both."

Upon arrival in Heber Springs on April 14, appellant and Carline stopped to eat before checking into the Holiday Inn Express at approximately 10:00 a.m. Carline went to the front desk and inquired about the cost of a room. She then went outside to get money from appellant and returned to the front desk. She explained that she did not tell the hotel personnel anything because appellant had threatened to kill her. Appellant and Carline checked into Room 117 of the hotel. Once in the room, appellant told her to throw the bloodied shirt she was wearing in a trash bin. Appellant, who had told Carline he was a painter, left the room at approximately 6:00 a.m. the next day to go to work. Carline then called her sister, Patsy Yarberry, and told her where she was. Yarberry,

who had to go to work, called Tammy and told her to call the police. Officers found Carline at the hotel that morning, and after questioning her, arrested appellant for the murder.

Officer Sean O'Nale of the Pulaski County Sheriff's Office recovered the bloodied shirt from the hotel room and carpeting from the blue Dodge truck and sent both to the State Crime Lab. Jane Parsons, a serologist with the State Crime Lab, compared the victim's blood with the blood on the submitted items. According to Parsons, less than one percent of the African-American population in the United States would have had the combination of enzymes found on the auto carpet. It was her opinion that the blood on the carpet was consistent with the victim's blood. Parsons further opined that approximately two percent of the African-American population would have the combination of enzymes found on the shirt. There was nothing inconsistent with the blood on the shirt and the victim's blood. Dr. William Sturner, Chief Medical Examiner of the State Crime Lab, performed the autopsy on the victim and determined that his death was caused by a single gunshot wound to the head, which entered above the victim's left eyelid and exited through the back of the right side of the head.

The trial court, over the State's objection, concluded that there was sufficient circumstantial evidence from which the jury could have concluded that Carline was an accomplice, and thus instructed the jury with AMI Crim. 2d 403, entitled "Accomplice Status in Dispute — Corroboration." The trial court reasoned that the jury could look at the circumstances after the offense and determine that Carline was an accomplice to the murder, thus triggering the corroboration requirement. After hearing all the evidence in the guilt-innocence phase, the jury retired and returned a verdict of guilty of first-degree murder. The State presented evidence of appellant's four prior felony convictions, and the jury recommended that appellant be sentenced to life imprisonment. The trial court entered judgment accordingly, from which appellant now appeals.

We examine the denial of a directed-verdict motion under the following standards:

> This court treats the denial of a motion for directed verdict as a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is

> whether there is substantial evidence to support the verdict; substantial evidence must be forceful enough to compel a conclusion one way or the other beyond suspicion and conjecture. On appellate review, it is only necessary for this court to ascertain that evidence which is most favorable to appellee, and it is permissible to consider only that evidence which supports the guilty verdict.

King v. *State*, 323 Ark. 671, 916 S.W.2d 732 (1996) (other citations omitted). In *King*, we also discussed at length the burden of proof on accomplice liability:

> The defendant bears the burden of proving that a witness is an accomplice. *Cole* v. *State*, 323 Ark. 8, 913 S.W.2d 255 (1996). An accomplice is one who, with the purpose of promoting or facilitating the commission of an offense, either solicits, advises, encourages, or coerces another person to commit the offense, aids, agrees to aid, or attempts to aid the other person in planning or committing the offense, or, having a legal duty to prevent the offense, fails to make a proper effort to prevent the commission of the offense. Ark. Code Ann. § 5-2-403 (Repl. 1993). One's status as an accomplice is a mixed question of law and fact. *Earl* v. *State*, 272 Ark. 5, 612 S.W.2d 98 (1981). One's presence at the crime scene or failure to inform law enforcement officers of a crime does not make one an accomplice as a matter of law. *Pilcher* v. *State*, 303 Ark. 335, 796 S.W.2d 845 (1990) (*citing Spears* v. *State*, 280 Ark. 577, 660 S.W.2d 913 (1983)).

323 Ark. at 677.

Contrary to the State's assertion in its brief, the jury in this case was instructed with AMI Crim. 2d 403, and was thus able to consider whether Carline was an accomplice to her husband's murder. The jury was thus instructed that if they found Carline to be an accomplice, her testimony must be corroborated by other evidence to connect appellant with the murder. The credibility of Carline's testimony was a matter for the jury to resolve and the jury was so instructed. In this case, we do not know whether the jury actually found that Carline was an accomplice. Even assuming that they did, there was sufficient corroborative evidence presented.

Patricia Allen, a bartender and waitress of the Rendevous Restaurant in North Little Rock, corroborated Carline's testimony

regarding appellant's motive for the murder. Allen testified that appellant was drinking Old Charter at the restaurant, located near the bus station, between 3:00 p.m. and 5:00 p.m. on April 13. Appellant began talking to Allen and asked her if she liked black people, and if she knew anyone who had anything to do with a white supremacist group. Appellant told her that he did not like "niggers." Desiree Bell testified that she saw an unfamiliar Dodge truck matching the description of the truck appellant was driving down the road from the murder scene. Bill Cooper testified that appellant had his blue Dodge pickup during the time of the murder. Moreover, both Carline's daughter, Tammy Moore, and her sister, Patsy Yarberry, described Carline as "hysterical" when they spoke with her on the phone. Brenda Ringer, an employee of Holiday Inn Express, testified that Carline appeared shaky and was trembling when she saw her in the hotel lobby. The blood found on the auto carpet and the blood on the shirt, both consistent with the victim's blood, corroborated Carline's story of how the murder occurred. Dr. Sturner's testimony about the trajectory of the gunshot wound is likewise consistent with Carline's account of how the murder took place.

Based on the foregoing, we conclude that the evidence was sufficient to support appellant's conviction for first-degree murder. We have reviewed the record pursuant to Ark. Sup. Ct. R. 4-3(h) and have determined that there are no errors with respect to rulings on objections or motions prejudicial to the appellant not discussed above.

Affirmed.

DUDLEY, J., not participating.

CITIZENS to ESTABLISH a REFORM PARTY
in Arkansas, et al. *v.* Sharon PRIEST, in Her Official Capacity
as Secretary of State for the State of Arkansas

96-639 926 S.W.2d 432

Supreme Court of Arkansas
Opinion delivered July 8, 1996

[redacted]

Cuddy & Lanham, by: *Samuel Lanham, Jr.*, of Counsel, and *Williams & Anderson*, by: *G. Alan Perkins*, for appellants.

Winston Bryant, Att'y Gen., by: *Angela S. Jegley*, Asst. Att'y Gen., for appellee.

BRADLEY D. JESSON, Chief Justice. This case concerns the appellants' efforts to establish the Reform Party as a new political party in the State of Arkansas. Their objective is to field a slate of candidates for national, state, and county offices in the 1996 general election. Arkansas law provides two means of forming a new political party. The convention process permits a political group to hold a convention for the purpose of choosing presidential and vice-presidential candidates. See Ark. Code Ann. § 7-8-302 (Repl. 1993). If the candidates poll at least three percent of the vote in the general election, the candidates' group is established as a political party. See Ark. Code Ann. § 7-1-101(1)(A) (Supp. 1995). The petition process, which was used by these appellants, permits a political group to submit a petition to the Secretary of State declaring its intention of organizing a political party. The petition must contain the signatures of qualified electors equal in number to at least three percent of the total vote cast for the office of Governor or nominees for presidential electors at the last preceding election. See Ark. Code Ann. § 7-1-101(1)(A) (Supp. 1995); Ark. Code Ann. § 7-7-203(g) (Supp. 1995).

The central issue in this case concerns the deadline by which such a petition must be filed. There are two Arkansas statutes which address the deadline and they are in utter conflict. Ark. Code Ann. § 7-1-101(1)(B) (Supp. 1995) sets out the deadline as follows:

> Except in preferential presidential primary elections, the petition shall be filed with the Secretary of State not later than 12:00 noon of the first Tuesday in May before the preferential primary election in which the political party filing the petition desires to participate.

Ark. Code Ann. § 7-7-203(g) sets out a different deadline:

> The petitions shall be filed with the Secretary of State no later than 12:00 noon on the first Tuesday in the fourth month before the preferential primary election....However, this subsection does not apply to preferential presidential primary elections.

Two problems are readily apparent. First, under § 7-1-101(1)(B), the effective filing deadline in 1996 was May 7. Under § 7-7-203(g), the effective filing deadline for 1996 was January 2. Second, each statute exempts preferential *presidential* primaries from its application. The trial judge resolved these matters by holding that the January 2 deadline in § 7-7-203(g) was controlling and that the legislature did not intend to exempt presidential primaries from § 7-7-203(g). We agree and affirm.

The facts of this case are undisputed. In November of 1995, Deborah Kraus, a political consultant for the Reform Party, approached a representative of the Secretary of State's office to discuss procedures for formation of a new political party. She was told that her group would have to submit a petition containing 21,505 signatures, which was three percent of the total votes cast for Governor in the 1994 election. She was further told that the deadline for filing the petition with the Secretary of State was January 2, 1996. On that date, the appellants presented a petition containing 28,546 signatures. Forty-five days later, the Secretary rejected the petition after concluding that only 17,262 of the signatures were valid.

Upon rejection of their petition, the appellants reviewed the law and discovered the conflict which exists between § 7-1-101(1)(B) and § 7-7-203(g). They then took the position that the deadline for filing their petition was not January 2, 1996, as established by § 7-7-203(g), but May 7, 1996, as established by § 7-1-101(1)(B). On May 6, 1996, they tendered to the Secretary of State a petition containing 7,000 new signatures and purported proof that 1,952 signatures from the original petition had been wrongfully rejected. The Secretary refused to accept the tender and reasserted the January 2, 1996 deadline. The appellants immediately filed suit in Pulaski County Circuit Court, seeking the following relief: 1) a writ of mandamus directing the Secretary to accept the May 6 petition and declare the Reform Party a new political party in

Arkansas; 2) a declaration that the May 7 deadline set out § 7-1-101(1)(B) was the operative deadline; 3) a declaration that neither § 7-1-101(1)(B) nor § 7-7-203(g) provided a deadline for a new party to participate in a *presidential* preferential primary election; and, 4) a declaration that the Secretary's refusal to accept the May 6 petition violated the Arkansas Civil Rights Act of 1993.

A hearing was held on May 9, 1996, just three days after the lawsuit was filed. On May 14, 1996, one week before the State's preferential primary election, the trial judge issued a letter opinion in which he held that the controlling deadline was January 2, 1996, pursuant to § 7-7-203(g). The judge further held that the legislature did not intend to exempt new parties wishing to participate in *presidential* preferential primaries from the January 2 deadline. Finally, the judge held that no violation of the Arkansas Civil Rights Act had occurred. The letter ruling was memorialized in an order entered May 17, 1996 and it is that order from which the appellants bring their appeal.

The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the General Assembly. *Pugh* v. *St. Paul Fire & Marine Ins. Co.*, 317 Ark. 304, 877 S.W.2d 577 (1994). As a guide in ascertaining legislative intent, we often examine the history of the statutes involved, as well as the contemporaneous conditions at the time of their enactment, the consequences of interpretation, and all other matters of common knowledge within the court's jurisdiction. *City of Little Rock* v. *AT&T Comm.*, 318 Ark. 616, 888 S.W.2d 290 (1994); *Mears* v. *Arkansas State Hospital*, 265 Ark. 844, 581 S.W.2d 339 (1979). A brief review of legislative history in this case shows the genesis of the conflict between § 7-1-101(1)(B) and § 7-7-203(g).

1971 Legislation

The first conflict between the statutes appeared after the passage of Acts 261, 347 and 829 of 1971. Act 261 established a deadline which fell during the month of May under § 7-1-101(1)(B). Acts 347 and 829 established a deadline which fell during the month of March under § 7-7-203(g).

1977 Legislation

In 1977, a federal court ruled that the conflict between § 7-1-101(1)(B) and § 7-7-203(g) rendered the new-party-petition dead-

line vague and unenforceable. *American Party of Arkansas* v. *Jernigan*, 424 F. Supp. 943 (E.D. Ark. 1977). Special note was made of the confusion engendered by piecemeal amendment of the State's election laws. In response to the federal court ruling, the legislature passed Act 888 of 1977. The Act established an identical deadline for both § 7-1-101(1)(B) and 7-7-203(g): the first Tuesday in May before the preferential primary. For the moment, the conflict was resolved.

1987 Legislation

Ten years later, a new set of significant election laws was enacted. Act 123 of 1987 created a separate and distinct *presidential* preferential primary to be held the second Tuesday in March (the preferential primary for state and county offices was scheduled two weeks before the second Tuesday in June). Section 1 of the Act contained the requirements for forming a new political party with the purpose of participating in the presidential primary. The petition deadline was the second Tuesday in November in the year preceding the presidential primary. The legislature did not change the "first Tuesday in May" deadlines contained in § 7-1-101(1)(B) and § 7-7-203(g). However, language was inserted into those statutes to show that they were inapplicable to preferential *presidential* primary elections. Section 7-1-101(1)(B) now began with the phrase "except in preferential presidential primary elections..." and § 7-7-203(g) now ended with the phrase "this section does not apply to preferential presidential primary candidates."

In the same legislative session, the General Assembly passed Act 248 of 1987 and it is here that we see the origin of the present conflict. Without explanation, § 7-7-203(g) was amended to read, in pertinent part, as follows:

> The petitions shall be filed with the Secretary of State no later than twelve o'clock (12:00) noon on the first Tuesday in the fourth calendar month before the preferential primary election.

Act 248 not only changed the statute's May deadline to a January deadline, it removed all language excepting *presidential* primaries from the statute's application. Thus, at the end of 1987, election laws pertaining to new-party-petition deadlines were in hopeless conflict. One law imposed a November deadline for parties wishing to run a candidate in the presidential primary; another

law imposed a May deadline but excepted presidential primaries; and a third law imposed a January deadline with no exceptions.

1989 Legislation

Two years later, some of this confusion was alleviated. Act 700 of 1989 repealed those parts of Act 123 of 1987 pertaining to presidential primaries. Thus, the separate and distinct presidential primary, along with the November deadline, ceased to exist. Sections 7-1-101(1)(B) and 7-7-203(g) continued in full force and effect. However, even though it was no longer necessary, each statute continued to reflect that its provisions were inapplicable to presidential primaries. In the case of § 7-1-101(1)(B), it is clear that the legislature simply failed to address the further necessity of the presidential-primary exception. In the case of § 7-7-203(g), the presence of the presidential-primary exception was more puzzling. Act 248 of 1987 completely removed all such language from the statute. Yet the following phrase, somewhat modified from its original form, appeared in the Arkansas Code version of the statute:

> this *sub*section does not apply to preferential presidential primary *elections*. (Emphasis added to show modification of language).

See Ark. Code Ann. § 7-7-203(g) (Supp. 1987). See also the 1989, 1993, and 1995 Supplements and the 1993 Replacement volume.

1995 Legislation

We arrive now at the contemporary legislation that was spawned by this history. Three Acts pertaining to election laws were passed by the legislature in 1995. The first, Act 901, was passed for the purpose of establishing state-supported primary elections.[1] Although Act 901 did not purport to amend § 7-7-203(g), it set out the January deadline and, inexplicably, added the type of language which had been deleted by Act 248 of 1987: "this subsection does not apply to preferential presidential primary elections." This language is identical to that contained in the Arkansas Code beginning in 1987.

---

[1] The Eighth Circuit had just decided that political parties could not be required to pay for their own primaries. *Republican Party of Arkansas* v. *Faulkner County*, 49 F.3d 1289 (8th Cir. 1995).

Acts 946 and 943 were passed for the purpose of complying with the National Voter Registration Act of 1993. See 42 U.S.C. §§ 1973gg to gg-10 (Supp. 1996). Neither Act purported to amend § 7-1-101(1)(B), yet they each reiterated the May deadline and the statute's presidential-primary exception. These Acts were approved two days after Act 901 was approved.

With this history in mind, we turn to our analysis of the issues. We address first the language of both statutes, which excepts presidential primaries from their application. The exception is superfluous in both cases. It is held over from a time when it was necessary to distinguish between presidential and nonpresidential primaries. Once Act 700 of 1989 did away with separate presidential primaries and their corresponding November deadline, the exception contained in § 7-1-101(1)(B) and § 7-7-203(g) was no longer necessary. Words that the legislature has inadvertently left in a statute and that are unnecessary or serve no useful purpose may be disregarded. *City of Fort Smith* v. *Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993); 2A N.J. Singer *Sutherland Statutory Construction*, § 47.37 (5th ed. 1994). Further, repeal of one act may render provisions of another act meaningless. *Witt* v. *Arkansas Game & Fish Comm'n*, 195 Ark. 21, 110 S.W.2d 704 (1937).

We also note that, in the case of § 7-7-203(g), the presidential-primary exception appears to have been included by mistake. As previously stated, the legislature eliminated the exception in Act 248 of 1987. Nevertheless, it was erroneously included in the Code beginning with the 1987 Supplement. In drafting Acts 946 and 963 of 1995, the legislature obviously looked to the Code provisions. The language used in those Acts does not reflect the original language contained in Act 123 of 1987. It mirrors the modified version of the exception which erroneously appeared in the Arkansas Code. We are reluctant to interpret a statute in a manner contrary to its express language, but we cannot allow a drafting error or codification error to circumvent legislative intent. *Rosario* v. *State*, 319 Ark. 764, 894 S.W.2d 888 (1995); *Cox* v. *City of Caddo Valley*, 305 Ark. 155, 806 S.W.2d 6 (1991).

Finally, the legislature could not have intended that new parties wishing to run a candidate for president be completely exempt from any petition deadline. The appellants admitted to the trial court that some type of deadline was necessary, as a practical matter. We will not adopt an interpretation of the law that leads to

an absurd result. *Henson* v. *Fleet Mtg. Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995). We therefore hold that the legislature did not intend to except presidential primaries from the application of the new party petition deadlines in these statutes, § 7-7-203(g) in particular.

We now turn to the question of which deadline must prevail. The statutes are in hopeless conflict, so one must control and one must yield. The appellants urge us to adopt the approach we have often taken when two statutes are in conflict with each other, i.e., the latter act controls. See *Gibson* v. *City of Trumann*, 311 Ark. 561, 845 S.W.2d 515 (1993); *Roberts* v. *Tice*, 198 Ark. 397, 129 S.W. 2d 258 (1939). They point to the fact that Acts 946 and 963 of 1995, which set out the May deadline, were passed two days later than Act 901 of 1995, which sets out the January deadline. We decline to make a rigid application of the "last passed" rule in this case. In *Horn* v. *White*, 225 Ark. 540, 284 S.W.2d 122 (1955), we observed that the rule must yield when its application would undermine legislative intent. We stated the following:

> Where Acts passed at the same session contain conflicting clauses, the whole record of legislation will be examined to ascertain the Legislative intent, and such intent, if ascertained, will be given effect, regardless of priority of enactment.

It is also noteworthy that, since 1987, the only enactments of the deadlines in either statute were in the nature of nonamendatory reenactments. Act 241 of 1991 and Acts 946 and 963 of 1995 merely retained the May deadline originally established in Act 123 of 1987. Act 901 of 1995 merely retained the January deadline from Act 248 of 1987. When an act amends the law, portions of the law that are not amended but simply retained are not thought of as new enactments. *Peterson Produce Co.* v. *Cheney*, 237 Ark. 600, 374 S.W.2d 809 (1964). Resorting to the "last passed" rule under such circumstances would elevate mechanical application over thoughtful analysis.

In divining the intent of the legislature, we may construe the statutes in question by looking to all laws on the subject, viewing them as a single system and giving effect to the general purpose of the system. *Hercules, Inc.* v. *Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995); *Pace* v. *State Use Saline County*, 189 Ark. 1104, 76 S.W.2d 294 (1934). When we view our State's system of election

laws as a whole, it is clear that the January deadline contained in § 7-7-203(g) would most likely serve the intention of the legislature.

The May deadline contained in § 7-1-101(1)(B) is virtually unworkable under Arkansas's scheme of election laws. Political party nominees in special or general elections must be selected first at a primary election. *Lewis* v. *West*, 318 Ark. 334, 885 S.W.2d 663 (1994). In 1996, the preferential primary election fell just two weeks after the May 7 deadline established by § 7-1-101(1)(B). A potential political party submitting its petition on May 7 could not, from a practical standpoint, have participated in the primary process. Jacque Alexander, Director of Elections for the Secretary of State, testified below that her office had needed thirty days to review the 28,546 signatures submitted in the original petition. The January deadline would allow a proper review of petition signatures; a May deadline would not. Additionally, various statutory deadlines that peaceably coexist with a January 2 deadline would be rendered meaningless if the May 7 deadline prevailed. See Ark. Code Ann. § 7-7-203(c) (Supp. 1995) (party pledges and filing fees in March and April); Ark. Code Ann. § 7-7-203(d) (Supp. 1995) (certification of candidates in March); Ark. Code Ann. § 7-7-305(b) (Supp. 1995) (drawing for ballot positions in April); Ark. Code Ann. § 7-5-418(a) (Supp. 1995) (early voting beginning on May 6). Interpretation of a statute that leads to absurd or unworkable consequences will be rejected. *Henson* v. *Fleet Mtg. Co.*, *supra*; *Horn* v. *White*, *supra*.

The appellants argue that the trial judge invaded the province of the legislature by considering the wisdom or expediency of the statutes involved. It is true that courts must take care when interpreting statutes to avoid overstepping the bounds of the judiciary function. However, that was not done in this case. The trial court was faced with the task of choosing between two conflicting statutes. It was proper, and in fact necessary, for the court to consider the practical effect of choosing one statute over another.

Finally, we observe that the last purposeful, unadulterated enactment of a new-petition deadline, which was not the product of a mere restatement of existing law, occurred in Act 248 of 1987. That act established a January deadline with no exceptions of any kind.

In light of the foregoing, we are convinced that the

deadline contained in § 7-7-203(g) best reflects the intention of the legislature. Since that deadline for purposes of 1996 would have been January 2, and since the appellants did not file a meritorious petition by that date, they failed to qualify as a new political party.

The appellants conceded in oral argument that the viability of their claim under the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §§ 16-123-101 to 108 (Supp. 1995) was dependent upon our ruling with regard to the statutory deadline. In light of our holding, it is not necessary to address the appellants' civil rights claims.

In closing, we note that the relief sought by the appellants in this case is unusual. They do not wish to hold a primary. Rather they ask that we allow them to hold a convention for the purpose of selecting candidates for the general election in November, much the way a vacancy in office is filled. See Ark. Code Ann. § 7-7-104(a)(1) (Repl. 1993). Since we are holding against the appellants on the deadline question, we do not reach the issue of whether such a remedy is available, in light of *Lewis* v. *West*, *supra*.

Affirmed.

DUDLEY, J., not participating.

Antwan Terrell SCOTT *v.* STATE of Arkansas

CR 96-20 924 S.W.2d 248

Supreme Court of Arkansas
Opinion delivered July 8, 1996

J. Blake Hendrix, for appellant.

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

DAVID NEWBERN, Justice. Antwan Terrell Scott was charged with first-degree murder after witnesses identified him as the person who shot and killed Corey Jones. He was convicted by jury and sentenced to forty years imprisonment. He contends on appeal that the Trial Court should have suppressed all evidence of his gang membership and should have granted his motion for mistrial when it was revealed that he smoked marijuana on the evening of the

murder. The conviction is affirmed because the gang-affiliation evidence was admissible to show the motive for the crime and the evidence of drug use was initially brought out by defense counsel during its case-in-chief.

On the evening of September 7, 1994, William Watkins, an officer with the Little Rock Police Department, received a disturbance call concerning the discharge of firearms. Officer Watkins responded to the call and found three young men standing over the body of the victim, Corey Jones. Mr. Jones had been fatally shot one time in the chest with a small caliber firearm.

Detective Ronnie Smith was assigned to the case and questioned the witnesses to the shooting. As a result of the investigation, the police determined that Mr. Scott was the shootist. Mr. Scott, who was seventeen years old at the time, was transported to the police station by a school resources officer on September 19, 1994. He was mirandized and questioned on his role in the shooting.

Although Mr. Scott initially denied being at the party, and later denied his role as the shootist, he ultimately admitted that he fired the fatal shot. According to the statement given by Mr. Scott, he went to the party with two of his friends, left the party, then returned. A short time after his return "about fifteen Crips and Folks started coming in."

Mr. Scott told the police that he and his friends left the house in order to avoid trouble, but approximately five minutes later the victim and several of his friends followed them out of the door. When the victim walked out, Mr. Scott saw him reach for a handgun and reacted by pulling his own .25 caliber pistol, firing one shot, and fleeing from the scene. He explained his actions by saying that he was in fear for his life.

Mr. Scott was charged with first-degree murder. Prior to trial he filed motions *in limine* to suppress any evidence of gang membership. The Trial Court ruled that the evidence would be admissible because it was relevant to the motive for the shooting.

At trial, the State presented evidence that Mr. Scott was a member of the Vice Lords gang and the victim was a member of the Folks gang. Evidence was also presented that the members of the two gangs did not get along. The State theorized to the jury that the gang rivalry was the motive behind the killing.

Mr. Scott's brother, Rodney Scott, testified for the defense. On direct examination he stated that he did not see his brother fire a weapon. However, he admitted that they were in the yard rolling up a marijuana cigarette just prior to the shooting. On cross-examination, he repeated his admissions concerning drug use. Following the last admission, Mr. Scott moved for a mistrial but requested no other relief. The Trial Court denied the motion.

1. Gang affiliation

Generally, evidence of motive behind a criminal offense is admissible. *Cooper* v. *State*, 324 Ark. 135, 919 S.W.2d 205 (1996); *Williams* v. *State*, 321 Ark. 344, 902 S.W.2d 767 (1995). The State is entitled to produce evidence "showing all circumstances which explain the act, show a motive for acting, or illustrate the accused's state of mind." *Smith* v. *State*, 310 Ark. 247, 837 S.W.2d 279 (1992); *Richmond* v. *State*, 302 Ark. 498, 791 S.W.2d 691 (1990). *See also Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert. denied*, 484 U.S. 872 (1987), 490 U.S. 1075 (1989). Where the purpose of evidence is to disclose a motive for killing, anything and everything that might have influenced the commission of the act may, as a rule, be shown. *Cooper* v. *State, supra; See Sullivan* v. *State*, 171 Ark. 768, 286 S.W. 939 (1926).

In Mr. Scott's statement he admitted membership in a gang called the Vice Lords. He then revealed that the victim was a member of the Folks gang, and that the members of the two gangs did not get along. Quawn Marshall, a witness for the State testified that Corey Jones was a Folk and Mr. Scott was a Vice Lord. He stated that the Crips and Folks did not get along with the Vice Lords. Brad Howard, another witness for the State, also identified the victim and Mr. Scott as members of rival gangs. We hold that the evidence of gang membership was relevant to show Mr. Scott's motive for shooting the victim.

Rule 403 of the Arkansas Rules of Evidence allows a trial court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *Passley* v. *State*, 323 Ark. 301, 915 S.W.2d 248 (1996); *Larimore* v. *State*, 317 Ark. 111, 877 S.W.2d 570 (1994). This weighing is a matter left to the Trial Court's sound discretion and will not be reversed absent a showing of manifest abuse. *Passley* v. *State supra; Billett* v. *State*, 317 Ark. 346, 877 S.W.2d 913 (1994). We hold that under these cir-

cumstances the Trial Court properly found that the prejudicial effect of the gang-affiliation evidence was not so great as to outweigh its probative value.

2. Mistrial

On direct examination a defense witness, Rodney Scott, stated that just prior to the shooting "We [including Mr. Scott] was rolling up a sack of weed." On cross-examination, Rodney Scott again mentioned, without an objection by the defense, that they were "rolling up a blunt" in the yard before the shooting occurred. Later in the cross-examination, the State asked Rodney if he drank. Rodney denied drinking anything but again admitted that he smoked "dope", and admitted that his brother, the appellant, smoked "weed" on the night of the shooting.

After the last admission, defense counsel moved for a mistrial on the ground that the evidence of the drug use was not admissible. The Trial Court noted that Rodney mentioned marijuana use on direct examination and denied the motion. Mr. Scott did not ask for any other relief.

■ One who opens up a line of questioning or is responsible for error should not be heard to complain of that for which one was responsible. *Russell* v. *State*, 306 Ark. 436, 815 S.W.2d 929 (1991); *Berry* v. *State*, 278 Ark. 578, 647 S.W.2d 453 (1983). The record shows that it was defense counsel's direct examination which first elicited testimony concerning drug use. Where similar evidence was previously admitted without objection, the admission of later testimony on the same subject is not prejudicial. *Hooper* v. *State*, 311 Ark. 154, 842 S.W.2d 850 (1992). We have refused to find prejudicial error where the evidence erroneously admitted was merely cumulative. *Griffin* v. *State*, 322 Ark. 206, 909 S.W.2d 625 (1995); *Bunn* v. *State*, 320 Ark. 516, 898 S.W.2d 450 (1995); *Gibson* v. *State*, 316 Ark. 705, 875 S.W.2d 58 (1994); *Snell* v. *State, supra*. Nor will we reverse in the absence of prejudice. *Bunn* v. *State, supra*.

■ Mr. Scott was responsible for bringing the matter of drug use to the attention of the jury. The evidence of which he com-

plains was merely cumulative. Under these circumstances he can show no prejudice.

Affirmed.

DUDLEY, J., not participating.

BORAL GYPSUM, INC., Arkansas Chemicals, Inc., Cross Oil & Refining Co., Inc., Green Bay Packaging, Inc., International Paper Co., Lion Oil Company, Quincy Soybean Company of Arkansas, Acme Brick Company, Aluminum Company of America, and Gaylord Container Corporation *v.* Timothy LEATHERS, in His Official Capacity as Commissioner of Revenues, Arkansas Department of Finance and Administration

96-282 924 S.W.2d 805

Supreme Court of Arkansas
Opinion delivered July 8, 1996
[Petition for rehearing denied September 9, 1996.]

The Rose Law Firm, by: *James H. Druff*, *Stephen N. Joiner* and *Deanna J. Weisse*, for appellants.

Michael J. Wehrle, for appellee.

DONALD L. CORBIN, Justice. Appellant, Boral Gypsum, Incorporated, appeals the judgment of the Pulaski County Chancery Court granting summary judgment to appellee, Timothy Leathers, in his official capacity as Commissioner of Revenues with the Arkansas Department of Finance and Administration (DF&A). The chancellor's order ruled that appellant's payment in-kind of compressor fuel diverted from a natural gas pipeline to NorAm Gas Transmission Company (NGT) (formerly known as Arkla Energy Resources Company), the transporter of the gas and owner of the pipeline, is subject to Arkansas use tax. Appellant raises two points for reversal of that order and asserts jurisdiction of the appeal lies in

this court because statutory interpretation is required. We find merit to the first point and reverse and remand.

The present case is a consolidation of four cases below involving a total of ten taxpayers-plaintiffs-appellants: Boral Gypsum, Inc.; Arkansas Chemicals, Inc.; Cross Oil & Refining Co., Inc.; Green Bay Packaging, Inc.; International Paper Co.; Lion Oil Co.; Quincy Soybean Company of Arkansas; Acme Brick Co.; Aluminum Company of America; and Gaylord Container Corporation. Pulaski County Chancery Court Cases E-94-5607, E-94-7096, and E-95-0657 were consolidated into appellant Boral Gypsum's case, E-94-2629. The operative facts are essentially identical in each case, save the particular amounts of tax. Therefore, the chancellor focused on the facts in appellant Boral Gypsum's case when drafting the order appealed. All ten appellants filed a joint notice of appeal, followed by a single brief on appeal. The brief follows the chancellor's approach in focusing on the facts of appellant Boral Gypsum's case. We do likewise in our opinion, using the word "appellant" to refer specifically to Boral Gypsum, but applying generally to the remaining nine appellants.

Appellant uses natural gas to manufacture sheetrock at its plant in Nashville, Arkansas. The gas is supplied by companies located outside Arkansas and transported to appellant's plant by NGT through NGT's interstate pipeline. In order to maintain the correct pressure in the pipeline, NGT diverts gas traveling through the pipeline to compressor stations, where the gas passes through a regulator to reduce its pressure and then is immediately burned. This diverted gas is known as "compressor fuel" and is the subject of this appeal.

The parties stipulated that when appellant purchases gas from out-of-state suppliers such as Continental Natural Gas Company in Oklahoma, the supplier's single invoice itemizes separately the amounts of gas and compressor fuel purchased. Thus, appellant purchases the compressor fuel along with the gas from a supplier, and the gas and compressor fuel then begin transportation to appellant's plant through NGT's pipeline. During transport, NGT diverts and uses the gas known as compressor fuel at its compressor stations, some of which are located in Arkansas. Consequently, when appellant receives the gas at its plant, it actually receives a lesser amount of gas than the total amount it purchased from the supplier. The compressor fuel, although purchased from a third-party supplier, is

appellant's payment in kind to NGT pursuant to a tariff authorized by the Federal Energy Regulatory Commission (FERC). According to the terms of the FERC tariff, NGT receives the compressor fuel from appellant at the point of receipt at its pipeline.

In 1993, appellee issued assessments for use tax due on appellant's payment in-kind of compressor fuel for the previous three years, January 1990 through December 1992. Appellant protested the assessment and requested an administrative hearing. The administrative law judge upheld the assessment, and appellee refused appellant's request to revise the assessment. Appellant paid the assessment under protest and filed this suit for a refund pursuant to Ark. Code Ann. § 26-18-406 (Repl. 1992). The chancellor heard the case on stipulated facts and cross motions for summary judgment, ultimately granting summary judgment to appellee. This appeal followed.

Our standard for review of a summary judgment is whether the evidentiary items presented by the moving party in support of the motion left a question of material fact unanswered and, if not, whether the moving party is entitled to judgment as a matter of law. *Baker* v. *Milam*, 321 Ark. 234, 900 S.W.2d 209 (1995). We view all proof in the light most favorable to the party opposing the motion, resolving all doubts and inferences against the moving party. *Id.* When the facts are undisputed, we simply determine whether the movant was entitled to judgment as a matter of law. *Equity Fire & Casualty Co.* v. *Needham*, 323 Ark. 22, 912 S.W.2d 926 (1996).

Appellant's first argument for reversal is that the trial court erred in ruling that the compensating or use tax statute, Ark. Code Ann. § 26-53-101 to -138 (1987 and Supp. 1995), supports taxing appellant for compressor fuel. Appellant contends that it should not be subject to use tax on compressor fuel that is exclusively owned and used by NGT to transport appellant's natural gas.

The stipulated facts are that appellant purchased natural gas from out-of-state suppliers who billed appellant in a single invoice for all natural gas purchased, including the compressor fuel. Attached to the stipulations was an invoice from Continental Natural Gas Company in Oklahoma to appellant itemizing separately the natural gas and the compressor fuel. According to the specific terms of the FERC tariff, NGT received the compressor fuel from Boral

at the point where it was delivered to NGT's pipeline.

Appellant contends that, because the compressor fuel is delivered to NGT outside the State of Arkansas before transportation ever begins and because NGT is the owner of the compressor fuel and the party who burns the fuel at its compressor stations within Arkansas, appellant is not the owner of the compressor fuel and does not use the compressor fuel in Arkansas and should, therefore, not be subject to use tax. This argument is consistent with the terms of the FERC tariff, whereby NGT takes receipt of the compressor fuel from appellant at NGT's pipeline.

Appellee responds that it is not NGT's use of the compressor fuel that it seeks to tax, rather it seeks to tax appellant's use of the compressor fuel as payment to NGT for transporting appellant's gas to its plant in Nashville. Appellee maintains that, under section 26-53-102(6)(A), there is no requirement for the imposition of use tax that title or possession of property be transferred; rather, all that is required is a transfer of the right to use the property. Appellee also relies on *American Television Co., Inc.* v. *Hervey*, 253 Ark. 1010, 490 S.W.2d 796 (1973), to support this contention.

Appellant strengthens its argument with the claim that because appellee admitted that appellant's partial cash payments of the tariff to NGT were not subject to use tax, likewise the in-kind payment of compressor fuel should not be taxed. We agree with this contention. Appellee did indeed state below that, if NGT had charged appellant for the compressor fuel, then the payment to NGT would not be taxable under the gross-receipts tax as the payment would constitute a transportation charge billed by a transporter other than the seller. This is a correct statement of the law according to DF&A's Gross Receipts Tax Regulation GR-18.A, which provides that transportation costs paid to an independent carrier other than the seller of the goods do not constitute part of the gross receipts of the sale. When the transportation costs are paid to the seller of the goods, however, they do constitute part of the gross receipts of the sale and are thus subject to gross-receipts tax. *Pledger* v. *Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852, *cert. denied*, 113 S. Ct. 82 (1992). We have recently reiterated this general concept in *Weiss* v. *Best Enterprises, Inc.*, 323 Ark. 712, 718, 917 S.W.2d 543, 546 (1996): "However, since the non-taxable service was included as part of the total consideration received..., the charge for services constitutes part of the gross proceeds, and

the entire proceeds are subject to taxation." Thus, we agree that if appellant had paid NGT cash rather than in-kind with compressor fuel, the cash payment would not be subject to gross-receipts tax, and the in-kind payment would likewise not be taxable.

While recognizing that imposition of the use tax does not require a transfer of ownership or possession, *see Hervey*, 253 Ark. 1010, 490 S.W.2d 796, we are nevertheless unwilling to extend application of the use tax to the facts of this case for two reasons. First, the transfer of ownership as well as the right to use the compressor fuel occurred in Oklahoma, not in this state. Section 26-53-106(a) levies the use tax on uses of tangible personal property in this state. Second, even assuming arguendo that the transfer occurred in Arkansas, appellant's payment in-kind of compressor fuel was a direct payment to NGT as compensation for the cost of transporting appellant's gas from Oklahoma to its plant in Nashville, regardless of the fact that appellant actually purchased the compressor fuel from a third-party supplier. Thus, even if the transaction occurred in Arkansas, it would not be taxable under the gross-receipts tax. This is a significant assurance that there is not an avoidance of tax on these facts. If a cash payment of transportation costs is not taxable, an in-kind payment should likewise not be taxable. That appellant purchased the compressor fuel from a third-party supplier and then paid the compressor fuel in-kind to NGT does not negate the fact that it was a direct payment of transportation costs to a transporter other than the seller.

If we were to follow appellee's argument that appellant's use of the compressor fuel (as a form of making payment) was taxable, we would be expanding the reach of the use tax beyond its scope and perhaps indefinitely. We are not willing to make such a broad extension of the scope of the tax; such an extension is better left to the General Assembly. Accordingly, we conclude the trial court erred in granting summary judgment to appellee, and we need not address appellant's remaining sub-points in support of its claim that it is not subject to use tax.

Appellant's second argument for reversal is that the trial court erred in holding that it was subject to the gross-receipts tax for the compressor fuel at issue here. Appellant refers to certain language in the trial court's order as confusing because it is an analysis of gross-receipts tax law. Because appellee never assessed a gross-receipts tax against appellant, we need not address this argument.

The order granting summary judgment is reversed, and the case is remanded to the trial court with directions to enter summary judgment for appellant.

DUDLEY, J., not participating.

Donnietha BRADFORD *v.* STATE of Arkansas

CR 96-5 927 S.W.2d 329

Supreme Court of Arkansas
Opinion delivered July 8, 1996

Mikke Connealy, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Donnietha Bradford contests her convictions for capital murder, kidnapping, and aggravated robbery and her sentence of life imprisonment without parole. She argues insufficiency of the evidence, breach of her Fifth and Sixth Amendment rights as they pertain to her statements to police, and failure of the trial court to give certain instructions to the jury relating to termination of her accomplice status. Because we conclude that her Sixth Amendment rights were violated in connection with her third statement to police officers, we reverse the convictions and remand for a new trial.

On June 1, 1994, Blytheville police officers were called to the house of Lester Frazier. When they arrived at the house, they found that it had been ransacked, that there was considerable blood on the premises, and that Frazier, a 79-year-old man, was missing. Three days later, Frazier's body was discovered in the Mississippi River south of Osceola. According to the medical examiner, Frazier's death was due to a fractured skull caused by a blunt force. Defensive wounds were found on Frazier's right hand.

On Friday, July 22, 1994, Donnietha Bradford was arrested in connection with Frazier's murder. She was instructed of her *Miranda* rights, and she executed a waiver of rights form at 6:20 p.m. that same Friday. A recorded statement was taken more than four hours later. In that statement, she related that she had a conversation with Rodney Barnett on May 24, 1994, at an Arby's restaurant in Blytheville. She stated that Barnett asked her if she planned to rob Frazier. She informed him that if she had intended to rob Frazier, she would have done so. Barnett replied, "I'll get him." Barnett told her that he knew Frazier's family and that the family had money.

A week later, Barnett told her that he had killed the old man, but gotten no money. She stated that Barnett told her that he cut the screen on Frazier's door and that when Frazier opened the door, he knocked him down. He proceeded to hit Frazier over the head and ask where his money was. Barnett ransacked the house looking for the money, but he could not find it. At that point, he walked across the street to his father's house and got his car. He forced Frazier into the car and drove him to the river. Once they arrived at the river, Barnett took a rock and repeatedly hit Frazier over the

head with it. According to her statement, about a month later, she visited with Barnett at Coleman's Combo in Blytheville. Barnett inquired if Bradford had said anything to anybody about the murder. When she answered "no," he said he wanted to keep it that way. He patted his waistband, indicating that he had a gun.

Approximately an hour and a half after the first interview, the police officers renewed their questioning of Bradford. Bradford gave a second statement in which she added that she had borrowed a pistol from an acquaintance, Frankie Milton, the night before Frazier was murdered. The pistol was inoperable because the cylinder was "broken off."[1] She stated that she borrowed the pistol because she had been threatened by another man. She stated that the next day she talked with Barnett, and she let him borrow the gun. Barnett told her that he had been watching Frazier's house because he was going to rob him. He asked Bradford if she was going to go with him, and she answered that she did not know. Thirty minutes later, they walked to Frazier's house. She saw Barnett approach the front door and begin to cut the screen so that he could unlatch the door. At that point, Bradford left, she stated, because she did not want to rob the man. Later, she returned to Frazier's house to see what Barnett was doing. She stated that she saw the screen door wide open and the front door cracked open. A few minutes later, the door slammed and Barnett began turning the lights off in the house. She walked back down the street and returned to Frazier's house in her car. She saw Barnett put Frazier into the front seat of his car, which he had backed into the driveway. Barnett then drove away with Frazier.

The next day, she saw Barnett, and he told her that he had killed Frazier. He then gave her a detailed account of the murder which tracked the description that Bradford gave in her earlier statement to the police officers. She added that he told her that he had left the gun he had borrowed from her at the river, but that he would retrieve it. Bradford denied helping transport Frazier to the river. She also denied leaving the gun at the river, acting as a lookout for Barnett, and entering Frazier's house.

On Monday, July 25, 1994, a hearing to determine whether

[1] According to Frankie Milton, the firing pin was missing, and the chamber would not open.

there was probable cause to detain Bradford was held before the Blytheville Municipal Court. Following the hearing, an affidavit for probable cause was issued, bond was set, and the public defender's office was appointed to represent her. Appointment of counsel was noted by the court on the affidavit for probable cause. Shortly after her appearance, another waiver of *Miranda* rights was executed by Bradford, and police officers renewed their questioning of her. At about 6:45 p.m., Bradford gave a more detailed account of the events of May 31, 1994. Her statement was similar to the previous statements, except that in this statement she added that Barnett forced her at knifepoint to search Frazier's house for money. He further pretended to threaten her with the disabled gun in order to scare Frazier. Barnett stated that he was going to take Frazier to the bank to get some money. When Barnett left to get his car, he ordered Bradford to watch Frazier, and she did so. She saw Barnett hit Frazier on the head, and she saw that his head was bloody. She left the house after Barnett drove away with Frazier in the car.

Bradford was eventually charged with the capital murder, aggravated robbery, and kidnapping of Frazier. Prior to trial, Bradford moved to suppress her three statements to police officers. At the *Denno* hearing conducted during the course of the trial, the trial court denied her motion and allowed all three statements to be introduced into evidence. Following a jury trial, the jury returned a verdict of guilty on all three counts, and Bradford was sentenced to life in prison without parole.

I. Insufficient Evidence

We first address Bradford's claim that there was insufficient evidence to support the verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Passley* v. *State*, 323 Ark. 301, 915 S.W.2d 248 (1996); *Williams* v. *State*, 321 Ark. 635, 906 S.W.2d 677 (1995). 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. *Passley* v. *State, supra; Davis* v. *State*, 319 Ark. 460, 892 S.W.2d 472 (1995). Accordingly, this court must address a challenge to the sufficiency of the evidence prior to considering an appellant's other assignments of trial error. *Passley* v. *State, supra; Byrum* v. *State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

When reviewing the sufficiency of the evidence on

appeal, this court does not weigh the evidence but simply determines whether the evidence in support of the verdict is substantial. *Passley* v. *State, supra.* Substantial evidence is that which is forceful enough to compel a conclusion one way or the other and pass beyond mere suspicion and conjecture. *Id.* In determining whether there is substantial evidence, we review the evidence in the light most favorable to the state, and it is permissible to consider only that evidence which supports the guilty verdict. *Id.* Further, circumstantial evidence may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Id.* Whether a reasonable hypothesis exists is for the trier of fact to resolve. *Id.*

At trial, Bradford made the following arguments for her motion for a directed verdict: On the capital murder charge, she argued that the State failed to prove that she acted alone or with others in causing the death of Frazier in the furtherance of a robbery. As to the aggravated robbery charge, she argued that there was no evidence that she threatened or employed force or that she was armed with a deadly weapon. With respect to the kidnapping charge, she contended there was no evidence to support the claim that she restrained the victim in any way.

The State urges that Bradford has changed her argument on appeal in that she now argues she was forced to participate in the robbery and that she never agreed to participate in the crimes. The State adds that this argument is, in reality, not an argument regarding the sufficiency of the evidence to support the conviction but is, rather, an argument that her participation was the result of duress, which requires an acquittal. We disagree with the State. Bradford maintains that the only evidence presented to prove her complicity is her third statement to police officers that she was forced to participate in the crimes and that that evidence is not valid evidence to show that she was an accomplice to the crimes. Accordingly, her argument continues to be that the State's evidence was inadequate to sustain the convictions.

The keystone of the State's case against Bradford was her third statement to police officers. Putting aside for the moment the legitimacy and propriety of that third statement, we hold that the State presented substantial evidence for the jury to find that she committed the crimes. Discounting her duress defense, there was evidence that she discussed the planning of the crime with Barnett,

that she loaned him a pistol to use, that she entered Frazier's house with Barnett, that she was present when Barnett initially struck Frazier on the head, that she searched the house for money, that she watched Frazier while Barnett left to get his car, and that Frazier's head was bleeding when he left the house. There was also much blood on the premises evidenced by photographs which showed the severity of the beating.

The jury did not have to believe Bradford's contention that she acted only out of duress. The jury could reasonably have believed that she voluntarily participated in the robbery attempt, that she voluntarily restrained the victim prior to his kidnapping by Barnett, and that her actions culminated in Frazier's death. Indeed, the jury could well have concluded that the fatal head injury occurred at Frazier's house. Cause of death was a fractured skull, and Frazier's head was bleeding when Barnett placed him in the car.

II. Suppression of Statements

Bradford next argues that the trial court erred in denying her motion to suppress the three statements she gave to Blytheville police officers. She initially asserts that she requested an attorney prior to giving her first statement to the police officers but was denied counsel in violation of her Fifth Amendment rights. The investigating officers testified at the *Denno* hearing, however, that Bradford never requested an attorney. They stated, to the contrary, that she completed the waiver of rights form and that, from all appearances, she understood her rights.

In reviewing a trial court's decision concerning the voluntariness of a custodial statement, this court makes an independent determination based on the totality of the circumstances and does not reverse the trial court unless that court's ruling is clearly against the preponderance of the evidence. *Moore* v. *State*, 321 Ark. 249, 903 S.W.2d 154 (1995). When conflicting testimony concerning the circumstances of a confession is offered, it is within the trial court's province to weigh the evidence and resolve the credibility of the witnesses. *Id.* In the instant case, there was conflicting evidence on whether Bradford requested counsel prior to her statements. The trial court apparently did not find that she requested an attorney. We conclude that this ruling was not clearly erroneous.

Bradford's second suppression argument is that her third incul-

patory statement taken after her probable cause hearing and appointment of counsel should have been suppressed as a result of a violation of her Sixth Amendment right to counsel. She points to the fact that she was arrested on Friday, July 22, 1994 and appeared before the Blytheville Municipal Court on the following Monday, July 25, 1994. At that appearance, the court determined that there was probable cause to support the charges against her. The court fixed bond and appointed the public defender's office to represent her. This action was memorialized in the court's affidavit of probable cause which was executed that same date. Bradford admitted at the *Denno* hearing that she was unaware that the court had appointed counsel for her. The investigating police officers also denied knowledge that Bradford had been appointed counsel. The trial court found, following the *Denno* hearing, that counsel had indeed been appointed for her prior to her third statement but that she had waived the right to counsel before giving that last statement.

The issue before us is whether the municipal court's appointment of counsel at the probable cause hearing curtailed subsequent police interrogation though neither police officers nor Bradford were aware of the appointment and though Bradford waived her *Miranda* rights before the third interrogation. The United States Supreme Court addressed the Sixth Amendment right to counsel in *Michigan* v. *Jackson*, 475 U.S. 625 (1986). That case involved two consolidated cases. One defendant, Bladel, was arraigned on a murder charge and asked at his arraignment that an attorney be appointed for him because of his indigency. The Court appointed counsel and mailed a notice of the appointment to the law firm. Bladel was not told that counsel had been appointed. Before the notice was received, police officers interviewed Bladel and, after advising him of his *Miranda* rights, obtained a confession. Jackson, the other defendant, also asked that counsel be appointed for him during his arraignment on murder charges. The next day, before he had an opportunity to consult with counsel, police officers interviewed him and, again, after advising him of his rights under *Miranda*, obtained a confession. In both cases, the investigating officers were present at the arraignment.

The Michigan trial courts denied the defendants' motions to suppress, but the Michigan Supreme Court reversed. The United States Supreme Court affirmed that reversal. In its decision, the

Court framed the pivotal issue by first stating that the Sixth Amendment provides the right to counsel at postarraignment interrogations which is a critical stage of the proceedings and signals the initiation of adversary judicial proceedings. The question then was whether the defendants effectively waived that right by executing a *Miranda* waiver after arraignment. In the course of its opinion, the Court stated:

> Indeed, after a formal accusation has been made — and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment — the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.
>
> ....
>
> The State points to another factual difference: the police may not know of the defendant's request for an attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

475 U.S. at 632, 634. The Court went on to hold that "[i]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636.

What distinguishes this case from *Michigan* v. *Jackson, supra,* is that in this case, Bradford did not request counsel at her probable cause hearing, but nevertheless the public defender was appointed to represent her without her knowledge. Thus, must a defendant affirmatively invoke her Sixth Amendment right to counsel in order

to be afforded the protections provided by *Michigan* v. *Jackson, supra*? In footnote 6 of *Michigan* v. *Jackson, supra*, the Court stated:

> In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request. *See Brewer* v. *Williams*, 430 U.S. at 404 ("[T]he right to counsel does not depend upon a request by the defendant"); *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962)("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"). Rather, we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation.

465 U.S. at 633.

■ We read *Michigan* v. *Jackson* to stand for the proposition that once the Sixth Amendment right to counsel attaches and once the defendant requests counsel, an ordinary waiver of *Miranda* rights will not suffice to validate a subsequent confession. The same principle should apply to appointed counsel, which is the situation that we have before us. The fact that Bradford was unaware that she was appointed counsel is irrelevant. We note in this regard that defendant Bladel in *Michigan* v. *Jackson, supra*, was similarly unaware. Moreover, police officers under *Michigan* v. *Jackson, supra*, are deemed to be aware of counsel's appointment through imputed knowledge. Once counsel was appointed by the court, knowledge of the appointment was imputed to police officers, and they were under an affirmative obligation to respect it. Just as a police officer who wishes to initiate an interrogation during the custody stage must determine if a request for counsel has been made (*Arizona* v. *Roberson*, 486 U.S. 675 (1985)), simple diligence requires that police officers take pains to learn whether counsel was appointed at a probable cause hearing.

The State relies on *Patterson* v. *Illinois*, 487 U.S. 285 (1988), to support its theory that Bradford waived her right to counsel by executing the *Miranda* waiver prior to the third statement. It is true that in *Patterson*, the defendant was interrogated postindictment and signed a waiver-of-counsel form. But defendant had not requested counsel; nor had one been appointed for him. Thus, the Supreme Court held that the defendant's waiver in *Patterson* was knowing and

intelligent under *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The critical fact, though, that did not exist in *Patterson* but exists in the instant case is that counsel had already been appointed for Bradford, and under *Michigan* v. *Jackson, supra*, knowledge of that fact was imputed to the police officers. The failure of police officers to learn about the appointment and obtain a statement from Bradford that she did not want appointed counsel present at the interrogation is what requires suppression in this case.

Case law in this state also militates in favor of suppression. In *Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988), we held that once the Sixth Amendment right to counsel attached and once counsel had been retained, even if there had been no formal request at the probable cause hearing as in *Michigan* v. *Jackson*, a defendant enjoyed the right to rely on counsel as a medium between himself and the state. *See Maine* v. *Moulton*, 474 U.S. 159 (1985). More significantly, in *Sutherland* v. *State*, 299 Ark. 86, 771 S.W.2d 264 (1989) (per curiam), we held that once counsel had been appointed, any waiver in connection with police-initiated interrogation was invalid under *Michigan* v. *Jackson, supra*, and *Arizona* v. *Roberson, supra*. In the instant case, the Sixth Amendment right to counsel had clearly attached, and counsel had been appointed. Though Bradford never formally requested counsel, the court's appointment provided a medium between herself and investigating officers. Her mere waiver of *Miranda* rights could not equate to a waiver of appointed counsel, a fact of which she was unaware.

The State concedes that *Sutherland* v. *State, supra*, dictates an outcome in favor of Bradford on this issue but urges this court to overrule *Sutherland* on the basis that *Sutherland* does not accurately reflect the opinions of the United States Supreme Court. We decline to do so. *Sutherland* v. *State* seems to fit squarely within the Supreme Court decisions on the issue of when the Sixth Amendment right to counsel attaches and the validity of subsequent *Miranda* waivers. *Michigan* v. *Jackson, supra,* holds that the Sixth Amendment right to counsel attaches when counsel is requested and a subsequent waiver of *Miranda* rights is of no consequence. We perceive no valid reason for not applying the same principle to situations where counsel has already been appointed. *Patterson* v. *Illinois, supra*, is distinguishable on its facts because in that case no counsel had been appointed by the court.

It should be noted that the Arkansas Court of Appeals has recently held that the mere appointment of counsel is not enough. Rather, there must be an affirmative invocation of the right to counsel in order to invalidate a later confession. *See Lanes* v. *State*, 53 Ark. App. 266, 922 S.W.2d 349 (1996). That decision is in direct conflict with our decision today. Accordingly, we overrule *Lanes* v. *State* on that point.

We further note that Rule 8 of the Arkansas Rules of Criminal Procedure dictates a reversal in this case. Rule 8.2 provides that the trial court shall appoint counsel to represent an indigent defendant at the first appearance, if the right is not knowingly and intelligently waived. An appointment of counsel was made here. Rule 8.3 provides that upon the first appearance of the defendant before the judicial officer, and after the defendant is advised of his rights:

> No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused assistance of counsel.

Thus, under our rule, an attorney for an indigent defendant should be appointed at the probable cause hearing, or the State must show that right to have counsel appointed at the hearing was specifically waived. *See Sutton* v. *State*, 262 Ark. 492, 559 S.W.2d 16 (1977).

There is a third issue raised by Bradford in this case. Nevertheless, because it is somewhat speculative as to whether the issue of alleged trial court error in not giving a certain instruction — AMCI2d 601 — will reoccur on retrial, we will not address the point. Suffice it to say, that where any evidence to support an instruction is before the jury, that instruction must be given. *State* v. *Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995).

Reversed and remanded.

DUDLEY, J., not participating.

Kirk FILES *v.* ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

95-952 925 S.W.2d 404

Supreme Court of Arkansas
Opinion delivered July 8, 1996

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Christopher O. Parker*, for appellant.

Robert L. Wilson and *Maria L. Schenetzke*, for appellee.

ROBERT L. BROWN, Justice. Appellant Kirk Files appeals the denial by the appellee, Arkansas State Highway and Transportation Department (Department), of his application for a billboard permit on land bordering Interstate Highway 40 in Brinkley. His arguments on appeal are twofold: the Department had no authority to question city zoning for the property in question, and the Department's hearing officer erred in finding that the purpose behind the

city zoning was to permit the erection of billboards. The circuit court affirmed the hearing officer's decision. We affirm the circuit court.

On November 9, 1992, the County Court of Monroe County ordered the annexation of 58.51 acres of land owned by the Duke family into the City of Brinkley. On December 15, 1992, the City of Brinkley approved the annexation and designated the property as C-2, which was Highway Commercial under the city ordinances. On March 1, 1993, Kirk Files, Inc., purchased the land from the Duke family. Kirk Files already owned several billboards on land along I-40 but within the city limits of Brinkley, and on March 11, 1993, he applied to the Highway Department for a permit to place a billboard on the purchased property.

On May 4, 1993, the Department denied Files's application for a billboard permit. The stated reasons for the denial were the sign site was not located on zoned or unzoned commercial or industrial land as defined by Highway Commission regulations, and, secondly, the land was annexed and zoned commercial by the City of Brinkley primarily for the purpose of erecting billboards, which contravened the policy expressed in the Federal and State Highway Beautification laws.

Files contested the Department's denial and requested a hearing. A hearing was held before a designated hearing officer, and Files testified that at the time he purchased the land at issue, it lay within the city limits of Brinkley and was zoned C-2, which under the City Ordinance is a Highway Commercial District. Files implicitly admitted that at the time of purchase the property was not commercially developed, and he stated that he had no present plans to develop the property. Files further testified that he owned other land along I-40 within the city limits of Brinkley and that he had placed billboards on those properties. He stated that none of those tracts had been commercially developed except for one which contained a retirement facility. He testified that he never approached any city official in Brinkley about the annexation and rezoning of the Duke land prior to his purchase.

Larry Long, section head of the Department's Environmental Division — Beautification Section, testified that, although the City of Brinkley had zoned the Duke land C-2, he did not consider that zoning to be valid commercial zoning for purposes of the outdoor

advertising regulations because the land had been zoned solely to allow billboards. Long further stated that federal regulations gave the Department the authority to look to the intent of the zoning to determine if the zoning was valid under the State and Federal Highway Beautification laws.

At a second hearing, Files again testified and stated that one of the pieces of land where he already maintained a billboard was used for agricultural purposes and was rented on a sharecropping basis. At the time the City annexed that land, he said that a manufacturing plant was to be built on the property. The company, though, went bankrupt. Files added that there was no commercial activity on the proposed site for the billboard, nor on any of the property he owned north of I-40 which had billboards. He stated that the proposed site is served by a dirt farm road. All improvements on the land are for agricultural purposes, and there are no utilities provided, except there is access to electricity and telephone services. Files finally stated that he never informed the Dukes that he would purchase the property if it was zoned commercial and that he had nothing to do with the property's annexation and rezoning. As to the land east of his property, Files testified that it was owned by a neighbor, who is also in the billboard business. That land is zoned C-2, and since 1983, it has never been commercially developed.

Jeff Ingram, a Beautification Coordinator for the Department, testified that the denial decision was based on the fact that there had been no commercial development in the annexed area. He also stated that the land adjoining the proposed site was agricultural and the only non-agricultural activity on that land was the placement of billboards. He admitted that the spread of billboards on farm land along I-40 raised a "red flag" that there was a problem with the zoning. The fact that the city had annexed another tract of land and zoned it commercial when the previous annexations had had no subsequent commercial development created a pattern in his opinion. Ingram further testified that he spoke with Brinkley's building inspector, Wayne Young, who informed him that property annexed into the city was normally annexed as residential property and that it was unusual for the Duke/Files property to be annexed and then commercially zoned. According to Ingram, Young told him that the land was zoned commercial because Files had stated that he wanted to place billboards there.

Larry Long retook the stand and agreed with Ingram's assess-

ment of the billboard proliferation. He also admitted that the Department had not certified Brinkley for comprehensive zoning which would have ended the Department's regulation of signs in the area but would still have permitted the Department to question commercial zoning purely for outdoor advertising.

The hearing officer upheld the Department's denial. In doing so, he found that there was no industrial or commercial development on several tracts of land adjacent to I-40 and inside the city limits of Brinkley, including the Files property. He further found that the evidence showed that the City of Brinkley did not want the responsibility of providing dedicated access or utilities to the Files property to encourage its development, and that Files had no plans to construct access or provide utilities on the land or to develop it in any way, either commercially or industrially. The hearing officer concluded by making these principal points:

> 1. The AHTD Environmental Division's Beautification Section acted within its authority to investigate the circumstances surrounding the City of Brinkley's zoning of Mr. Kirk Files's property for purposes of the Highway Beautification program.
>
> 2. The AHTD Beautification Section had sufficient information and precedent to conclude that the current zoning of this property was for the erection of outdoor advertising and acted properly within their authority under the Highway Beautification Act in denying the application/permit.
>
> 3. It is necessary, when considering an outdoor advertising application/permit for approval, for the Department to review the specifics of the contents of the application and the circumstances behind it to determine if it complies with Federal and state law with respect to the placement of outdoor advertising in zoned or unzoned commercial or industrial areas pursuant to the Regulations, and thereby satisfies the purposes and intent of the Highway Beautification Act.
>
> 4. This property has not been zoned commercial for the purposes of the Highway Beautification program until the zoning procedures outlined in the Cities' zoning ordinances have been satisfied and a final determination of the properties' correct zoning under the Cities' comprehensive zoning

plan has been completed.

Files filed a petition for judicial review of the hearing officer's decision, and the circuit court affirmed that decision.

Files now argues on appeal that the hearing officer erred as a matter of law in finding that the Department could look behind Brinkley's zoning designation and examine the motivation behind that zoning for purposes of the Arkansas Highway Beautification Act. The standard of review for decisions of administrative agencies is well-established:

> Our review is not directed toward the circuit court but toward the decision of the agency recognizing that administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. If we find the administrative decision is supported by substantial evidence and is not arbitrary, capricious or characterized by an abuse of discretion, we uphold it.

Arkansas Dep't of Human Servs. v. *Wilson*, 323 Ark. 151, 155, 913 S.W.2d 783, 785 (1996), quoting *Franklin* v. *Arkansas Dep't of Human Servs.*, 319 Ark. 468, 472, 892 S.W.2d 262, 264 (1995) (citations omitted). The construction of a statute by an administrative agency is not overturned unless it is clearly wrong. *Arkansas Dep't. of Human Servs.* v. *Wilson, supra.* However, where the statute is plain and unambiguous, this court will interpret the statute to mean only what it says. *Id.*

We first look to the policies to be accomplished by the State and Federal Highway Beautification laws. The 1965 Federal Highway Beautification Act (23 U.S.C. § 131 *et seq.*) provides for the control of junkyards and billboards to preserve natural beauty and promote public safety and investment in areas adjacent to the interstate and primary highway systems. In furtherance of the Act's objectives, Congress required states receiving federal funds to establish provisions for the effective control of billboards and junkyards or risk jeopardizing ten percent of those funds. *See* 23 U.S.C. § 131(b). The Arkansas Highway Beautification Act, codified at Ark. Code Ann. § 27-74-101 *et seq.* (Repl. 1994), was adopted with that congressional directive in mind. *See Arkansas State Hwy. Comm'n* v. *Roark*, 309 Ark. 265, 828 S.W.2d 843 (1992). The purpose behind the Arkansas Act is likewise to promote the reason-

able, orderly, and effective display of outdoor advertising, to promote the safety and recreational value of public travel, and to preserve natural beauty. *See* Ark. Code Ann. § 27-74-201 (Repl. 1994).

Files relies on Ark. Code Ann. § 27-74-204 (Repl. 1994), and Department regulations as authority for his argument. Section 27-74-204 states in part:

> (a) [N]othing contained in this chapter shall prohibit the erection and maintenance of outdoor advertising signs, displays, and devices consistent with customary use within six hundred sixty feet (660') of the nearest edge of the right-of-way of interstate, primary, and other state highways designated by the State Highway Commission:
>
> (1) Within those areas which are zoned industrial or commercial under authority of the laws of this state....

A Department regulation reenforces this point. *Regulations for Control of Outdoor Advertising*, Agreement III E. (Arkansas State Highway Commission 1972) (cited hereinafter as "*Highway Regulations*"). There is no statutory definition of what comprises industrial or commercial activity.

Files contends that § 27-74-204(a)(1) is unambiguous and must be interpreted precisely as it reads to give full effect to local zoning actions. While we agree with that stated principle of statutory interpretation, we disagree that the adduced statute decides the issue. This court has held that the Arkansas Highway Beautification Act is remedial in nature and must be broadly construed so to effectuate the purpose sought to be accomplished by its enactment. *Arkansas State Hwy. Comm'n* v. *Roark, supra.* Moreover, the General Assembly has vested the Highway Commission with regulatory authority to enforce the Arkansas Highway Beautification Act. Ark. Code Ann. §§ 27-74-203, 27-74-211(b) (Repl. 1994). And while the Arkansas statute relied on by Files does not define what constitutes valid "commercial activity" for zoning purposes, Highway regulations do define it as excluding "outdoor advertising structures." *Highway Regulations* I.F.1.

Federal regulations make this same point precisely. Zoning actions of the states will be accepted by the Secretary of Transportation for the purposes of 23 U.S.C. § 131(d), but state actions that

are created *primarily* to permit outdoor advertising structures will not be recognized as valid zoning for outdoor advertising control purposes. C.F.R. § 750.708(b).

State Highway regulations also provide that when a city has adopted a certified comprehensive zoning plan and the Department delegates authority over the control of outdoor advertising to the city because of that comprehensive plan, the Department may continue to retain authority to prohibit invalid outdoor advertising. *Revised Highway Regulations*, I. J. A comprehensive zoning plan has not been implemented for Brinkley. But the policy expressed in this regulation is still another example of the Department's express authority to monitor outdoor advertising.

In *Alper* v. *Nevada*, 97 Nev. 5, 621 P.2d 492 (1980), the Nevada Supreme Court examined local commercial zoning and held that the Federal and State Highway Beautification laws should be interpreted broadly and that an inquiry into the status of billboard areas should not be limited to a review of the face of a zoning ordinance. Rather, the Nevada Supreme Court held that the inquiry should include reference to actual as well as contemplated land uses. In reaching its decision, the Nevada Supreme Court focused on federal regulation 23 C.F.R. 750.708(d), which does not recognize commercial zoning created primarily to allow billboards. *See also United Outdoor Advertising Co., Inc.* v. *Business, Transportation and Housing Agency*, 44 Cal. 3d 242, 746 P.2d 877, 242 Cal. Rptr. 738 (1988) (commercial zoning to permit outdoor advertising must have independent validity or will run afoul of 23 C.F.R. § 750.708(b)); *but see Penn Advertising, Inc.* v. *Department of Transportation*, 147 Pa. 624, 608 A.2d 1115 (Pa. Comwlth. 1992) (state statute providing commercial zoning authority was unambiguous).

■ We agree with the analysis of the Nevada Supreme Court and hold that the Department appropriately examined the propriety of the Brinkley zoning ordinance. Some deference must be given to the Department's interpretation of state and federal regulations in this area. The Department's interpretation of its authority enables it to review limited commercial zoning decisions relating to outdoor advertising to determine validity. This fosters the purposes of the Highway Beautification Act and assures compliance with federal law. The General Assembly certainly contemplated that the Department would regulate outdoor advertising in accordance with state and federal law.

Files next contends that there was no substantial evidence to support the hearing officer's finding that the real purpose behind the rezoning was to permit the erection of billboards. It is well-settled that this court must affirm the decision of an administrative agency, if there is substantial evidence of record to support it. *Arkansas Dept. of Human Servs.* v. *Wilson, supra*; *Partlow* v. *Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d 23 (1980). Substantial evidence is valid, legal, and persuasive evidence and such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Arkansas Dep't of Human Servs.* v. *Wilson, supra*; *Partlow* v. *Arkansas State Police Comm'n, supra.*

Here, there is substantial evidence to support the hearing officer's conclusion that the commercial zoning designation was given for the sole purpose of erecting billboards. To summarize that evidence, land with billboards adjacent to the proposed site had been zoned commercial but otherwise were being used only for agricultural purposes. One of these properties had been zoned commercial in 1982 — ten years prior to the zoning of the proposed site — and still had no commercial development. Files candidly acknowledged that he was in the billboard business and that he had no plans to develop the land at issue. In fact, he owned other commercially zoned lands which were used for agriculture and which contained billboards. No dedicated access or services by the city were planned for the Files property. Finally, there is Jeff Ingram's testimony that he was told by a Brinkley building inspector, Wayne Young, that Files wanted the C-2 Highway Commercial designation so that he could place billboards on the property. This evidence more than supports the hearing officer's conclusion. We hold that the evidence sustaining the hearing officer's decision is substantial.

Because we affirm the hearing officer's decision, we need not address the Department's alternative contention that the City of Brinkley's C-2 classification for the Files property was not a final zoning action.

Affirmed.

DUDLEY, J., not participating.

COLONIA UNDERWRITERS INSURANCE COMPANY *v.*
Darrell RICHARDSON

96-330 924 S.W.2d 808

Supreme Court of Arkansas
Opinion delivered July 8, 1996

Huckabay, Munson, Rowlett & Tilley, P.A., by: *John E. Moore* and *Julia L. Busfield*, for appellant.

Gregg, Hart & Farris, by: *Phillip Farris*, for appellee.

ANDREE LAYTON ROAF, Justice. This case involves an interpretation of the underinsured motorist coverage statute. Ark. Code Ann. § 23-89-209 (Supp. 1995). Appellee Darrell Richardson was involved in an accident with an underinsured vehicle. At the time of the accident, Richardson was insured by appellant Colonia Underwriters Insurance Company (Colonia). Richardson filed suit against Colonia alleging that he was entitled to underinsured motorist coverage in the amount of $25,000. The trial court granted summary judgment in favor of Richardson on the basis that he was entitled to underinsured motorist coverage by operation of

law. We reverse and remand.

The relevant facts in the instant case are not in dispute. On July 13, 1992, Richardson purchased an insurance policy for a 1982 Oldsmobile Cutlass from Colonia. At that time, he rejected underinsured motorist coverage by signing the following statement:

> I have had Underinsured Motorist Coverage explained to me and fully understand it. I reject Underinsured Motorist Coverage and understand that my policy will not contain this coverage when issued or renewed. However, I may request to add the coverage later.

Richardson was issued a policy with a term from July 13, 1992, to July 13, 1993. On November 13, 1992, Colonia issued two General Change Endorsements showing that his policy had been amended to add insurance on a 1991 Isuzu Trooper and a 1982 Datsun truck. The 1982 Oldsmobile remained on the policy after the addition of the two new vehicles.

On January 13, 1993, Richardson was injured when he was struck by a truck owned by Big "M," Inc. The liability carrier for Big "M" ultimately paid Richardson $105,000, the total limits of its policy. Richardson, however, claimed bodily injury and damages in excess of Big "M" 's insurance coverage. In March 1994, Richardson made demand upon Colonia to pay the underinsured motorist coverage; Colonia refused payment. Richardson had never been charged nor had he ever paid a premium for underinsured motorist coverage.

Richardson filed the present action against Colonia on August 19, 1994; he sought the policy limit of $25,000, a 12% penalty, interest from the date of demand, and attorney's fees. Colonia admitted that Richardson made demand for the payment of underinsured motorist coverage; however, Colonia contended that Richardson specifically rejected underinsured motorist coverage.

Subsequently, Colonia moved for summary judgment on the basis that Richardson rejected underinsured motorist coverage and, pursuant to Ark. Code Ann. § 23-89-209(2), that rejection was effective as to substitute vehicles added to his policy. In his response to Colonia's motion, Richardson asserted that any time a new vehicle is insured, a new policy is issued. Richardson asserted that he was not offered underinsured motorist coverage either at the

time that the 1991 Isuzu Trooper was insured or at the time that a 1985 Nissan truck was insured. In addition, Richardson moved for partial summary judgment on the issue of whether underinsured motorist coverage for the 1991 Isuzu Trooper should be implied as a matter of law.

On July 3, 1995, the trial court entered an order granting summary judgment in favor of Richardson. The trial court concluded that the instant case involved the addition of a vehicle to an existing policy rather than the substitution of vehicles on a policy. The trial court further concluded that Richardson's rejection of underinsured motorist coverage was not broad enough to include rejection of underinsured motorist coverage for an amendment to the policy by the addition of another vehicle. The trial court noted that the contract language simply rejected coverage for the policy when issued or renewed; the language was not broad enough to include a substituted or amended policy. Finally, the trial court found that because Richardson was not given the opportunity to reject in writing underinsured motorist coverage on the 1991 Isuzu Trooper and the 1985 Nissan truck, such coverage was implied by operation of law.

A jury trial was held regarding the issue of damages, and the jury returned a verdict in favor of Richardson in the amount of $25,000. On December 7, 1995, judgment was entered, and Richardson was awarded $25,000, prejudgment interest from the date of demand, 12% penalty, attorney's fees, costs, and expenses. On appeal, Colonia contends that the trial court erred in finding that underinsured motorist coverage was implied as a matter of law and in awarding prejudgment interest.

■ The standard for review of a summary judgment is whether the evidentiary items presented by the moving party in support of the motion left a question of material fact unanswered and, if not, whether the moving party is entitled to judgment as a matter of law. *National Bank of Commerce* v. *Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996). We view all proof in the light most favorable to the party opposing the motion, resolving all doubts and inferences against the moving party. *Id.* However, where the operative facts of the case are undisputed, we simply determine on appeal whether the appellee was entitled to summary judgment as a matter of law. *Hertlein* v. *St. Paul Fire and Marine Ins. Co.*, 323 Ark. 283, 914 S.W.2d 303 (1996).

Richardson obtained the initial insurance policy from Colonia in July 1992, the policy was amended in November 1992, and he was injured in January 1993. During that period, Ark. Code Ann. § 23-89-209(a), Underinsured motorist coverage, provided in part:

> Every insurer writing automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicles in this state shall provide underinsured motorist coverage unless rejected in writing by a named insured. . . . *After a named insured or applicant for insurance rejects underinsured motorist coverage, the insurer or any of its affiliates shall not be required to notify any insured in any renewal, reinstatement, substitute, amended or replacement policy as to the availability of such coverage.*

(Emphasis supplied.) We have recognized that this statute requires insurers to provide underinsured motorist coverage to the named insured unless such coverage is rejected in writing by the insured. *Shelter Mutual Ins. Co.* v. *Irvin*, 309 Ark. 331, 831 S.W.2d 135 (1992). It is clear that Richardson rejected underinsured motorist coverage on July 13, 1992. Thus, the question presented in the instant case is whether Colonia was required to notify Richardson of the availability of underinsured motorist coverage when he added vehicles to his policy in November 1992.

We have not previously considered this issue; however, we have addressed comparable issues regarding uninsured motorist coverage and no-fault coverage. In *Lucky* v. *Equity Mutual Ins. Co.*, 259 Ark. 846, 537 S.W.2d 160 (1976), the appellant signed a rejection of uninsured motorist coverage, and he was issued liability insurance on his 1960 Ford truck by the appellee. The appellant continued to renew the policy; however, over five years later a 1964 Ford truck was substituted for the 1960 Ford truck in the original policy. We held that when the parties to an insurance contract agree to a policy endorsement which has the effect of substituting coverage of one automobile for that of another, the transaction constitutes new insurance "delivered or issued for delivery in this State" within the meaning of the uninsured motorist statute. *See* Ark. Code Ann. § 23-89-403 (Supp. 1995); *American Nat'l Property & Casualty Co.* v. *Ellis*, 315 Ark. 524, 868 S.W.2d 469 (1994).

We have recognized that the effect of the decision in *Lucky* was

to require insurers to offer uninsured motorist coverage to the insured upon the event of substituting vehicles even though the insured had previously rejected such coverage. *See Ellis, supra.* At the time *Lucky* was decided, the uninsured motorist statute provided in part:

> [T]he coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.

See Ark. Stat. Ann. § 66-4003 (Repl. 1966). We noted that to accept the construction suggested by the appellee would permit one rejection to be effective for any and every automobile that might be substituted by the insured for the original vehicle. *Lucky, supra.*

In *American Nat'l Property & Casualty Co.* v. *Ellis*, 315 Ark. 524, 868 S.W.2d 469 (1994), we addressed the effect of an amendment to the uninsured motorist statute. The statute was amended to provide in part:

> [T]he coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage, *and this rejection shall continue until withdrawn in writing by the insured.*

(Emphasis supplied.) *See* Ark. Code Ann. § 23-89-403(b) (Repl. 1992). We held that the amendment did not change the law. We observed that if the General Assembly intended to, in effect, overrule the *Lucky* decision, it failed to do so because it said nothing which affected the holding of the case. We stated that we were certain that the General Assembly did not intend that rejection of uninsured motorist coverage in one insurance contract be binding in a subsequent one.

Similarly, we have held that a declaration of automobile insurance issued with a substituted vehicle also requires a second rejection of no-fault insurance under Ark. Code Ann. § 23-89-203 (Repl. 1992). *Fimpel* v. *State Auto. Mut. Ins. Co.*, 322 Ark. 797, 911 S.W.2d 950 (1995). Section 23-89-203 provided for rejection of no-fault coverage by the insured, and it provided:

> (a) The named insured shall have the right to reject in writing all or any one (1) or more of the coverages enumerated in § 23-89-202.

> (b) After the rejection, unless the named insured requests coverage in writing, the coverage need not be provided in, nor supplemental to, a renewal policy.

Although uninsured motorist coverage and no-fault coverage had different purposes, we recognized that both are mandated coverages which must be offered to prospective insureds. Finally, we noted that the *Lucky, supra,* and *Ellis, supra,* cases require a rejection of the mandatory coverage when a new declaration occurs which includes a substituted automobile, and we could "see no reason why that construction should not apply to a second category of mandatory automobile insurance — in this case, no-fault coverage — as well."

In reaching our decision in *Fimpel, supra,* we recognized that the General Assembly amended Ark. Code Ann. § 23-89-203(b) to provide in part:

> (b) After a named insured or applicant for insurance rejects this coverage, the insurer or any of its affiliates shall not be required to notify any insured in any renewal, reinstatement, substitute, amended, or replacement policy as to the availability of such coverage.

See Act 527 of 1995. We concluded that it would be patently unfair to sanction a legislative clarification of a preexisting statute when we had previously construed the effect of mandatory coverage on substituted vehicles contrary to the purported clarification. This language, however, is nearly identical to the language found in the underinsured motorist coverage statute at issue in the instant case.

Further, an Arkansas federal district court and the Eighth Circuit Court of Appeals have addressed a similar issue involving the underinsured motorist statute. *See Warford* v. *State Farm Mut. Ins. Co.*, 69 F.3d 860 (8th Cir. 1995); *Warford* v. *State Farm Mut. Ins. Co.*, 871 F.Supp. 1085 (W.D.Ark. 1994). According to the district court, Warford was involved in an automobile accident in April 1992, and the accident was proximately caused by the negligence of the other driver. At the time of the accident, Warford had automobile insurance issued by State Farm Mutual Insurance Company (State Farm). The limits of the tortfeasor's liability coverage had been exhausted, and Warford made demand upon State Farm for underinsured motorist coverage in the amount of $50,000 contending that such coverage was implied by law in view of State Farm's failure to make such insurance available.

Warford had first obtained insurance in Arkansas on September 2, 1987, for a 1976 AMC Hornet. Warford signed a form which provided in part: "I have been offered Underinsured Motor Vehicle Coverage for bodily injury, with limits up to my automobile bodily injury liability limits, and I reject the coverage entirely." In February 1988, the insurance on the 1976 AMC Hornet was transferred to a 1973 Chevrolet Impala. In August 1988, the insurance coverage on the Impala was transferred to a 1988 Honda Accord. It was undisputed that Warford's Arkansas policy did not contain underinsured motorist coverage and that he had not paid premiums for the coverage.

According to the district court, Warford asserted that the substitution of coverage constituted new insurance under Arkansas case law, and since she did not reject underinsured motorist coverage at the time of the substitution, it was implied by operation of law. State Farm contended that the substitution of the 1973 Impala and then the 1988 Honda for the 1976 Hornet constituted either a "substitute," "replacement," or "amended policy" within the meaning of Ark. Code Ann. § 23-89-203 and required no new rejection.

In concluding that no underinsured motorist coverage was implied by operation of law, the district court stated that the language of the uninsured motorist statute construed in *Lucky*, *supra*, and *Ellis*, *supra*, differed significantly from that contained in the underinsured motorist statute. The court stated that it did not believe the holding in *Lucky* and *Ellis* extended to the underinsured motorist statute. Finally, the court held that the rejection of underinsured motorist coverage obtained from Warford in 1987 was effective and that a second or subsequent rejection was not required when a vehicle was substituted for the original vehicle.

On appeal, the Eighth Circuit affirmed the decision of the district court. *Warford* v. *State Farm Mut. Ins. Co.*, 69 F.3d 860 (8th Cir. 1995). The court concluded that the Arkansas Supreme Court would hold that State Farm did not have a duty to offer Warford underinsured motorist coverage in 1988 after she rejected coverage in writing in 1987. The court further stated that the 1991 amendments to the statute expressly provide that a written rejection is effective as to "any renewal, reinstatement, *substitute*, amended or replacement policy," and the amendments make clear that State Farm had no duty to offer Warford underinsured motorist coverage

after she rejected coverage in writing in 1987.

In the instant case, the trial court relied upon *Lucky* v. *Equity Mutual Ins. Co.*, 259 Ark. 846, 537 S.W.2d 160 (1976), and *American Nat'l Property & Casualty Co.* v. *Ellis*, 315 Ark. 524, 868 S.W.2d 469 (1994), to conclude that Richardson's existing automobile liability insurance would not have applied to the 1991 Isuzu Trooper without insurance having been "delivered or issued in this state." The court found that Richardson was not given the opportunity to reject in writing underinsured motorist coverage when the vehicle was added and that the rejection that Richardson signed was not broad enough to cover and include rejection of coverage for an amendment to the contract by the addition of another vehicle. The trial court stated that the rejection "merely rejects coverage for the policy when issued or renewed." The trial court further found that because Colonia failed to give Richardson the opportunity to purchase, or reject in writing, underinsured motorist coverage on the 1991 Isuzu Trooper, such coverage would be implied by operation of law. The trial court stated that Colonia could not rely on the statute to expand the contractual language of Richardson's rejection to include a substituted, amended, or replacement policy.

■ We hold, however, that the underinsured motorist coverage statute at issue makes clear that "[a]fter a named insured or applicant for insurance rejects underinsured motorist coverage, the insurer or any of its affiliates *shall not* be required to notify any insured in *any* renewal, reinstatement, substitute, *amended* or replacement policy as to the availability of such coverage." Ark. Code Ann. § 23-89-209. In the instant case, Richardson *amended* his policy to add two vehicles after he rejected underinsured motorist coverage. The *Lucky*, *supra*, and *Ellis*, *supra*, cases are simply not controlling because the uninsured motorist coverage statute contained different and much narrower language.

■ In addition, the trial judge mistakenly relied upon his conclusion that the rejection that Richardson signed was not broad enough to include rejection of coverage for an amendment to the contract by the addition of another vehicle. The language in the contract is simply not relevant. In order for underinsured motorist coverage to be implied by operation of law, Colonia must fail to comply with the underinsured motorist coverage statute. *See Shelter Mutual Ins. Co.* v. *Irvin*, *supra*. The trial court seems to have concluded that coverage may be implied by operation of law even if

Colonia is in compliance with the statute. The court, however, cannot force upon the insurance company something that is not present in the statute. *See Ross* v. *United Servs. Auto. Ass'n*, 320 Ark. 604, 899 S.W.2d 53 (1995).

The underinsured motorist coverage statute at issue provides that after a named insured rejects coverage, the insurer is not required to notify the insured in any amended policy as to the availability of such coverage. Richardson rejected underinsured motorist coverage when he purchased his policy, and Colonia was not required to notify him as to the availability of such coverage when his policy was amended. Therefore, there is no basis for underinsured motorist coverage to be implied by operation of law. The summary judgment in favor of Richardson is reversed; Colonia's motion for summary judgment should have been granted.

For its second point on appeal, Colonia asserts, in the alternative, that the trial court erred in awarding prejudgment interest. However, because our resolution of Colonia's first point on appeal disposes of the case, it is not necessary to address the second point.

Reversed and remanded for entry of an order consistent with this opinion.

DUDLEY, J., not participating.

Mary DILLON, Kathleen Inmon, and Dorothy Johnson *v.*
TWIN CITY BANK

95-713 924 S.W.2d 802

Supreme Court of Arkansas
Opinion delivered July 8, 1996

Ogles Law Firm, P.A., by: *John Ogles* and *Hubert W. Alexander*, for appellants.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Susan Gordon Gunter* and *Graham F. Sloan*, for appellee.

ANDREE LAYTON ROAF, Justice. Appellants Kathleen Inmon and Mary Dillon are mother and daughter respectively. Dorothy Johnson is Inmon's aunt. Appellee Twin City Bank, a creditor of Inmon, sued Inmon, Dillon, and Johnson for the alleged fraudulent conveyance of certain property. Inmon and Dillon appeal from the chancellor's ruling that Inmon made fraudulent transfers with the actual intent to hinder, delay, or defraud Twin City Bank. The final decree entered by the chancellor purportedly transferred real property that was involved in the dispute, 7500 Toltec, from Johnson to Inmon. However, after the chancellor made her Findings of Fact

and Conclusions of Law, but prior to her entering the final decree, Johnson deeded the real property to Inmon. We hold that this appeal is moot and dismiss.

An in-depth discussion of the underlying facts of this case is not necessary, since the appeal is moot. In her Findings of Fact and Conclusions of Law, the chancellor determined that cash funds used to purchase two pieces of real property, 13 Woodbriar and 7500 Toltec, were paid by Inmon. The chancellor then determined that 13 Woodbriar was titled in Dillon's name when it was purchased in April 1991. She found that Inmon made deposits in an account in Dillon's name and signed checks with Dillon's name for the construction of 13 Woodbriar. The chancellor found that all cash deposits in Dillon's account and all cash payments for 13 Woodbriar were from funds from the sale of Inmon's father's property and Inmon's alimony. She determined that the purchase of the lot and the construction costs of 13 Woodbriar were fraudulent conveyances from Inmon to Dillon. The chancellor found that all proceeds from the sale of 13 Woodbriar were placed in an account in the name of Dillon. The chancellor found that Inmon purchased 7500 Toltec and had it titled in Dillon's name. She found that funds used to construct Toltec came from the account in Dillon's name that mainly contained the deposit from the sale of 13 Woodbriar. The chancellor concluded that Inmon was the true and equitable owner of 7500 Toltec. The chancellor found that Dillon transferred 7500 Toltec to Johnson and ruled that the deed of 7500 Toltec from Dillon to Johnson should be set aside as a fraudulent conveyance. In sum, the chancellor determined that Inmon fraudulently conveyed funds to Dillon by making deposits in Dillon's checking accounts and purchasing property in her name. She found that the funds were used to build 13 Woodbriar, and the money from the sale of Woodbriar was used in the construction of 7500 Toltec. The chancellor directed Twin City Bank to prepare a precedent regarding the title and ownership of 7500 Toltec and send it to appellants for approval prior to presenting it to the court for entry. Following the entry of the Findings of Fact and Conclusions of Law, Johnson transferred 7500 Toltec to Inmon by quitclaim deed. The deed was recorded on November 15, 1994.

The decree from which appellants appeal was entered on December 16, 1994. The decree states that neither Dillon nor Johnson hold a legal or equitable interest in 7500 Toltec. The

decree states that it operates to pass title of the property to Inmon. However, Johnson voluntarily conveyed 7500 Toltec to Inmon by quitclaim deed prior to the decree being entered.[1] Therefore, this case is moot.

> A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Arkansas Intercollegiate Conference* v. *Parnham*, 309 Ark. 170, 174, 828 S.W.2d 828, 831 (1992). As a general rule, this court does not address moot issues. *Leonards* v. *E.A. Martin Machinery Co.*, 321 Ark. 239, 900 S.W.2d 546 (1995); *Johnson* v. *State*, 319 Ark. 3, 888 S.W.2d 661 (1994). There are some exceptions to the rule that this court does not address moot issues, such as cases which are capable of repetition yet evade review, *see Nathaniel* v. *Forrest City School Dist.*, 300 Ark. 513, 780 S.W.2d 539 (1989), and cases involving the consideration of public interest and prevention of future litigation, *see Duhon* v. *Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990), but these exceptions do not apply to the present case.

Thomas v. *Arkansas Board of Correction*, 324 Ark. 6, 918 S.W.2d 156 (1996). In the present case, the ultimate outcome of the proceedings below, as decreed by the chancellor, was that 7500 Toltec was to be transferred to Inmon. At the time the decree was entered, Johnson already had deeded 7500 Toltec to Inmon. Therefore, any judgment rendered would have no practical legal effect upon any existing controversy. Johnson's voluntary transfer of 7500 Toltec to Inmon and Inmon's acceptance are inconsistent with a subsequent appeal directly related to the transfer of the property to Inmon. *See Shepherd* v. *State Auto Property & Casualty Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993).

Appellants did not respond in their reply brief to Twin City Bank's argument that the appeal is moot. However, appellants previously responded to Twin City Bank's motion to dismiss the appeal based on mootness. In so doing, appellant Dillon asserted that the case was not moot as to her, because she was not involved

[1] From Inmon's counsel's statement at a hearing prior to the entry of the decree, it appears that Johnson deeded the property to Inmon because the parties were concerned about Johnson's age and health.

in the transfer of 7500 Toltec from Johnson to Inmon. Nevertheless, the property was transferred to Inmon, which was what the chancery court decreed, and any decision by this court would have no legal effect on any existing controversy. Any separate action that Dillon might have against Johnson and Inmon based upon Johnson's transferring the property back to Inmon is not presently before this court and is not cause for this court to reach the merits of this appeal. *See Pennington* v. *Pennington*, 315 Ark. 479, 868 S.W.2d 460 (1994).

Appeal dismissed.

DUDLEY and CORBIN, JJ., not participating.

Everett L. KING *v.* STATE of Arkansas

CR 96-165 925 S.W.2d 159

Supreme Court of Arkansas
Opinion delivered July 8, 1996

John R. Hudson, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate, for appellee.

ANDREE LAYTON ROAF, Justice. Everett L. King was convicted of possession of a controlled substance with intent to deliver and delivery of a controlled substance. He was sentenced to 36 years imprisonment. This court previously affirmed that conviction on direct appeal. *King* v. *State*, 314 Ark. 205, 862 S.W.2d 229 (1993). However, we reversed the denial of King's subsequent Rule 37 petition challenging his sentence. We held that the trial court erred in allowing King's former counsel to remain in the courtroom throughout the Rule 37 hearing after King had invoked A.R.E. Rule 615; King had alleged numerous ineffective assistance of counsel claims. We specifically stated that King was entitled to a new Rule 37 hearing. *King* v. *State*, 322 Ark. 51, 907 S.W.2d 127 (1995). On remand, the trial court again denied King's petition. King appeals from this second denial of his Rule 37 petition.

King argues on appeal that: (1) the trial court erred by entering the order summarily denying his petition without conducting a new Rule 37 hearing as directed by this court; (2) the trial court was without jurisdiction to enter this order because he was outside of Washington County when he prepared the order; and (3) the criminal justice coordinator erred in refusing to permit King's request for a writ of mandamus to be considered by this court. We hold that King's abstract is flagrantly deficient in violation of Ark. Sup. Ct. R. 4-2(a)(6), and we affirm.

The following is a verbatim reproduction of the abstract submitted by King's counsel:

MANDATE
(Tr. 3)
SUPREME COURT OF ARKANSAS OPINION
(Tr. 4-9)
CERTIFICATION OF CLERK
(Tr. 10)
TRIAL COURT ORDER
(Tr. 11-12)

LETTER FROM SUPREME COURT COORDINATOR
DENYING PETITIONER'S REQUEST FOR
WRIT OF MANDAMUS
(Tr. 13)
NOTICE OF APPEAL AND DESIGNATION OF RECORD
(Tr. 14)
CERTIFICATE OF SERVICE
(Tr. 15)
CERTIFICATE OF COURT REPORTER
(Tr. 16)
CERTIFICATE OF CIRCUIT CLERK
(Tr. 17)

We have often held that a summary of the pleadings and the judgment appealed from are the bare essentials of an abstract. *D. Hawkins, Inc.* v. *Schumacher*, 322 Ark. 437, 909 S.W.2d 640 (1995). This court does not presume error simply because an appeal is made. *Mayo* v. *State*, 324 Ark. 322, 920 S.W.2d 843 (1996). It is the appellant's burden to produce a record sufficient to demonstrate error, and the record on appeal is confined to that which is abstracted. *Midgett* v. *State*, 316 Ark. 553, 873 S.W.2d 165 (1994). The reason underlying our abstracting rule is basic — there is only one transcript, there are seven judges on this court, and it is impossible for each of the seven judges to examine the one transcript. *Bunn* v. *State*, 320 Ark. 516, 898 S.W.2d 450 (1995). We will not explore the record for prejudicial error, except in death or life-imprisonment cases where a motion, objection, or request on the point at issue was made before the trial judge. *Watson* v. *State*, 313 Ark. 304, 854 S.W.2d 332 (1993).

King's failure to abstract the order appealed from and other critical documents precludes this court from considering issues concerning them. *Jackson* v. *State*, 316 Ark. 509, 872 S.W.2d 400 (1994).

Affirmed.

DUDLEY, J., not participating.

Lamont BOWDEN *v.* STATE of Arkansas

CR 95-1258 925 S.W.2d 158

Supreme Court of Arkansas
Opinion delivered July 8, 1996

Ronald Carey Nichols, for appellant.

No response.

PER CURIAM. Defense counsel, Ronald Carey Nichols, appeared on July 1, 1996, in response to this court's order to show cause why he should not be held in contempt of this court's four prior orders to file appellant's brief. Upon his appearance, Mr. Nichols concedes he had previously failed to file appellant's brief, but had done so on Friday, June 28, 1996. He asserted his failure to file a timely brief was not willful.

Mr. Nichols offered what he called "extenuating circumstances" concerning the hospitalization of an infant daughter, who has cerebral palsy and was in a live-or-die status during this same period when appellant's brief was due. We consider those statements in mitigation of Nichols' failure to file a timely brief, and if Mr. Nichols files an affidavit formally verifying those statements, we direct no further action is necessary.

Keith Cox HILSTROM *v.* STATE of Arkansas

CR 96-563 923 S.W.2d 874

Supreme Court of Arkansas
Opinion delivered July 8, 1996

James O. Cox, for appellant.

No response.

PER CURIAM. On June 3, 1996, a motion by appellant for rule on clerk was denied because the attorney for appellant, James O. Cox, did not admit fault. The appellant's attorney was given thirty days from the date of the per curiam to file a motion and affidavit accepting full responsibility for not timely filing the transcript. Appellant, Keith Cox Hilstrom, by his attorney, James O. Cox, has filed a second motion for rule on the clerk. In this motion, his attorney admits that the record was tendered late due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry* v. *State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 295 Ark. 964 (1979) (per curiam).

A copy of this per curiam will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979).

Steve J. JACKSON and Miles King *v.* Jim Guy TUCKER, Governor of Arkansas

96-792 927 S.W.2d 336

Supreme Court of Arkansas
Opinion delivered July 12, 1996

[redacted]

Petitioners, Pro Se.

No response.

PER CURIAM. Steve J. Jackson and Miles King file an original action in this court requesting a restraining order against Jim Guy Tucker, as Governor of Arkansas. Shown as plaintiffs in their complaint and amended complaint, they ask for an expedited hearing so this court can determine whether defendant Jim Guy Tucker should be prohibited from acting as Governor. The gravamen of the complaint, as amended, is to challenge the validity of appointments and grants made by Mr. Tucker after Mr. Tucker was found guilty of two felonies in a federal district court proceeding.

We know of no authority under which the moving parties may file an original action in this court, and they cite no applicable precedent. First, they cite Rule 1-2(a)(6), but that rule sets out this court's *appellate* jurisdiction in cases of quo warranto, prohibition,

injunction, or mandamus. Next, they cite Rule 6-1 which is this court's rule pertaining to petitions for extraordinary relief involving special proceedings. In Rule 6-1(a), the rule provides that, in *cases* in which the jurisdiction of the court is *in fact appellate* although in form original, such as petitions for writs of prohibition, certiorari, or mandamus, the pleadings with certified exhibits *from the trial court* (if applicable) are treated as the record. Rule 6-1(c) and (e) then address that, when filing a petition under Rule 6-1(a), petitioners may seek relief to *stay the trial court proceeding*, so that a briefing schedule can be set by this court. Those provisions, again, invoke this court's authority to *review a trial court's proceeding*.

Rule 6-5 is also cited by the moving parties, but that rule merely establishes the procedure where this court's jurisdiction is original rather than appellate. Rule 6-5 specifically mentions Amendment 7 to the Arkansas Constitution, which specifically provides this court with authority to review the validity of statewide petitions in certain circumstances. Although not mentioned in Rule 6-5, this court has exercised original jurisdiction where its contempt powers were at issue. *Osborne* v. *Power*, 322 Ark. 229, 908 S.W.2d 340 (1995).

In sum, this court's jurisdiction is appellate in nature except where specific law or precedent has established authority for it to proceed in an original action. The moving parties cite no such legal authority under which this court can proceed in an original action concerning the circumstances set out in their complaint, and we know of none. The moving parties' complaint deals with factual issues that require the taking of evidence. A trial court has the jurisdiction and is established to deal with such evidentiary matters.

The moving parties simply have offered no citation that establishes original authority for this court to proceed, and what they have offered demonstrates a lack of understanding of the constitutional process and the role and rules of this court. Accordingly, we deny petitioners' request.

JESSON, C.J., BROWN and ROAF, JJ., not participating.

Eric AVETT *v.* STATE of Arkansas

CR 95-1307 928 S.W.2d 326

Supreme Court of Arkansas
Opinion delivered July 15, 1996

William R. Simpson, Jr., Public Defender, by: *C. Joseph Cordi, Jr.*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

BRADLEY D. JESSON, Chief Justice. The appellant was convicted of two counts of theft by receiving. Ark. Code Ann. § 5-36-106 (Repl. 1993). He was sentenced to ten years on each count, to run concurrently. On appeal, he challenges the sufficiency of the evidence to support his convictions. We agree that the evidence was insufficient and therefore reverse and dismiss.

The facts are as follows. On December 9, 1994, a 1993 Chevy Astro van owned by Debbie Strickland was stolen from her office parking lot in southwest Little Rock. On December 10, 1994, various children's toys and items of clothing were stolen from the Salvation Army warehouse in southwest Little Rock. One week later, Little Rock Police officer Charles Weaver was patrolling an area near 29th and Arch Streets when he noticed a van leaving what he described as a "known crack house." He ran the van's license plate on a mobile data terminal. While he was doing this, the van

turned into a driveway at 2711 Arch Street. Officer Weaver continued driving while waiting on a report from the terminal. Within a few minutes, the report came back that the van was stolen. Weaver verified the information by radio and asked for the assistance of another unit. He returned to the place he had last seen the van. It was pulling out of the driveway at 2711 Arch. Weaver stopped the van and told the occupants to get out. Both the driver and the passenger complied. Weaver then ordered both men to get on the ground. The driver, Tonda Baker, did so. The passenger, appellant Eric Avett, was not cooperative. He cursed the officer and the police department in general, refused to get on the ground, and yelled for his mother (there is some evidence that Avett lived in the house at 2711 Arch). According to Weaver, Avett smelled of alcohol and had a crack pipe in his pocket. As officers began to take him into custody, he became, according to Weaver, "extremely violent...kicking at officers, yelling for his mother." Finally, Avett was sprayed with a half-second burst of pepper spray. This enabled the officers to get him into a patrol car. Once inside the patrol car, Avett continued his verbal abuse.

An inventory search of the van revealed boxes of toys and items of children's clothing, mostly in the rear of the van. The van itself was in poor shape. Debbie Strickland was called to identify her vehicle. She noted that the steering column was badly broken and had numerous wires hanging from it, that different tires and rims had been installed, that the speakers had been stripped from the van, and that some of the seats had been taken out.

This evidence, along with some evidence of the value of the stolen items, constituted the State's case against the appellant. The case was tried to the court. At the close of the State's evidence, the appellant moved for a directed verdict. The trial judge denied the motion. The appellant then took the stand. He stated that he had only been in the van for three to four minutes when it was stopped by the police. He denied having any knowledge that the van or its contents were stolen. On cross-examination, he admitted that in 1988, he was convicted of breaking or entering, theft of property, and possession of a controlled substance without a prescription (the appellant had been charged as a habitual offender, having been convicted of more than one but less than four felonies). The court found the appellant guilty on both counts, reasoning that he should have known the van was stolen, given its condition. This appeal

followed.

A person commits theft by receiving if he:

> receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen.

Ark. Code Ann. § 5-36-106(a) (Repl. 1993). "Receiving" means acquiring possession, control, or title or lending on the security of the property. Ark. Code Ann. § 5-36-106(b) (Repl. 1993).

The evidence in this case consists of the fact that the appellant was a passenger in the van for a few minutes (the appellant's testimony is the only evidence of how long he was in the van; the State offered no other proof on this), that the inside of the van was in poor shape; and that the appellant became violent and belligerent upon being confronted by the police. The appellant argues that being a passenger in a stolen vehicle is not, standing alone, enough to establish constructive possession of the vehicle. We agree, and so held in *Riddle* v. *State*, 303 Ark. 42, 791 S.W.2d 708 (1990). However, the State notes that, in *Riddle*, we nevertheless upheld a conviction for theft by receiving based on other corroborative evidence of guilt. Riddle was a passenger in a stolen vehicle. When an officer recognized the vehicle and turned on his blue lights, the vehicle fled at a high rate of speed. After a chase, the vehicle crashed into a stop sign. The occupants, including Riddle, fled from the scene. As Riddle was being chased on foot, he turned and fired a pistol at the officer in pursuit. We said that Riddle's occupancy of the vehicle, coupled with his flight from the police and his violent attempt to avoid capture constituted sufficient evidence of theft by receiving. The appellant's angry, violent behavior in this case is a far cry from being part of a high speed chase, running from the scene and firing a pistol at an officer in pursuit. There is no aspect of flight to avoid arrest which was critical to our holding in *Riddle*.

The State simply did not meet its burden of proof in this case. The appellant's brief presence in a stolen van which was in poor condition and his violent outbursts upon being taken into custody cannot support a conviction for receiving, retaining or disposing of stolen property, knowing or having good reason to know it was stolen.

The dissent attempts to buttress the State's case by pointing to the fact that, six and a half years before this incident took place, the appellant was convicted of breaking or entering and theft of property. The State does not argue this on appeal, nor did the prosecution make this a part of its case below. The appellant's prior convictions were introduced by the State without objection apparently for impeachment purposes during cross-examination of the appellant. The trial judge did not refer to this evidence in determining the appellant's guilt. The dissent cites *Rudd* v. *State*, 308 Ark. 341, 825 S.W.2d 565 (1992), for the proposition that the appellant's prior convictions were evidence of his commission of the offense in this case. *Rudd* was a residential burglary case. To obtain a conviction, the State was required to prove *the purpose* for which the accused entered an occupiable structure. Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1993). We said that Rudd's former burglary and theft convictions were admissible to show the purpose for which Rudd had entered the residence.

We are reluctant to consider the appellant's former convictions as substantive evidence in this case. First, the convictions could not be considered evidence of the appellant's purpose in getting into the vehicle because purpose is not an element of the offense of theft by receiving. Second, there is an element of unfairness in bolstering the State's case with questionable evidence which neither the State nor the judge appeared to rely on at trial, which the State has not argued on appeal, and which the appellant has not had the opportunity to object to, either at the trial level or on appeal.

Based upon the foregoing, we hold that the evidence was insufficient to support the appellant's convictions for theft by receiving. The appellant also raises an issue regarding proof of the value of the items stolen. Since we reverse and dismiss on other grounds, we do not address that issue. Likewise, the State raises an issue regarding our holding in *Strickland* v. *State*, 322 Ark. 312, 909 S.W.2d 318 (1995). In that case, we held that a defendant in a nonjury trial need not make a directed verdict motion to preserve sufficiency of the evidence questions on appeal. The State asks us to overrule that case and cites the imprecise nature of the appellant's directed verdict motion with regard to proof of value. Since we do not reach the proof of value issue, it is unnecessary for us to address the State's argument.

Reversed and dismissed.

GLAZE, CORBIN, and BROWN, JJ., dissent.

TOM GLAZE, Justice, dissenting. In finding Eric Avett guilty of the offense of theft by receiving, the trial judge heard the state's case and Avett's testimony in defense. During the prosecutor's cross-examination of Avett, Avett admitted he was a three-time felon, which included convictions for theft, burglary and possession of a controlled substance. Reduced to its simplest terms, the majority court, in reversing the trial judge's decision, holds the judge could not disbelieve Avett's explanation that he was only a passenger in the stolen van when it was stopped by the police. If there was ever a case where this court has invaded the factfinding role of the trial judge, it is this one.

First, the majority court cites the case of *Riddle* v. *State*, 303 Ark. 42, 791 S.W.2d 708 (1990), for the proposition that being a passenger in a stolen vehicle is not, standing alone, enough to establish constructive possession of the vehicle. Of course, that rule is sound. But even in *Riddle*, the court upheld the passenger-defendant's conviction for theft by receiving because he fled from the scene after the stolen vehicle had crashed. The court said that, where a passenger in a stolen vehicle flees for the purpose of avoiding arrest, a factfinder may infer therefrom the dominion and guilty knowledge necessary to convict. *Id.* at 44. In *Riddle*, the defendant never took the stand, so his credibility was never in issue. Nonetheless, based only on the state's evidence that Riddle fled to avoid arrest, this court affirmed Riddle's jury conviction.

In the present case, there was far more evidence to prove Avett's guilt than existed in proving the defendant's conviction in *Riddle*. Here, the state showed Officer Charles Weaver stopped a stolen 1993 van in which Avett was a passenger. In stepping out of the van, Avett was uncooperative and used abusive language toward Officer Weaver. Avett became extremely violent, kicked at the officer and was only quelled after officers sprayed Avett with O C Pepper Spray.

The 1993 stolen van was described as being in "horrible shape" — the steering column was "busted" with wires hanging out of it, "its tires and rims had been taken, inside seats had been removed and its speakers had been stripped." The van also contained brand-new toys that were boxed and had never been opened. The toys had been stolen from the Salvation Army.

At trial, Avett testified in an attempt to explain his presence in the stolen van. Avett claimed he got the driver of the van to give him a ride home which was only a distance of "two or three houses" away. He denied noticing anything about the van or the new toys contained in it.

In rendering his decision finding Avett guilty, the judge clearly disbelieved Avett's story. The judge said that Avett should have known the van with the Christmas gifts in it was stolen. The judge declared that, because the steering wheel had wires hanging loose and "all kinds of new toys" were in the van, Avett could not have been in the van without having known it was stolen. The trial judge was *not* required to believe Avett had only (1) been in the van four minutes, (2) was getting a ride home which was a distance of three houses away, (3) had never noticed how the almost new 1993 van had been stripped to a "horrible shape," and (4) was unaware of unopened boxes of toys contained in the van. In fact, the judge quite reasonably could have inferred that, given his past criminal history, Avett was in no way the innocent participant he purported to be.

The majority opinion is far off the mark in suggesting that, because the judge did not specifically refer to Avett's prior convictions in deciding his guilt, that this court should not consider them. Nor was the judge required to state all of the evidence and his findings when declaring Avett guilty. The majority court cites nothing to support these assertions because the law clearly holds otherwise.

In a bench trial, the trial judge is capable of evaluating the evidence and the judgment will stand unless all of the competent evidence is insufficient to support the judgment. *Rich Mountain Elec. Coop* v. *Revels*, 311 Ark. 1, 841 S.W.2d 151 (1992). Here, all the testimony was admitted into evidence without objection. In addition, it has been held that a remark made by a judge who tries a case without a jury may not be construed as his entire findings of fact and conclusions of law. *Legate* v. *Passmore*, 268 Ark. 1161 (Ark. App. 1980).

The trial judge trying this case is well-versed in the rules of evidence, and he, as well as the other members of the bench and bar, know that, when a defendant takes the stand, the defendant's credibility is an issue. *See* A.R.E. 609; *see Turner* v. *State*, 325 Ark.

237, 926 S.W.2d 843 (1996); *Schalski* v. *State*, 322 Ark. 63, 907 S.W.2d 693 (1995); *Donald* v. *State*, 310 Ark. 197, 833 S.W.2d 770 (1992); *Gustafson* v. *State*, 267 Ark. 278, 590 S.W.2d 853 (1979). Once again, because the trial judge is capable of evaluating evidence, our law does not require a trial judge to actually mention Rule 609 when utilizing it to reject the defendant's version of what occurred.

In addition, under A.R.E. Rules 404(b) and 403, the state was permitted, as it did, to introduce Avett's prior theft of property and burglary convictions to show his furtive intent, thus countering Avett's defense of mistake and his explanation that he had not noticed anything in or about the van when he had entered the stolen van. *See Turner*, 325 Ark. 237, 926 S.W.2d 843; *Rudd* v. *State*, 308 Ark. 401, 825 S.W.2d 565 (1992). Again, the majority opinion ignores established law when suggesting the trial judge was required to review all the evidence he relied on in reaching his decision as well as the rules of evidence he may have considered.

In conclusion, the majority opinion is bereft of reasoning and common sense to say sufficient evidence does not exist to show Avett's guilt. To the contrary, the evidence clearly supports the judge's finding of guilt and that decision should be affirmed.

CORBIN and BROWN, JJ., join this dissent.

Dr. Patsy NICHOLS and Mary Alice Bell *v.*
Shirley Bell WRAY

95-1093 925 S.W.2d 785

Supreme Court of Arkansas
Opinion delivered July 15, 1996

Davis & Goldie, by: *Steven B. Davis*, for appellants.

James D. Sprott, for appellee.

DAVID NEWBERN, Justice. The late Eppa Sisco had three daughters, Dr. Patsy Nichols, Mary Alice Bell, and Shirley Bell Wray. Ms. Sisco's will purported to divide her estate equally among the daughters, and there was evidence that she expressed that intention often. After her husband's death, Ms. Sisco altered certificates of deposit by placing Ms. Wray's name on them as joint owner with the right of survivorship. Ms. Bell and Dr. Nichols sought reformation of the certificates or the imposition of a constructive trust for their benefit. The Chancellor did not rule on the reformation request and declined to impose a constructive trust, citing Ark. Code Ann. § 23-32-1005 (Repl. 1994), as interpreted by *Hall* v. *Superior Fed. Bank,* 303 Ark. 125, 794 S.W.2d 611 (1990), which makes the terms of the certificates conclusive on the issue of the intent of the depositor. We are asked to overrule the *Hall* case, and we decline to do so.

The Chancellor did impose a constructive trust for the benefit of Dr. Nichols and Ms. Bell upon one parcel of land Ms. Sisco conveyed to Ms. Wray. That resulted from his finding that it was Ms. Sisco's intention to convey the land to Ms. Wray and thus avoid

losing the property in the event she had to enter a nursing home and not to make a gift of it to Ms. Wray. Ms. Wray cross-appeals that part of the decision, and we affirm on cross-appeal.

In 1979, Ms. Sisco and her husband offered Ms. Wray a one-acre tract of land in exchange for her agreement to take care of them. She agreed, and the land was deeded to her. In 1983, they gave her another tract for the construction of a garage. Neither Dr. Nichols nor Ms. Bell objected to either of these gifts of real estate, and the Chancellor, finding that the transactions were intended as gifts, concluded there were no circumstances warranting the imposition of a constructive trust upon those properties.

In 1985, Mr. Sisco died. Ms. Sisco executed new signature cards on certificates of deposit naming Ms. Wray as Joint Tenant in place of Mr. Sisco. Over Ms. Wray's objection, Dr. Nichols testified that her mother told her Ms. Wray was included on the certificates because a bank employee said a "local person" was needed on the accounts. Both Dr. Nichols and Ms. Bell testified they were aware that Ms. Wray's name was on the accounts, and that they trusted her "judgment" regarding those funds. The Chancellor, as noted above, declined, on the basis of the *Hall* case, to consider any evidence of Ms. Sisco's intent regarding the certificates other than the documents themselves.

The next transaction occurred in January 1991, when Ms. Sisco deeded pasture land to Ms. Wray for the purpose of "squaring up" her property. The land was rented to farmers as pasture, and Ms. Wray collected the rent. The Chancellor did not find evidence sufficient to impose a constructive trust on that property.

The property upon which the Chancellor did impose a constructive trust was the last of the real estate transactions between Ms. Wray and Ms. Sisco in which Ms. Sisco, in 1994, conveyed the property on which her residence was located.

1. The CDs

The Chancellor's order stated that § 23-32-1005(2)(C) and the *Hall* case precluded him from considering, with respect to the certificates of deposit, the evidence presented by witnesses who testified that Ms. Sisco intended her three daughters to share equally in her estate. His order states:

As regards the joint accounts, there is no evidence of fraud,

> undue influence or misrepresentation or any other abuse of the familial trust which existed between the mother and the defendant [Ms. Wray], nor proof of a request from the defendant that the money be given to her. The daughter [Ms. Wray] is a natural object of the deceased's bounty and a person who had, for many years, lived next door and taken care of the deceased's needs to a greater extent than the other children, who lived elsewhere.

The order does not address the request that the certificates of deposit be reformed. The burden of obtaining a ruling upon that requested remedy was upon Ms. Nichols and Ms. Bell. As the Chancellor did not address it, and no objection was made to his failure to address it, we cannot say he erred in not reforming the instruments. *Barnes* v. *Pearson Termite and Pest Control, Inc.*, 266 Ark. 635, 587 S.W.2d 823 (1979).

We note in passing that the mistake urged as a basis for reformation was allegedly between the bank and Ms. Sisco as to whether a "local person" had to be named joint tenant. We have not seen a case in which a person who is not a party to a contract has been allowed to obtain reformation of it. It has been held that one who is not a party may not obtain reformation. *Shelter Mut. Ins. Co.* v. *LittleJim*, 927 F.2d 1132 (10th Cir. 1991). *Cf. Hunt* v. *Century Indem. Co.*, 192 A. 799 (R.I. 1937).

Section 23-32-1005(1)(A) addresses instances in which "a deposit has been made or a certificate of deposit purchased in the names of two (2) or more persons and in form to be paid to any of the persons so named, or the survivors of them. It is followed by subsection (2)(A) which states "the account or certificate of deposit ... shall be the property of those persons as joint tenants with right of survivorship," and then subsection (2)(C) which provides, in pertinent part:

> (C) The opening of the account or the purchase of the certificate of deposit in this form shall be conclusive evidence in any action or proceeding to which ... the surviving party is a party of the intention of all of the parties to the account or certificate of deposit to vest title to the account or certificate of deposit, and the additions thereto, in such survivor.

In the *Hall* case we were confronted with a dispute over

joint accounts held by a decedent and survivor in a bank and in a brokerage firm. There was strong evidence that the survivor's name was on the accounts only to assist the decedent and that she recognized her obligation to hold the proceeds for the beneficiaries named in the decedent's will. After pointing out that "We have not previously addressed the underlying question of whether in the absence of fraud, extrinsic evidence will be allowed to reflect the intent of the parties in establishing joint accounts with right of survivorship," we interpreted the statute as follows:

> We find that the language of Ark. Code Ann. § 23-32-1005(2)(A) and (C) is clear; the opening of the account in the name of two or more persons designated as joint tenants or as joint tenants with right of survivorship "*shall be conclusive evidence in any action* or proceeding to which...the surviving party is a party *of the intention of all of the parties to the account*...to *vest title to the account*...in such survivor." (Our emphasis.) The first rule to be applied in statutory construction is to give the words in the statute their usual and ordinary meaning. If there is no ambiguity we give a statute effect just as it reads. *Pledger* v. *Ethyl Corp.*, 299 Ark. 100, 771 S.W.2d 24 (1989).
>
> The statute declares that the establishment of the account as joint tenants provides conclusive evidence of the intention of all parties. The signature card for the Superior Federal account provided that Dorothy Edwards and Virginia Hall held the account as joint tenants with right of survivorship. Moreover, the signature card suffices to provide written designation to the bank that the account is held in joint tenancy. Therefore, the trial court erred in considering extrinsic evidence as to Dorothy Edwards' intent, and the funds in the account belong to the appellant as surviving joint tenant.

We held the statute did not apply to the account with the brokerage firm because it is not a bank. The evidence of intent was admissible to show it was not the intention of the decedent to make a gift of that account to the survivor, thus we upheld the decision that the survivor was not the owner of the brokerage account.

■ The Chancellor's decision with respect to the certificates of deposit is completely consistent with our decision in the *Hall*

case. Ms. Nichols and Ms. Bell argue intent is irrelevant to the question whether a constructive trust should be imposed, and that is what we said in *Edwards* v. *Edwards*, 311 Ark. 339, 843 S.W.2d 846 (1992), the implication being that statement is inconsistent with the *Hall* rationale. We note, however, that our opinion in the *Hall* case observed there had been no fraud. We note also that the Chancellor in this case found "no evidence of fraud, undue influence or misrepresentation or any other abuse of the familial trust." In other words, he found no evidence that the intent of Ms. Sisco as "conclusively" determined by the nature of the certificates of deposit was induced by any impropriety on the part of Ms. Wray. Intent may indeed not matter when the issue is whether there has been unjust enrichment and a constructive trust is sought, but if there is no basis for establishment of that restitutionary remedy, other than intent, then the statute controls.

We decline to overrule the *Hall* case. Absent a constitutional challenge to the statute, which we have not entertained as yet, we are hardly in a position to change the language of the statute the clear meaning of which we applied in the *Hall* case. As Ms. Wray points out, were it not for the statute, as interpreted, the issue of whether a constructive trust should be imposed would arise almost any time a person decided to make a gift of a bank account to one of several siblings, simply on the basis of an argument that no parent could intend to favor one over another. We have cited the *Hall* decision with approval several times, most notably in *Nall* v. *Duff*, 305 Ark. 5, 805 S.W.2d 63 (1991), and the General Assembly has met twice without taking any action with respect to the statute since our decision in 1990 interpreting it to mean what it says. In these circumstances overruling would not be appropriate.

2. The land

In her cross-appeal, Ms. Wray argues we should reverse the Chancellor's decision to impose a constructive trust on the last of the four parcels of land that were transferred to her by her mother. The Chancellor imposed the trust because he found clear and convincing evidence that Ms. Sisco's intention in making the transfer was to divest herself of ownership to qualify for public-nursing-home benefits. Ms. Wray contends we should reverse the Chancellor's decision because other evidence indicates that Ms. Sisco's intent was to give her the property outright as recognition for the care she had given over the years. Ms. Wray argues that the pres-

ence of this evidence means that "clear and convincing evidence" to support the imposition of a constructive trust is lacking.

To impose a constructive trust, there must be full, clear, and convincing evidence leaving no doubt with respect to the necessary facts, *Tillar* v. *Henry*, 75 Ark. 446, 88 S.W. 573 (1905), and the burden is especially great when a title to real estate is sought to be overturned by parol evidence. *Nelson* v. *Wood*, 199 Ark. 1019, 137 S.W.2d 929 (1940). The test on review is not whether the court is convinced that there is clear and convincing evidence to support the chancellor's finding but whether it can say the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, and we defer to the superior position of the chancellor to evaluate the evidence. *Brasel* v. *Brasel*, 313 Ark. 337, 854 S.W.2d 346 (1993); *Wright* v. *Wright*, 279 Ark. 35, 648 S.W.2d 473 (1983). *See also Davis* v. *Davis*, 48 Ark. App. 95, 890 S.W.2d 280 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *RAD-Razorback Ltd. Partnership* v. *B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986).

We cannot say that the Chancellor was clearly erroneous in his finding concerning Ms. Sisco's intent in conveying the last parcel of land. While there is testimony that indicates Ms. Sisco stated she was glad for Ms. Wray to have the property because of the care she had received from her over the years, there is ample evidence that she intended her daughters to share equally in her estate, and that her purpose for conveying the last parcel of land was not to make a gift to Ms. Wray but to enable herself to receive nursing home benefits.

Ms. Sisco's will provided her property should go in equal shares to her three daughters. Five disinterested witnesses, including Ms. Sisco's three close friends and her two sisters, testified that Ms. Sisco frequently stated she wanted her children to share equally in her estate and she never stated that she wanted to favor one of her daughters over the others. Mary Alice Bell and Patsy Nichols also testified their mother told them they would share the estate equally with Ms. Wray.

The most compelling evidence of Ms. Sisco's intention for the transfer can be found in Ms. Wray's own testimony, where she

admits, "My mother did not want the State to be able to take her home, should I not be able to take care of her anymore. And so, in case she had to go to a nursing home, she did not want her home to go to the State." Ms. Wray also testified that although the deed was actully executed in April 1994, her mother later "falsified" the document by reexecuting the second page of the deed to show it was signed on April 1, 1991. The deed was filed for record on April 20, 1994. Ms. Wray stated that her mother decided to alter the deed to make it appear to the State that the conveyance had occurred some three years previous to its actual date.

In light of the evidence that indictates Ms. Sisco's intention for her daughters to share equally in her property, and Ms. Wray's admission that the last conveyance was intended to protect the property in the event her mother entered a nursing home, we cannot say that we are left with "a definite and firm conviction" that the Chancellor made a mistake by deciding to impose the constructive trust.

Affirmed on appeal; affirmed on cross-appeal.

DUDLEY, J., not participating.

POM, INC., and Commercial Union Insurance *v.*
Carl Ray TAYLOR and Second Injury Fund

96-342 925 S.W.2d 790

Supreme Court of Arkansas
Opinion delivered July 15, 1996
[Petition for rehearing denied September 9, 1996.]

Bailey, Trimble, Capps, Lowe, Sellars, & Thomas, by: *Chester C. Lowe, Jr.*, for appellant.

David L. Pake, for appellees.

DAVID NEWBERN, Justice. This is another in a series of workers' compensation cases dealing with the proof necessary to establish Second Injury Fund liability. In 1989, Carl Ray Taylor suffered a compensable injury requiring surgery to the L-4 — L-5 area of his back while he was employed by the appellant, POM, Inc. He had suffered a work-related injury in the same area of his back in 1983. The second injury also required surgery. After his second injury he was assigned a disability rating of 25%.

Arkansas Code Ann. § 11-9-525(a)(1) and (2) (Repl. 1996) provides that the Second Injury Fund is established and designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while

the worker was in the employer's employment. The Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined. *Mid-State Const. Co.* v. *Second Injury Fund,* 295 Ark. 1, 746 S.W.2d 539 (1988).

Upon review of Mr. Taylor's second claim, the Workers' Compensation Commission held the Second Injury Fund not liable as Mr. Taylor had not suffered any wage loss from the first injury. The Court of Appeals, in an unpublished opinion, reversed the Commission's decision, *POM* v. *Taylor,* CA 92-1250, (Ark.App. December 1, 1993), and we affirmed in *Second Injury Trust Fund* v. *POM, Inc.,* 316 Ark. 796, 875 S.W.2d 832 (1994). We held the term "impairment" included results of work-related injuries as well as non-work-related ones. Accordingly, Mr. Taylor's case was remanded to the Commission.

After reconsidering the claim, the Commission once again found that the Second Injury Fund was not liable for any portion of Mr. Taylor's benefits. According to the Commission, Mr. Taylor's prior disability or impairment did not combine with the second compensable injury to produce his current disability status, and he was rendered permanently and totally disabled as a result of his second back injury and subsequent surgery. The Court of Appeals, in another unpublished opinion, agreed with the Commission. *POM* v. *Taylor,* CA 95-360 (Ark. App. February 28, 1996). We granted POM's petition for review.

This case focuses on the third element of the test enunciated in *Mid-State Const. Co.* v. *Second Injury Fund, supra.* The test, which is used to determine whether the Second Injury Fund must share liability for compensating an injured worker, was stated as follows:

> First, the employee must have suffered a compensable injury, at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

Our most recent decision on this issue is *Hawkins Const. Co.* v. *Maxell,* 325 Ark. 133, 924 S.W.2d 789 (1996), in which we held that the Commission's finding with respect to the third element of

the test was not supported by substantial evidence. In the *Hawkins Const. Co.* case, the unrebutted medical testimony indicated that the claimant's two injuries combined to produce his present impairment rating. The only evidence before the Commission contrary to the medical testimony was that which showed the claimant suffered no disability from his first injury that kept him from continuing to do the same sort of labor he had done previously. In finding that such evidence could not overcome the strong medical evidence, we stated, "[t]he fact that Mr. Maxell suffered no wage-loss disability after [his first] injury has *no necessary bearing* on the issue whether he suffered an impairment from that injury which contributes to his present injury." (Emphasis added.)

Our opinion in the *Hawkins Const. Co.* case, and certain cases decided by our Court of Appeals, have helped define how "wage-loss evidence" can be used in the *Mid-State* test. These cases suggest that where there is medical evidence that the two injuries combined to produce the current disability rating, contradictory evidence that the claimant was able to return to the same type of labor after his first injury is not determinative of the Second Injury Fund's liability. However, while the ability to work and lack of wage loss cannot be used alone to contradict the medical evidence, it may be used to corroborate it when combined with other evidence, *e.g.*, medical testimony that the claimant was cured after his first injury.

The correct approach is illustrated in *Arkansas Highway & Transp. Dept.* v. *McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). The Court of Appeals recited medical evidence that indicated the claimant's disability was attributable to his most recent injury, rather than a combination of injuries. In light of the medical evidence, the Court indicated that the claimant's ability to work was not the determining factor in the Commission's decision against the liability of the Second Injury Fund.

> The Commission did refer in its opinion to the claimant's physical abilities and his lack of physical problems subsequent to this prior back impairment but before his compensable injury. However, we cannot conclude that the Commission made the lack of prior "disability" a determining factor, and we do not think that the extent of one's physical abilities prior to a compensable injury is necessarily irrelevant in every case, or in this case, to the decision whether the third prong of the test has been met.

In *Bussell* v. *Georgia Pacific Corporation*, 48 Ark.App. 131, 891 S.W.2d 75 (1995), the Court of Appeals affirmed when the Commission considered the claimant's ability to work, but only in light of other evidence that indicated that the second injury alone was responsible for the disability. Specifically, the Commission was influenced by the severity of the second accident and the apparent success of the treatments for the first injury.

In this case, we find substantial evidence to support the Commission's decision based on the medical evidence that was introduced, as well as Mr. Taylor's ability to work, which tends to corroborate that evidence. In the *Hawkins Const. Co.* case there was no evidence other than the ability to return to work and absence of wage loss to show the lack of contribution of the first injury to the ultimate condition of the worker. On the other hand, there was strong medical testimony showing that the first injury created a physical condition which contributed to the ultimate disability. In this case, there is medical evidence that Mr. Taylor obtained an excellent result from his first surgery and that the original assessment of 10% disability to the body as a whole was only *pro forma*. It was permissible for the Workers' Compensation Commission to consider Mr. Taylor's lack of wage-loss disability as some corroboration of that medical testimony.

The first surgery was performed by a Dr. Christian. When inquiry was made by the insurance company which handled Mr. Taylor's first claim, the response came from Dr. Thompson, who had been Dr. Christian's partner. In the letter, Dr. Thompson noted, "I have never seen Mr. Taylor, as far as my records indicate." The doctor noted that a disability rating was not previously assigned because, when Dr. Christian released Mr. Taylor, no claim had been filed. Dr. Thompson interpreted Mr. Taylor's records and assigned a 10% disability rating. The doctor stated his rationale for choosing a 10% rating as follows:

> It has been my practice throughout the years to consider a successfully operated ruptured disc results in a 10% disability of the body as a whole, based on the fact that the patient no longer has a good shock absorber in his back as a result of the condition which was treated (not because of the surgery) and that as a result over the years, he will get some narrowing of the disc space with excess pressure on the facets, so he may get into trouble in the future. It was on this

> basis that I have felt justified in recommending a 10% disability rating on a person, who for all practical purposes is "cured."

Dr. Thompson also wrote that Mr. Taylor's records indicate that "he got an excellent result" from the surgery and "has been released to full activity." Dr. Haines, the surgeon who performed the second surgery, stated in a postoperative report that Mr. Taylor had previously undergone surgery in the same area of his back, and that "Carl had done well, after surgery, until his time of reinjury."

To be sure, Dr. Thompson's letter indicates that patients who suffer injuries similar to Mr. Taylor's initial one typically lose the "shock absorber" between their discs and for that reason are likely to have trouble in the future. That evidence, however, served only to raise a factual issue which was for the Commission to decide. *Buckeye Cotton Oil* v. *McCoy,* 272 Ark. 272, 613 S.W.2d 590 (1981). When there is any substantial evidence to support the Commission's decision, we affirm. *Kuhn* v. *Majestic Hotel,* 324 Ark 21, 918 S.W.2d 158 (1996). In our view, notwithstanding Dr. Thompson's general remarks, the evidence from Mr. Taylor's records that he was for all practical purposes "cured" after his first surgery combined with the fact that he returned to work without limitations for some six years was substantial evidence from which the Workers' Compensation Commission could have concluded the Second Injury Fund was not responsible for any part of Mr. Taylor's second claim.

Affirmed.

DUDLEY, J., not participating.

JESSON, C.J., and GLAZE, J., dissent.

TOM GLAZE, Justice, dissenting. I respectfully dissent. The court of appeals' unpublished opinion on review here misstates what must be shown under controlling case law to establish Second Injury Fund liability. *See Mid-State Construction* v. *Second Injury Fund,* 295 Ark. 1, 746 S.W.2d 539 (1988); *Hawkins Const. Co.* v. *Maxell,* 325 Ark. 133, 924 S.W.2d 789 (1996). That unpublished opinion concludes as follows:

> Most importantly, there was no proof that Taylor's present disability status would not have resulted solely as the result of his present compensable injury, considered alone and of

> itself, i.e., that Taylor would *not* have been totally disabled as a result of this injury even if he had *not* suffered an earlier impairment. (Emphasis added.)

As this court has held in *Mid-State* and *Hawkins*, to establish Second Injury Fund liability, the employee (1) must have suffered a compensable injury at his present job, (2) must have had a prior permanent partial disability or impairment and (3) that disability or impairment must have combined with the recent compensable injury to produce the current disability status. Quite clearly, the proof required under the third prong of the *Mid-State* test is different than proving the negative and differently worded burden of proof set out in the court of appeals decision above. In my view, that misstatement persists and has caused enough confusion for this court to have reached the wrong result.

The record reflects that Dr. S. B. Thompson gave Taylor a 10% impairment rating following Taylor's first injury. In doing so, Thompson stated Taylor no longer had a good shock absorber in his back and that, over the years, Taylor would have narrowing of the disc space with excess pressure on the facets, so he may get into trouble in the future. Dr. Lynn Haines, who performed surgery on Taylor after his second injury, said that he had received information relating to Taylor's first injury and had concluded he would not have given Taylor a blanket release to return to work. Nonetheless, Haines stated that, subsequent to Taylor's second injury, there were significant neurologic deficits, along with persistent pain and discomfort, which he felt *would bring about an alteration in the patient's limitations*. And finally, Jim Spragins, a vocational expert, expressed his opinion that as a result of *both* injuries and resulting surgeries, Taylor was essentially unemployable.

As is readily obvious from the above expert testimony, proof very clearly was presented to show Taylor's preexisting impairment (10%) and subsequent injury combined to produce his current permanent disability. Haines and Spragins, together, established that Taylor's earlier injury limitations had been altered by the second injury so as to make Taylor unemployable.

The majority opinion suggests the foregoing evidence is insignificant because "there is medical evidence Mr. Taylor was cured after his first injury and that the original assessment of 10% disability to the body as a whole was only *pro forma*." I suggest the majority

has improperly weighed or taken out of context, Dr. Thompson's testimony to reach the *pro forma* conclusion. No such evidence was presented. Thompson did suggest that Taylor was cured for all practical purposes after the first injury, but in making that comment added (1) Taylor no longer had a good shock absorber in his back, (2) Taylor would get narrowing of the disc space with pressure on the facets and (3) he may get into trouble in the future. In my view, a fair-minded person could not read Thompson's evaluation of Taylor and conclude Taylor had not been impaired by his first injury and surgery. Yet, the majority uses Thompson's remarks as substantial evidence to affirm the Commission's decision.

As Thompson indicated, Taylor was predisposed to having trouble in the future and Taylor did. And *that second injury* (no surprise to anyone) *recurred at the same L-4 -5 level as before.* I believe the majority's reliance on Thompson's "cured" remark is out of context and is in no way substantial evidence to support the Commission's decision to deny Second Injury Fund liability. Therefore, I would reverse the court of appeals' decision.

JESSON, C.J., joins this dissent.

STATE of Arkansas, Department of Finance and Administration
v. Debora STATON

96-215 934 S.W.2d 478

Supreme Court of Arkansas
Substituted Opinion upon Granting of
Rehearing delivered October 28, 1996

Beth B. Carson, Revenue Legal Counsel, for appellant.

Michael A. Skipper, for appellee.

ROBERT H. DUDLEY, Justice. In January 1994, Debora Staton purchased a car and an extended service contract on the car and paid State sales tax on the sale of both the car and the service contract. The State sales tax attributable to the service contract was $49.28. On April 21, 1994, Ms. Staton filed a claim with the Department of Finance and Administration for refund of the $49.28 on the ground that, under the language of the sales-tax statute, the tax did not apply to the extended service contract. The Department denied the refund.

On July 7, 1994, Ms. Staton filed suit in chancery court and asked for judgment of $49.28. In addition, she sought class certification for all other taxpayers similarly situated. On May 8, 1995, the chancellor certified a class of taxpayers under Ark. R. Civ. P. 23 as "all of those who have, since July 7, 1991, purchased vehicle service contracts, sometimes referred to as extended warranties, covering motor vehicles within the State of Arkansas."

On November 21, 1995, the chancellor ruled that the service contracts were not taxable and that each class member could submit a claim to the chancery court for refund, dating back to 1991. The Department appeals to this court. Staton cross-appeals. We affirm the ruling that service contracts are not taxable and reverse the ruling certifying the class, causing the cross-appeal to be moot.

The Department argues that the chancellor erred in ruling that the service contracts were not taxable. It argues that Ark. Code Ann. § 26-52-301(3)(C)(i) and § 26-52-103(4) (Repl. 1992), together, provide the basis for taxation. The chancellor ruled correctly. Arkansas Code Annotated § 26-52-301(3)(C)(i), in material part, plainly levies a "tax...upon the gross proceeds or gross receipts derived from all sales to any person of...service of...and repair of motor vehicles." An extended warranty is not "service" of a motor vehicle. As the promised repairs are completely contingent upon events that may not transpire, the contracts cannot be said to be for service or repairs to automobiles. Consequently, we affirm this part

of the chancellor's order.

We turn now to the Department's point for reversal that the chancellor lacked subject-matter jurisdiction to certify the class. In its argument, the Department contends that the doctrine of sovereign immunity prohibits taxpayers' suits against the State except when permission to sue has been granted, and at other limited times not material to this suit. The Department contends that permission to seek a refund of erroneously assessed and collected sales tax is governed by Ark. Code Ann. § 26-18-507(e)(2)(A) (Repl. 1992), which allows a taxpayer to sue the sovereign for improperly collected sales tax only after a refund has been sought and the request is refused or when no response is made by the Department. The Department concludes that since Ms. Staton is the only taxpayer who had sought a refund and the only taxpayer whose request was denied, the chancery court did not have subject-matter jurisdiction over other members of the proposed class. The argument is well taken.

Article 5, section 20, of the Constitution of Arkansas cogently provides: "The State of Arkansas shall never be made defendant in any of her courts." This sovereign immunity may be waived only in limited circumstances. *Arkansas Dep't of Human Servs.* v. *State*, 312 Ark. 481, 850 S.W.2d 847 (1993); *Arkansas Game & Fish Comm'n* v. *Lindsey*, 299 Ark. 249, 771 S.W.2d 769 (1989). The doctrine of sovereign immunity is rigid. *Austin* v. *Arkansas State Highway Comm'n*, 320 Ark. 292, 895 S.W.2d 941 (1995).

Arkansas Code Annotated § 26-18-507(e)(2)(A) (Supp. 1992) grants legislative permission to a taxpayer to sue the State after a claim for refund has been filed and refused or the Commissioner has not acted upon it. *There must be full compliance with this type of statute before sovereign immunity is waived. Hercules, Inc.* v. *Pledger*, 319 Ark. 702, 706-07, 894 S.W.2d 576, 578 (1995). Because Ms. Staton's claim for refund was the only one filed and rejected, sovereign immunity was waived in only that one case.

A trial court acquires no jurisdiction where the suit is one against the State and there is no waiver of sovereign immunity. *McCain* v. *Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943); *Pitcock* v. *State*, 91 Ark. 527, 121 S.W. 742 (1909). Thus, the State is correct in its contention that the trial court had no subject-matter jurisdiction over the entire class. Subject-matter jurisdiction based on sovereign immunity is an issue that is *always open*, and it is the duty of an appellate court to raise the issue of its own volition. *Crossett Lumber Co.*, 206 Ark. at 61-62, 174 S.W.2d at 120.

Interwoven with the doctrine of sovereign immunity in tax cases is sound fiscal public policy. Throughout the years, with one exception, we have written that a taxpayer must comply with the statutory requirements before sovereign immunity is waived. We have said that this procedure places the government on notice of the claim and informs it that it may be required to refund the money; consequently, it should make appropriate financial allowances. We fully discussed this policy in the recent case of *Mertz* v. *Pappas*, 320 Ark. 368, 896 S.W.2d 593 (1995), as follows:

> We have consistently followed the common law rule that prohibits the recovery of voluntary paid taxes, except where a recovery is authorized by a statute, without regard to whether the payment is voluntary or compulsory. *See, e.g., City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982); *Searcy County* v. *Stephenson*, 244 Ark. 54, 424 S.W.2d 369 (1968); *Thompson* v. *Continental Southern Lines, Inc.*, 222 Ark. 108, 257 S.W.2d 375 (1953). We follow this rule even when an illegal exaction claim is based on constitutional grounds. *Cash*, 277 Ark. at 504-05, 644 S.W.2d at 233. *When recovery is authorized by statute upon payment "under protest," we literally require a payment "under protest". Hercules, Inc.* v. *Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995). There is an exception for payment under coercion, *see Cash*, 277 Ark. at 505, 644 S.W.2d at 233; *Chapman & Dewey Land Co.* v. *Board of Directors*, 172 Ark. 414, 288 S.W. 910 (1926), but that exception is not applicable to the case at bar.
>
> The reasoning underlying our cases is sound. When taxes are paid to a government they are deposited into that government's general revenues and ordinarily are spent within that tax year. However, when the government is put on notice that it may be required to refund those taxes, it can make the appropriate allowance for a possible refund. *See Hercules, Inc.*, 319 Ark. at 707, 894 S.W.2d at 578. If we were to allow refunds for taxes voluntarily paid in previous years, it would jeopardize current and future governmental operations because current and future funds might be necessary for the refund.

Id. at 370, 896 S.W.2d at 594 (emphasis supplied).

In another case, one involving a claim for refund under the comparable income-tax statute, we wrote:

> In enacting § 28-18-406, the General Assembly had in mind at least two reasons for requiring a taxpayer to desig-

> nate specifically any payment as being under protest when seeking judicial review of a final deficiency assessment. First, § 28-28-406(c) mandates that all taxes and penalties paid under protest are to be held by the director in an escrow account denominated the "Tax Protest Fund Account," and that refunds are to be made from this account. While we agree with Hercules that the phrase "paying under protest" is not defined by the Act, these terms are not ambiguous or difficult to understand. Protest is commonly understood to mean a formal disapproval or objection issued by a concerned party. Here, under § 28-18-406, it is clear that the protest is intended to place DF&A on notice that the taxpayer's payment must be deposited into the Protest Fund account. Second, a taxpayer who has protested and pursued an earlier administrative review of a proposed assessment under § 28-18-404 may reasonably decide not to pursue further adjustments of the assessment or judicial review of the final determination. While a payment which is not made under protest is deposited into general revenues and becomes available for immediate use by the state, a payment made under protest only becomes available for the state's use after the taxpayer fails to file suit within the one year period or after judicial determination that the deficiency assessment was valid. *See* § 28-18-406(c)(3).

Hercules, Inc. v. *Pledger*, 319 Ark. 702, 707, 894 S.W.2d 576, 578 (1995).

Another case in which we recognized fiscal policy concerns was *City of Little Rock* v. *Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). In that case, which involved a tax that was illegal from its inception, we pointed out that, even though the tax had always been illegal, it had been collected and spent by the City; therefore, the class action could be maintained only from the date the suit was filed and the City was put on notice that it should make allowance before spending the money.

The anomalous case is *Pledger* v. *Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991). In that case it was necessary for each member of the purported class of taxpayers seeking a refund of income taxes to file for a refund as a prerequisite for membership in the class. At issue there, as here, was Ark. Code Ann. § 26-18-507, the statute by which the State can waive sovereign immunity. We held that the statute did not require each member of the class to file a request for a refund. This court agreed with the argument that

requiring strict compliance with the statute would "ignore one of the bases for class action suits, i.e., to deal with these types of issues in a single action rather than requiring all members of a class to bring suit." *Id.* at 56, 811 S.W.2d at 293. However, neither the majority opinion nor the dissenting opinion mentions sovereign immunity, and the case contains no holding on the issue of sovereign immunity. We did not recognize that sovereign immunity was an issue that should have been argued, and we failed to raise it on our own motion. By not doing so, we allowed Ark. R. Civ. P. 23, the class action rule, to prevail over the constitutional provision granting sovereign immunity. But we now recognize that the issue is before us, and we reverse this part of *Pledger* v. *Bosnick*.

In the case now before us, Ms. Staton was the only taxpayer who complied with the statute that caused the State to waive sovereign immunity. It was error to certify a class composed of other taxpayers when they had not complied with that statute, and for that reason we reverse the certification of the class.

On cross-appeal Staton contends that the chancellor erred in refusing to grant an injunction against the collection of the tax and in refusing to order an accounting. Since we hold that it was error to certify the class, these two issues are moot.

This opinion is substituted for the opinion handed down on July 15, 1996. *See State* v. *Staton*, 325 Ark. 341, 925 S.W.2d 418 (1996).

Affirmed in part and reversed and remanded in part for proceedings consistent with this opinion.

NEWBERN, CORBIN, and BROWN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The petition for rehearing filed by the Department of Finance and Administration (DFA) in this case does little more than reargue the points as they were argued in DFA's original brief. Those points were fully aired in the original majority and dissenting opinions. (The original majority opinion appears as an appendix to this dissenting opinion.) The petition for rehearing, therefore, is distinctly violative of Rules of the Supreme Court and Court of Appeals of the State of Arkansas 2-3(f), and it should be denied summarily. Not only does the majority ignore our established rule on that point, it overrules recent precedent and rides roughshod over taxpayers whose money may have been illegally collected by the State. All of that is done in the name of sovereign immunity, which has been waived by the General Assembly.

The majority opinion rehashes the arguments which led to our original decision in this case. It states as a main point that the majority and dissenting opinions in *Pledger* v. *Bosnick,* 306 Ark. 45, 811 S.W.2d 286 (1991), a case upon which the original majority opinion relied, did not mention sovereign immunity. The suggestion seems to be that, because the decision did not mention sovereign immunity, it does not apply to this case. That is incorrect.

A main issue in the *Pledger* case was whether it was necessary for each member of the purported class of taxpayers seeking a refund of state income taxes to have filed for a refund as a prerequisite for membership in the class. At issue there, as here, was Ark. Code Ann. § 26-18-507, the statute by which the General Assembly waived sovereign immunity. While the opinion did not mention sovereign immunity, it held that the statute did not require a refund request by each member of the class. This Court agreed with the argument that requiring strict compliance with the statute would "ignore one of the bases for class action suits, *i.e.*, to deal with these types of issues in a single action rather than requiring all members of a class to bring suit."

The opinion granting rehearing concludes that government might have to "shut down some essential services" if the taxpayers are allowed to proceed as a class in a case such as this one. The argument is not convincing. The opinion focuses on the need of government to have notice of its possible liability. It does not, however, suggest why, as in a case such as this one, the notice given by one taxpayer should not be sufficient to inform the government that it may owe all who are similarly situated.

The sky is indeed not falling in this case or in others for which the *Pledger* decision should be precedent. Ed Hicks, the Excise Tax Administrator, testified that the General Assembly appropriates $50,000,000 biennially for the miscellaneous tax account for the purpose of making refunds. In response to a question by the Chancellor, Mr. Hicks stated there was plenty of money in that account to satisfy the claims at issue in this case. Contrary to the conclusion of the majority, government obviously has the ability to plan for and accommodate claims such as the one under consideration.

The Chancellor's order, approved by the original majority opinion in this case, would have required notice to the taxpayers of the facts giving rise to claims, *i.e.*, the allegation that the tax had been illegally collected. It would have then required each taxpayer seeking membership in the class to present proof of payment of the tax at issue and make a claim to a master for refund.

The effect of the majority opinion granting rehearing is to suggest that DFA may sit by smugly and entertain the claims of the one or two taxpayers who may have information about the possible illegality of the tax in question, knowing all the while that there are thousands of others who may be owed but with whom it will never have to reckon.

Once again, it must be pointed out that it is the announced policy of DFA to treat all taxpayers alike. Assuming that is the policy to be applied, it should make no theoretical difference to DFA or the State's coffers whether the action proceeds as a class action or as a single claim by Ms. Staton if she prevails. It will, however, make a great practical difference to the others to whom the money may be owed. If the class action were allowed to proceed, taxpayers would be afforded notice pursuant to Ark. R. Civ. P. 23(c) which requires "the best notice practicable under the circumstances." Denial of the class action will undoubtedly result in many persons who may be owed refunds remaining ignorant of the fact. As the majority of the members of this Court stated in the original opinion in this case, avoidance of payment of money owed is not a good reason for refusal of a class action.

I respectfully dissent.

CORBIN and BROWN, JJ., join.

APPENDIX TO DISSENTING OPINION

This is a class-action tax-refund case. The appellee, Debora Staton, sued the Department of Finance and Administration (DFA) on behalf of herself and other taxpayers for refunds of sales taxes paid on purchases of extended warranty agreements. The Chancellor certified the class action in accordance with Ark. R. Civ. P. 23(a). Although requests for an accounting and an injunction prohibiting the collection of the tax were denied, the Chancellor held in favor of the class on the merits and ordered refunds to taxpayers who seek them.

1. Appeal

Several issues are presented. DFA attacks the jurisdiction of the Chancellor to hear the suit as a class action because of failure to name a class of persons who have followed the statutory procedure to obtain a tax refund. The class counters with a claim that the class certification has not been appealed in a timely manner. On the merits, DFA contends the tax law, as interpreted for many years by DFA, permits collection of the tax. On cross-appeal, the class contends the Chancellor erred in refusing to enjoin the DFA from

continuing to collect the tax and in refusing to require an accounting to class members who had paid the tax rather than to those who come forward with claims. We hold the Chancellor did not err on any of the points asserted.

a. Timeliness of appeal

The order certifying the class was entered May 8, 1995, and the notice of appeal from the final judgment was not filed until December 13, 1995. Although interlocutory, an order granting a motion to certify a case as a class action "in accordance with Rule 23 of the Arkansas Rules of Civil Procedure" is appealable. Ark. R. App. P. 2.(a)9. DFA does not question the class's compliance with the basic requirements of Rule 23. It contends, rather, that sovereign immunity, Ark. Const. art. 5, § 20, precluded the Chancellor from having subject matter jurisdiction of the claim made by the class because its purported members have not complied with the provisions of the statute granting permission to sue the State and thus waiving sovereign immunity.

As the issue on appeal goes beyond the technical aspects of class certification, we do not regard it as untimely. Even if DFA had appealed within 30 days of the class certification, it is doubtful that we would have entertained its sovereign immunity claim upon interlocutory appeal. *Arkansas State Bd. of Educ.* v. *Magnolia Sch. Dist. No. 14,* 298 Ark. 603, 769 S.W.2d 419 (1989).

b. Subject-matter jurisdiction

Upon the purchase of a vehicle, Ms. Staton, the class representative, paid a sales tax of $49.28 on the price she paid for an extended warranty. She filed a claim for a refund from DFA which denied the claim. Ms. Staton then filed an action in Chancery Court on behalf of herself and on behalf of other similarly situated taxpayers. The amended complaint alleged that DFA was unlawfully imposing a tax on the prices paid by members of the plaintiff class for extended warranty coverage on automobiles. It asserted that the Arkansas Gross Receipts Act did not authorize the imposition of such a tax and sought a refund of the taxes paid on the sale of extended warranties. The complaint also prayed for an injunction to stop DFA from collecting the tax and for an accounting to determine which taxpayers had paid the tax. It would thus have put the onus of determining who had paid the tax, and thus of determining who was potentially entitled to a refund, upon DFA.

DFA moved to dismiss on the ground that it failed to state facts upon which relief could be granted and on the ground that Ms.

Staton lacked standing. After Ms. Staton filed a second amended complaint, DFA again moved to dismiss. DFA claimed, as another reason for dismissal, that "the doctrine of sovereign immunity bars a class action tax refund lawsuit where not all of the proposed class members have satisfied the administrative requirements necessary to confer subject matter jurisdiction on this court."

The order certifying the class recognized as members of the class "all of those parties who have, since July 7, 1991, purchased vehicle service contracts, sometimes referred to as extended warranties, covering motor vehicles within the state of Arkansas."

The essence of DFA's sovereign immunity argument is that sovereign immunity prohibits suits against the State except when permission to sue has been granted. The statute granting permission to taxpayers such as Ms. Staton is Ark. Code Ann. § 26-18-507(e)(2)(A) (Repl. 1992) which allows a taxpayer to seek judicial relief from an improperly collected tax after a refund has been sought and there has been no timely response from "the director" or the request has been refused. As the complaint in this case seeks relief for a class of persons without specifying that they must have followed the statutory refund procedure, DFA contends the concept of sovereign immunity precluded subject-matter jurisdiction in the Chancery Court.

We recently rejected the same argument in *Pledger* v. *Bosnick,* 306 Ark. 45, 811 S.W.2d 286 (1991). In that case, certain taxpayers claimed that the State had taxed their pension incomes in a discriminatory manner. The challenged law allowed a full exemption for certain retirees from state government positions while exempting only a small portion of the pensions of others. On appeal it was urged that the Chancellor erred in allowing refunds to members of the class who had not filed amended income-tax returns for 1985. It was argued by the State, as in this case, that class members had not complied with § 26-18-507.

The Chancellor's order permitting recovery by the class was affirmed. The opinion stated, "Although this court has not ruled on this precise issue as applicable to tax refunds, there is ample authority for the appellees' position and we adopt that reasoning. *See Santa Barbara Optical Co.* v. *State Bd. of Equalization,* 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (1975); *Ware* v. *Idaho State Tax Commission,* 98 Idaho 477, 567 P.2d 423 (1977); *Clark* v. *Lee,* 273 Ind. 572, 406 N.E.2d 646 (1980); *Thorn* v. *Jefferson County,* 375 So.2d 780 (Ala. 1979); and *Fiorito* v. *Jones,* 39 Ill.2d 531, 236 N.E.2d 698 (1968)." We now review the "reasoning" we adopted from those cases.

The opinion in *Fiorito* v. *Jones, supra,* concerned amendments to an Illinois tax statute which gave exemptions to certain service providers while taxing all others. Some of the class members were the service providers who were to pay the tax to the State, and some were persons who had been charged the tax by the providers. It was held that the differences between the class members were not sufficient to void the class because each group presented common legal and factual issues, and each would have an interest in the common fund to be created by a holding that the tax was improperly collected.

In *Ware* v. *Idaho State Tax Commission, supra,* a group of taxpayers had failed to claim refunds of sales taxes due to persons over 65. The tax authority had failed to make available means to request the refunds and had even misrepresented the law on the procedure to be used. Although those facts are quite different from the ones now before us, some of the reasoning of the Supreme Court of Idaho is useful.

> The record before us shows that the Commission ... refused any refund claims such as those which were found valid by the trial court. It admits that it had no intention of allowing any such claims. In these circumstances, we find that the requirement of the filing of a claim for the refund was the requirement of a useless and futile act. "The law does not require useless acts from litigants as prerequisites to seeking relief from the courts." [Citations omitted.]

In *Clark* v. *Lee, supra,* plaintiffs claimed an Indiana "occupations income tax" discriminated against non-resident taxpayers by giving a credit to residents against other taxes. A question on appeal of a judgment in favor of the plaintiffs was whether the class was proper in the absence of a showing that all of the class members had exhausted their administrative remedies.

In holding the class was proper, the following reasoning was expressed by the Supreme Court of Indiana:

> In the situation with which we are confronted, the named plaintiffs personally satisfied the jurisdictional requirements of the statute by exhausting their administrative remedies before bringing their action. In so doing they afforded the state government the opportunity of reckoning with their claim. The claim itself was constitutional in nature and sought to void the statute because it discriminated against a class to which plaintiffs belonged, namely non-residents. It was by its nature a claim which would, if successfully prose-

> cuted by a lone plaintiff, provide a basis for class-wide relief in the absence of certification. We, therefore, conclude that the certification of this action as a class action does not vitiate or evade the jurisdictional requirements of the statute and is not contrary to the case law cited.

The Alabama case, *Thorn* v. *Jefferson County, supra,* cited in *Pledger* v. *Bosnick, supra,* is not as helpful as the others. In that case, the Alabama Supreme Court merely held that there was no requirement that class members have sought a refund when the claim was that the property-tax statute in question was unconstitutional and thus void.

In *Santa Barbara Optical Co.* v. *State Bd. of Equalization, supra,* a group of dispensing optical corporations sued California for refund of improperly imposed sales taxes. The State demurred on several bases including a contention that not all of the corporations had made timely claims with the State, each stating its name and the amount of refund due. The demurrer was sustained. The California Court of Appeals reversed, holding the claims statute was satisfied if the representative members of the class gave "sufficient information to identify and make ascertainable the class itself." The Court also declined the State's argument that some unnamed members of the class could not be "claimants" under the applicable refund statute because their claims had never been disallowed in writing, so their claims were not timely. The underlying reason recited for the decision sounded familiar.

> If a class suit were not permitted a multiplicity of actions will be necessary in order to effectuate recovery by the individual purchasers. Since in many instances, the small amount involved may discourage an individual action as economically impractical, the state would be unjustly enriched, if a class suit were not permitted.

In *Woosley* v. *State of California,* 3 Cal.4th 758, 13 Cal. Rptr.2d 30, 838 P.2d 758 (1992), the California Supreme Court overruled the Court of Appeals decision in the *Santa Monica Optical Co.* case on the basis that the California Constitution specifically provides: "After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." The Court was also influenced by the fact that the California legislature had, subsequent to Woosley's submission of his claim, enacted a law that required that any class action for refund of vehicle license fees be authorized by each member of the class who must sign the claim. The reasoning of the

Court was that the State must know the claims against it and thus be able to plan its budget accordingly.

To be sure, there are other cases in other jurisdictions which use reasoning contrary to that we adopted from the cases we cited in *Pledger* v. *Bosnick, supra.* All of the cases we cited are found in Annot., "Propriety of Class Action in State Courts to Recover Taxes," 10 ALR 4th 655 (1981). *See also* Annot., "Maintenance of Class Action Against Governmental Entity as Affected by Requirement of Notice of Claim," 76 ALR 3d 1244 (1971).

Again, we have decided this issue based on the reasons given in the cases we cited in *Pledger* v. *Bosnick, supra.* We note in this case that filings for refunds by all the class members would apparently have been useless acts. We note also testimony presented by DFA that, once a decision had been reached by a court in a suit by a single taxpayer that the tax had been illegally collected, all taxpayers would be treated the same. We fail to see how presentation of requests for refund by way of a class action could be prejudicial to DFA or the budgeting process in view of DFA's apparent willingness to give a refund to any taxpayer who seeks it after such a decision. It may be that more taxpayers who have paid the tax will become claimants due to the notices to be provided through the Court than would have sought refunds absent such a procedure, but discouraging payment of money owed is hardly a good reason to deny a class action.

We hold the Chancellor did not lack jurisdiction of the subject matter of the claim, as the class certification was proper.

c. The merits of the claim

Arkansas Code Ann. § 26-52-301 (Supp. 1995) provides in part:

> There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> * * *
>
> (C)(i) *Service of* alteration, addition, cleaning, refinishing, replacement, *and repair of motor vehicles*, aircraft, farm machinery and implements, motors of all kinds, tires and batteries, boats, electrical appliances and devices, furniture, rugs, upholstery, household appliances, television and radio, jewelry, watches and clocks, engineering instruments, medical and surgical instruments, machinery of all kinds, bicycles, office machines and equipment, shoes, tin and sheet metal,

mechanical tools, and shop equipment. [Emphasis added.]

DFA contends that the sales of extended warranties are taxable because it has ruled them taxable, and has taxed them for at least 17 years, and because the Court impliedly held that they are taxable in *Ragland* v. *Miller Trane Service Agency*, 274 Ark. 227, 623 S.W.2d 520 (1981).

In the *Ragland* case the taxpayer was engaged in the business of inspecting, servicing, and repairing commercial heating and cooling devices. The taxpayer sold two types of contracts. The first was an "inspection only" contract which all parties agreed was exempt from the gross-receipts tax. The second was a "Full Coverage Commercial Service Contract" whereby the service agency agreed with a customer to inspect (a minimum of 3 times a year), maintain, and repair commercial heating and cooling units. The contract provided for an annual or monthly prepayment. The full maintenance agreement was designed to assure the maximum service for the efficient and economical operation of the equipment. Contract jobs under the service agreement took priority over other jobs and were guaranteed prompt action upon request.

The State, through the Revenue Department Hearing Board, determined that the service agency owed a sales-tax deficiency of $8,253.71, which included interest and a 10% penalty, for failure to remit the 3% gross-receipts tax on the sale of the commercial contracts from September 1, 1975, through August 31, 1978. The assessment was paid under protest and then made the subject of a chancery court claim. The Chancellor found that 75% of the taxes assessed were improper, including the interest and penalty. The State was ordered to repay those funds.

On appeal, it was stipulated that the issue presented was whether the total consideration paid pursuant to the contract was subject to the 3% sales tax, or only that portion which relates to specific repairs. The State contended the Chancellor erred in finding the service agency's full-coverage commercial contract could be broken down into component parts for the purposes of collecting the gross-receipts tax.

The Court noted that the sales-tax statute in effect provided for a 3% tax on gross proceeds or receipts derived from the service of "alteration, addition, cleaning, refurbishing, replacement and repair of . . . machinery of all kinds . . . ." The Court also noted that the term "gross proceeds" or "gross receipts" was defined as "the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for . . . ."

Based on the statute, the Court, in concluding that the entire value of the contract was subject to the sales tax, stated:

> Here, the total consideration paid by appellee's customers is for the package of services, i.e., inspection, maintenance and repairs, which it agreed to perform during the period covered by the contract. Maintenance and repairs of the machinery are taxable services. Inspection of the equipment is a prerequisite to the routine maintenance and repair and is an integral part of the contract. This inspection involves labor performed pursuant to the sale of taxable services; therefore, the cost of such an inspection cannot be deducted from the total amount of consideration paid for the full service contract. Appellee's insurance coverage for reimbursement to it for repairs it made, plus 3% sales tax, was for its benefit. In summary, appellant's claim is properly based upon the total consideration received by appellee for the sale of its package contract.

DFA argues that, because the contract receipts for future services were held to be taxable, the implication is that receipts for services to be performed upon contingency are taxable. We see a considerable difference between a prepayment for services to be rendered and a payment for something like insurance against the need for services which may or may not arise. DFA's interpretation is obviously strained.

In response to the dissenting opinion, we must also note that which DFA does not argue. *City of Little Rock* v. *Cash,* 277 Ark. 494, 644 S.W.2d 229 (1983), is cited in DFA's brief solely in support of this statement: "This court hears equity cases *de novo* on the record and enters such judgment as the chancellor should have entered on the undisputed facts." DFA makes no argument whatever to the effect that, because the tax was "voluntarily" paid by the class members, they may not succeed in their quest for refunds.

We decline to address the issue in any depth, but point out summarily that there is good reason for not making such an argument. The general statement we adopted in *Thompson* v. *Continental Southern Lines, Inc.,* 222 Ark. 108, 257 S.W.2d 375 (1953), from Cooley, *The Law of Taxation,* Ch. 20, § 1282, and cited in *City of Little Rock* v. *Cash, supra,* was based on Professor Cooley's recitation that "every man must know the law." It included the following: "It is well settled that if the payment of a tax is a voluntary payment, it cannot be recovered back, except where a recovery is authorized by

the provisions of a governing statute regardless of whether the payment is voluntary or compulsory." Section 26-18-507(a) authorizes such an action when a tax is paid under "mistake of law." *See Taber* v. *Pledger,* 302 Ark. 484, 791 S.W.2d 363 (1990), cert. denied, 498 U.S. 967 (1990). The statute makes no reference to whether the tax was paid voluntarily or as the result of compulsion.

The reason we decline further to address this issue raised in the dissenting opinion is that it was not raised in the Trial Court or here. Our reason was stated by the majority of the members of this Court in *Smart* v. *State,* 297 Ark. 324, 761 S.W.2d 915 (1988), in response to a dissenting opinion raising an issue not argued by the appellant at trial or on appeal:

> The dissenting opinion asserts that the majority "evades the question...." There are clear and cogent reasons. The argument was not raised in the trial court, nor was it argued on appeal. Either omission, according to literally hundreds of our cases, many of which are authored by the dissenting justice, obviates our dealing with issues that are not presented. If we undertook to answer arguments that were raised neither here nor in the trial court, the process of appellate review should doubtless collapse under its own weight. Few principles of appeal and error are more widely followed or firmly entrenched than the rule that we do not address arguments not raised by the litigants.

See also Smith v. *State,* 310 Ark. 31, 832 S.W.2d 497 (1992); *Williams* v. *State,* 304 Ark. 279, 801 S.W.2d 296 (1990).

DFA does argue its interpretation of the statute in question here is entitled to deference, and we agree. *See Arkansas Public Service Comm'n* v. *Allied Telephone Company,* 274 Ark. 478, 625 S.W.2d 515 (1981). The basic rule of statutory construction, however, is to give effect to the intent of the General Assembly, and when a statute is clear, it is given its plain meaning. *Hercules, Inc.* v. *Pledger,* 319 Ark. 702, 894 S.W.2d 576 (1995).

The statute plainly levies a "tax . . . upon the gross proceeds or gross receipts derived from all sales to any person of . . . service of . . . and repair of motor vehicles." An extended warranty is not "service." As the promised repairs are completely contingent upon events which may not transpire, the contracts cannot be said to be for service or repairs to automobiles.

The judgment is affirmed on appeal.

2. Cross-appeal

a. Injunction

The Chancellor was asked to enjoin DFA from collecting the

tax. The class contends:

> Plaintiff was given judgment for $10,050,759.17 plus additional taxes and interest accruing at the rate of $6,352.00 per day. Since defendant was not enjoined from collecting the illegal tax on extended warranties, taxpayers have, and will, continue to pay State sales tax on extended warranties. It is possible that the total amount of refunds will exceed the damages awarded.

The only authority cited on this point is *Harkey* v. *Matthews,* 243 Ark. 775, 422 S.W.2d 410 (1967), for the proposition that public officials may be enjoined from *ultra vires* acts.

It is not at all clear that the Chancellor awarded the amount stated as a "judgment" in favor of the class. As we read the order, he found as a matter of fact that the figure stated was the amount which might have to be refunded.

The Chancellor was presented with evidence that DFA maintained a miscellaneous tax account through which it would pay the refund if ordered. According to testimony presented by DFA, $50 million per year was appropriated for the account for the years 1995, 1996, and 1997, and the State could have at least $30 million available for each fiscal year. The refunds, if required, would come out of that account. Testimony was also presented that an injunction, if granted, could disrupt public education and the services performed by the Department of Human Services.

The Chancellor denied the request for an injunction, finding that DFA had "established that sufficient funds are appropriated from which refunds may be made if ultimately ordered by the Court." An order granting or denying an injunction is within a chancellor's discretion. *Smith* v. *American Trucking Ass'n,* 300 Ark. 594, 781 S.W.2d 3 (1989). The Chancellor did not abuse his discretion.

b. Accounting

Again without citation to authority, it is contended that the Chancellor should have ordered DFA to identify each member of the group and refund the amount of the tax paid to that member.

Evidence was presented that such a requirement would be extremely burdensome and expensive. The Chancellor ruled that "the better method of refund is to require each taxpayer to present proof of their payment of taxes on an extended warranty during the time period in question in this lawsuit. A master is to be appointed to review and approve each claim filed for refund."

We consider the solution reached by the Chancellor to be consistent with our decision in *International Union of Electrical, Ra-*

dio, and Machine Workers v. *Hudson,* 295 Ark. 107, 747 S.W.2d 81 (1988), in which we emphasized the need for discretion in the management of a class action and the desirability of choosing a management solution fair to all parties.

Affirmed on cross-appeal.

DUDLEY, J., not participating.

JESSON, C.J., and GLAZE, J., dissent.

END APPENDIX TO DISSENTING OPINION

ROBERT L. BROWN, Justice, dissenting. The legacy of this opinion is to deny Arkansas taxpayers who have paid $20, $30, $50, or $100 in illegally assessed taxes a remedy for recouping those taxes. This is unjust and unfair in the extreme. Until today a remedy was recognized. *See Pledger* v. *Bosnick,* 306 Ark. 45, 811 S.W.2d 286 (1991). Now the majority of this court closes that door and effectively locks these people out of court and divests them of any practical legal recourse. I would deny rehearing and affirm our decision in *State* v. *Staton,* 325 Ark. 341, 925 S.W.2d 418 (1996) (*Staton I*).

The majority decides as it does for two primary reasons: (1) an immutable and unshakable conviction that sovereign immunity allows the Department of Finance and Administration (DFA) to collect illegal taxes under these circumstances with impunity; and (2) an amorphous notion that allowing individuals who are part of a class to file claims for refund for illegal taxes will bankrupt the State. I disagree on both counts.

First, on sovereign immunity. We do have a provision in our Constitution that says the State may not be a defendant in her courts. Ark. Const. art. 5, § 20. But the General Assembly has enacted a statute permitting claims for refunds for taxes erroneously and mistakenly paid and for suits thereafter if the claims are not paid. Ark. Code Ann. § 26-18-507 (Repl. 1992). Thus, sovereign immunity has been waived by the General Assembly for erroneously paid taxes. The fact that these taxes were voluntarily paid is of no moment in light of the statute that provides a refund remedy after voluntary payment.

The question then is whether § 26-18-507 has been complied with by virtue of the class-action remedy under Arkansas Rule of Civil Procedure 23. I conclude that it has been. Under comparable circumstances, we held there was compliance in *Pledger* v. *Bosnick, supra.* Using the precedent of *Bosnick,* we decided in *Staton I* that a class action was a valid means of claiming refunds under § 26-18-507 for wrongfully collected taxes. We further affirmed the chancellor who required each taxpayer to present proof of payment of

the erroneous tax as a prerequisite to a refund. That is what the statute requires. Hence, the remedy afforded in this case met the statutory requirements.

The majority no doubt believes that permitting a class-action suit before class members have claimed refunds puts the cart before the horse. *See* Ark. Code Ann. § 26-18-507(c) (Repl. 1992). Not so. The class representative, Debora Staton, filed this lawsuit on behalf of the class. Notice presumably has gone out or will go out to class members who now must prove their claims. The net effect of this, as was emphasized in *Staton I*, is that notices will be sent to class members under court auspices as provided by Rule 23. Better notification to wronged class members will enhance their ability to claim refunds and is without question a worthy goal.

The majority writes, somewhat myopically, that individuals who have paid a $30 or $40 sales tax on an extended warranty should have claimed a refund under § 26-18-507 prior to the class-action relief. But how does that person know the tax is illegal? That person does not know. In addition, prior to the class action lawsuit, had a class member claimed a refund, that person would have been rebuffed by DFA because DFA's position was that the tax was valid. A claim for refund would have been a totally useless act. It was only after the class action lawsuit and the decision by the chancellor that a claim had viability. Indeed, a class action is the only practical way to remedy this illegal tax, since only the most civic-minded citizen would undertake the arduous burden of obtaining judicial relief when the recovery could only be nominal at best.

The majority plainly fears a catastrophic loss to the State coffers resulting from class-action claims. I do not see that. In this case, each class member must prove his or her claim, which is what we held in *Staton I*. And consider the alternative. The majority is holding that DFA can wrongfully collect taxes, then build a wall around itself and assert that a taxpayer has no practical recourse, even when the taxpayer can prove the claim. The rationale by DFA is it has already relied on those wrongfully collected taxes for spending purposes. Something is severely out of kilter here. If a tax is wrongfully assessed and collected against a person and the taxpayer can prove it, that person deserves to be repaid. That is the remedy § 26-18-507 provides.

Again, the anomaly here is that under the decision today these people who have been wrongfully taxed have no remedy as a practical matter. In *Pledger* v. *Bosnick*, 306 Ark. 45, 811 S.W.2d 286

(1991), this court recognized that fact and permitted precisely what the class attempts to do in this case. Moreover, that was a 1991 decision and the General Assembly since that decision has taken no action to disabuse Arkansas taxpayers that that is a correct interpretation of the law. Finally, I strongly disagree with the majority's conclusion that sovereign immunity was not contemplated by *Pledger* v. *Bosnick, supra.* That is splitting fine hairs. In *Bosnick*, we analyzed § 26-18-507, *which waives sovereign immunity*, and determined that compliance had occurred.

In short, the taxpayers of this State are put in a Catch-22 situation when the majority holds that they must first seek a refund apart from the class for a tax (1) they did not know was wrongful, and (2) DFA would not have refunded in any event because DFA believed it to be a valid tax. I would not give DFA *carte blanche* to tax illegally and then deny refunds after class action notice and proof by the taxpayers.

I respectfully dissent.

NEWBERN and CORBIN, JJ., join.

BAKER CAR AND TRUCK RENTAL, INC.; Arelco, Inc., d/b/a National Car Rental; and Carco Rentals, Inc. *v.* The CITY OF LITTLE ROCK, Arkansas, Acting By and Through the Little Rock Municipal Airport Commission

95-1128 925 S.W.2d 780

Supreme Court of Arkansas
Opinion delivered July 15, 1996
[Petition for rehearing denied September 9, 1996.*]

*Special Chief Justice Josephine L. Hart would grant. Jesson, C.J., and Dudley, J., not participating.

Friday, Eldredge & Clark, by: *Harry A. Light*, for appellant Baker Car and Truck Rental, Inc.

Stark, Dininger & Smith, by: *William K. Byrum*; and *Davidson, Horne & Hollingsworth*, by: *Garland W. Binns*, for appellant Arelco, Inc., d/b/a National Car Rental.

Hardin, Dawson & Terry, by: *Robert M. Honea*, for appellant Carco Rentals, Inc.

Kaplan, Brewer, & Maxey, P.A., by: *Philip E. Kaplan* and *JoAnn C. Maxey*, for appellee.

TOM GLAZE, Justice. This litigation arises out of leases entered into between the Little Rock Municipal Airport Commission and Avis, Hertz, and National car-rental businesses having concessions at the Little Rock Airport. These three car-rental businesses first entered into identical leases in 1971, and each had a ten-year rental term with an additional ten-year option, ending in 1991. In 1973, Hertz and National obtained a second option to renew for a five-year period, extending their lease terms to 1996. All of these and later leases entered into between the Commission and car-rental

businesses contained a clause referred to as a "most-favored-nations (MFN) clause." What interpretation and effect this clause should be given is the focus of this litigation. The clause reads as follows:

> That the concession granted by this agreement is not exclusive and lessor [Commission] shall have the right to deal with and perfect arrangements with any other individual company or corporation for engaging in like activity at the Airport; *provided, however, no other concession for auto rental operation shall be granted on more favorable terms and conditions than granted to the concessionaires [car-rental lessees] herein.* (Emphasis added.)

Avis[1], a franchisee of Baker Car and Truck Rental, Inc. (Baker), never invoked the MFN clause in its 1971 lease in an attempt to extend its 1971 lease to comport with the extended five-year term in the Hertz and National supplemental leases. Significantly, the Baker, Hertz, and National leases all contained concessionaire fees based upon a rate of $ .03 "per deplaning airline passenger" for the first 30,000 passengers per month and $2.75 for all deplaning passengers over 30,000.

What led to this legal dispute was the Commission's 1986 concessionaire lease with Budget Rent-A-Car. This lease gave Budget a ten-year term with two five-year renewal options, extending Budget's concession rights to 2006. Budget's lease contained the MFN clause and other terms and provisions in the above-mentioned, prior car-rental leases, including the concessionaire fee rate based upon deplaning airline passengers.[2] However, by the time Baker's 1971 lease expired in 1991, the Commission was reconsidering its car-rental concessionaire fees and how they should be computed. It proposed basing the concessionaire's fee upon the "percentage of the concessionaire's gross receipts" rather than upon the "number of deplaning passengers." This new formula or gross-receipts percentage rate concededly represents an increase in costs to the appellants' car-rental businesses by establishing a higher fee rate than that required under the Commission's deplaning-passenger formula. As a consequence, Baker rejected the Commission's new formula rate in the proposed new lease. Instead, Baker submitted

---

[1] For clarity, Avis will be referred to as Baker.

[2] Some differences exist between Budget's 1986 lease and the prior 1971 and 1973 leases. For example, the rates for terminal building space, parking space and ground rental space were higher and rental rate and fee review procedure differs in Budget's lease. The Budget lease also contains an additional leasehold improvements section not contained in the earlier leases.

that, under the MFN clause of its 1971 lease, its existing lease terms and conditions (including the "deplaning-passenger formula rate") had been *automatically extended* to 2006 when the Commission executed its twenty-year lease with Budget in 1986.

The Commission agreed to extend Baker's lease to 1996 to coincide with Hertz's and National's 1973 amended leases, but Baker rejected such an extension agreement because Baker believed its lease was automatically extended to the 2006 date provided in Budget's lease. After Baker rejected the Commission's proposed extension agreement, the Commission approved a new concession agreement providing that concession fees be based upon a percentage of gross receipts. It then informed Baker, Hertz, National, and Budget that, if they did not execute the Airport's new lease agreement when their existing agreements terminated, their rental space would be put up for bid. About nine months later, the Commission notified Baker that its tenancy would be terminated.

Baker filed suit in chancery court, seeking declaratory judgment and specific performance of the MFN clause and requesting its 1971 lease terms be extended to the 2006 termination date provided in Budget's lease. It also asked the chancery court to declare the new proposed "percentage of gross receipts" formula an illegal exaction. Hertz and National intervened, reasserting Baker's claims. The parties filed motions for summary judgment, but the chancellor granted the Commission's, thereby dismissing Baker's and its co-plaintiffs' complaint with prejudice.

On appeal, Baker, Hertz, and National (hereafter collectively referred to as Baker) question the chancellor's finding that the parties' lease agreements, particularly the MFN clause, are unambiguous, and as a matter of law, reflect the parties never intended the car-rental leases to be automatically extended by a competing company's separate and later lease.

The chancellor relied heavily on the case of *Eveleth Taconite Co.* v. *Minnesota Power & Light Co.*, 221 N.W. 157 (Minn. 1974), where the Minnesota Supreme Court was faced with a similar issue. There, Eveleth Taconite Company entered into two contracts that called for the Minnesota Power & Light Company to provide all necessary electric power to Eveleth's plant and mine. Both companies settled on a three-year contract for providing power to Eveleth's plant, and a five-year contract for providing power to its mine. The contracts contained a MFN clause which provided as follows:

> Company [defendant Minnesota Power] agrees that, if at any time during the term of this agreement it has in effect an agreement which gives or grants to any other customer,

> similarly engaged in the taconite industry and who receives the same class and type of electric service as Eveleth Taconite Company, more favorable treatment for the purchase of said electric service or otherwise gives or grants to any such customer more favorable price, terms or conditions, with respect to said other customer's purchase of said electric service, Company shall notify Eveleth Taconite Company in writing with respect to said more favorable treatment, price, terms or conditions and said Eveleth Taconite Company, at its election, may request Company to substitute for this agreement such more favorable agreement in its entirety or on an equivalent basis to amend this agreement to give effect to such substitution.

Subsequent to the signing of Eveleth's contracts, Minnesota Power executed contracts with other taconite producers, and the terms and conditions of those contracts were the same as Eveleth's except they were for a period of ten years, and being later in time contained different termination dates. When the time came for cancellation of Eveleth's contracts, Eveleth insisted the MFN clause in its contracts entitled it to the same termination date as that contained in the longest contract in which Minnesota Power had entered with other taconite producers. Without this requested extension of its term of contract, Eveleth was required to pay a higher rate for electricity than that paid by the other competing companies. The Minnesota Supreme Court rejected Eveleth's contention and gave the following reasoning:

> In our judgment, there is little doubt that the parties intended that *the most-favored-nations clause would protect plaintiff [Eveleth] from being placed in a noncompetitive position* by provisions in its contracts with defendant [Minnesota Power], including the price of its electricity, which were less advantageous than provisions its competitors might be granted by defendant at a later time *during the agreed-upon span of plaintiff's contracts. We do not believe that the period of duration of the contract was intended to be included in the phrase "terms or conditions" because to do so would create a situation in which the contract could be indefinitely extended at plaintiff's election if defendant continued to enter contracts with other taconite companies. In other words, these contracts would be perpetual if defendant entered other agreements with taconite producers because plaintiff, if it so chose, could continually assume the longer term of those contracts.* That result appears inconsistent with the intent of the parties, particularly in light of the evidence concern-

> ing the pre-contract negotiations in which plaintiff successfully resisted defendant's preference for a 10-year contract. In addition, the fact that the most-favored-nations clause uses the two separate phrases, "term" and "terms or conditions," in different parts of the clause and in different contexts, gives further evidence that the parties intended those words to have different meanings. (Emphasis added.)

Like the holding in the *Eveleth* case, the chancellor here simply determined that, when construing the MFN clause in Baker's and the Commission's 1971 lease agreement, the parties never intended the length of their agreement would be extended. In fact, the 1971 lease contained another provision separate from the MFN clause that established (1) a ten-year term commencing with August 24, 1971, and (2) a renewable period of ten years upon the same terms and conditions. No language in either the length-of-term provision or the MFN clause of the 1971 lease specifically provided for an automatic extension of Baker's lease term for any reason. To accept Baker's argument that its lease should be "automatically extended" requires one to rewrite the parties' agreement, which we refuse to do. Also, if we were to approve Baker's "automatic extension" theory, these car-rental leases would be perpetual, since Baker would continually assume the longer lease term given any existing or new competitor. Our court of appeals has held a lease provision will not be construed as conferring a right to a perpetual renewal unless the language is so plain as to admit of no doubt of the purpose to provide for perpetual renewal. *Pults* v. *City of Springdale*, 23 Ark. App. 182, 745 S.W.2d 144 (1988). That holding makes sense, is applicable here and negates Baker's theory because the plain wording of the 1971 lease provides for no automatic term extensions.

Baker suggests its 1971 lease is ambiguous, and the chancellor erred in not finding so. Baker points to parole evidence it offered to show the Commission had long manifested an intention to treat car-rental concessionaires equally and to have uniform commencement and termination dates for all such concessionaires. Again, uniform termination dates were never mentioned in the Baker/Commission lease, nor was there any language providing for automatic term extensions for any reason.

In fact, a fair reading of the MFN clause of the Baker/Com-

mission 1971 lease reflects merely that the Commission could not give concessions, containing more favorable terms and conditions, to other car-rental operations. Under this provision, Baker had every right to enforce its contractual rights when it received disparate treatment, but it never did so until after its lease expired. Having delayed such action, Baker now argues its 1971 lease should be construed to mean it had been automatically extended when Budget's 1986 lease was executed, thus making Baker's expiration date to be 2006, rather than the 1991 date actually provided in Baker's lease.

In sum, Baker, under the plain language of its 1971 lease, could have negotiated or filed suit in an effort to enforce its rights under the MFN clause, but it simply failed to do so. The chancellor was correct in her holdings — the 1971 lease was free of ambiguity, extrinsic evidence was irrelevant, and when construing the entire agreement, the MFN clause in Baker's lease did not automatically extend the termination date to coincide with the termination date of the Budget lease.

Finally, we consider Baker's argument that, aside from the trial court's ruling regarding the MFN clause issue, the trial court erred in refusing to reach Baker's other argument that the commission's proposed new lease constituted an illegal exaction because it contained an unlawful new rental rate based upon each concessionaire's gross receipts. The chancellor reasoned that, because Baker continued to operate under a year-to-year agreement and had not, as yet, executed the Commission's proposed new lease agreement containing the asserted unlawful rental rate, it would be merely advisory on the chancellor's part to decide the rental rate issue.[3] We agree. Suffice it to say, courts do not sit for the purpose of determining speculation and abstract questions of law or laying down rules for the future conduct of individuals in their business and social relations. *Micklish* v. *Grand Lodge of the Loyal Star,* 162 Ark. 71, 25 S.W. 353 (1924); *see also Andres* v. *First Ark. Development Finance Corp.*, 230 Ark. 594, 324 S.W.2d 97 (1959). Because this issue presented by Baker depends on a state of facts which is future,

[3] We note that intervenor appellants National Car Rental and Hertz also have never signed the Commission's proposed lease.

contingent, or uncertain, we agree with the chancellor that it would be premature and advisory to render a decision at this time.

Special Justice JAMES A. ROSS, JR., joins this opinion; Special Chief Justice JOSEPHINE L. HART, NEWBERN and BROWN, JJ., dissent; JESSON, C.J., and DUDLEY, J., not participating.

DAVID NEWBERN, Justice, dissenting. The words of a contract are to be taken and understood in their plain meaning. *First Nat. Bank of Crossett* v. *Griffin,* 310 Ark. 164, 832 S.W.2d 816 (1992), *cert. denied,* 507 U.S. 919 (1993), appeal after remand, 318 Ark. 848, 888 S.W.2d 306 (1994); *Farm Bureau Mut. Ins. Co. of Arkansas, Inc.* v. *Milburn,* 269 Ark. 384, 601 S.W.2d 841 (1980). To hold that the term (duration) of a contract is not one of its terms and conditions raises legal sophistry to a new level.

The evidence before the Chancellor included J. Dan Baker's affidavit and the deposition of Harry Don Denton, assistant manager of the airport. Mr. Baker stated his intention was that the duration of the 1971 concession agreement was to be one of the terms and conditions subject to the "most-favored-nation clause." Mr. Denton stated that, when the car-rental concession agreements were entered in 1971, all were of the same duration. At one point of his deposition, as abstracted, Mr. Denton also said:

> My concern was generated as a result of the words in the contract with really little understanding of the concept of the most favored nation clause. There were two principal concerns: one, the actual reading of the sentence. The words in the contract implied to me that terms and conditions meant what it said.

His other principal concern was the other facilities contracts at the airport which had similar terms. He said the "[i]ntention of the 7/94 agreement was to have all the concessionaires sign new agreement[s] to eliminate the controversy over varying maturities."

The Airport Commission has entered an agreement with Budget with rental rate terms more favorable to Budget than those it now wishes to impose on the other concessionaires. The Budget lease was apparently entered without consideration of the fact that its duration exceeded the durations of the leases to the other concessionaires and might well violate the provision prohibiting the Airport Commission from granting to Budget terms and conditions

more favorable than those granted to Baker and the others.

In *Eveleth Taconite Co.* v. *Minnesota Power & Light Co.,* 221 N.W.2d 157 (1974), the Minnesota Supreme Court rejected the invitation to define the meaning of "terms or conditions" in the context of whether it includes "term" or duration of the contract in all fact situations. The "most favored nation clause" in that contract provided, "if at any time *during the term of this agreement* it [the electric company] has in effect an agreement which gives or grants to any other customer ... more favorable treatment ... or otherwise *gives or grants* to any such customer *more favorable price, terms or conditions* ..." Eveleth would be entitled to obtain the same terms [emphasis by the Court]. Explaining its decision to differentiate the two references to "term" and "terms and conditions" in the case before it, the Court said:

> In our judgment, there is little doubt that the parties intended that the most-favored-nations clause would protect plaintiff from being placed in a noncompetitive position by provisions in its contracts with defendant, including the price of its electricity, which were less advantageous than provisions its competitors might be granted by defendant at a later time during the agreed-upon span of plaintiff's contracts. We do not believe that the period of duration of the contract was intended to be included in the phrase "terms or conditions" because to do so would create a situation in which the contract could be indefinitely extended at plaintiff's election if defendant continued to enter contracts with other taconite companies. In other words, these contracts would be perpetual if defendant entered other agreements with taconite producers because plaintiff, if it so chose, could continually assume the longer term of those contracts. That result appears inconsistent with the intent of the parties, particularly in light of the evidence concerning the pre-contract negotiations in which plaintiff successfully resisted defendant's preference for a 10-year contract. In addition, the fact that the most-favored-nations clause uses the two separate phrases, "term" and "terms or conditions," in different parts of the clause and in different contexts, gives further evidence that the parties intended those words to have different meanings."

To begin, the article of the contract before us containing the "most-favored-nation clause," Article I.C.3., does not have in it both "term" and "terms and conditions." Their appearance together in Article V having to do with the duration of the agreement is virtually irrelevant to the "most-favored-nation clause." This difference robs the *Eveleth* case of much of its precedential value for this case. In addition, we have here no negotiating history of either party seeking leases of longer duration in 1971. To be noted carefully is the Minnesota Supreme Court's recognition that the lease in question would be perpetuated only to the extent that other leases were entered with longer terms.

The fear of "perpetual" agreements is ill-founded. There is nothing perpetual about the Budget lease. Honoring the "most-favored-nation clause" will not extend the Baker lease beyond the term of the Budget lease. As long as the Airport Commission remembers not to enter any other leases with durations past 2006, the leases of the other concessionaires will not endure beyond that point.

The Airport Commission has made a mistake and has placed itself in a position of having to violate its agreement with its concessionaires in order to institute concessionaire rental rates more favorable to it. While it may, perhaps, be able to extricate itself from that position through negotiation with the concessionaires, it should not be allowed to do so by tortured interpretation of plain contract language.

I respectfully dissent.

BROWN, J., and Special Chief Justice JOSEPHINE L. HART, join.

Gina Felicia FLEMINGS (Foster) *v.* Darryl A. LITTLES

96-293 926 S.W.2d 445

Supreme Court of Arkansas
Opinion delivered July 15, 1996
[Petition for rehearing denied September 9, 1996.*]

Child Support Enforcement Unit of Pulaski County, by: *Kimberly D. Burnette*, for appellant.

The Perroni Law Firm, P.A., by: *Samuel A. Perroni*, for appellee.

TOM GLAZE, Justice. This is a paternity case which was first decided on February 4, 1982. On that date, the court entered a final judgment declaring appellee Darryl A. Littles to be the father of appellant Felicia Flemings's (Foster's) infant child. The court ordered Littles to pay $50.00 per month as child support. Almost twelve and one-half years later, August 10, 1994, Littles filed a pro se motion in chancery court, requesting the court to order a paternity test, but Flemings objected, complaining the chancery court lacked jurisdiction to modify the 1982 judgment. The court granted Littles's motion, and upon finding the test excluded Littles as the father, set aside the twelve-year-old judgment. The sole issue on appeal is whether the chancery court had authority to grant

*Brown and Roaf, JJ., would grant.

Littles's motion and later set aside the earlier 1982 paternity judgment. We hold it did not; therefore, we reverse and remand.

Littles cites the case of *Little* v. *Streater*, 452 U.S. 1 (1980), where the Supreme Court held a Connecticut statute unconstitutional because it forced an indigent party seeking a paternity determination to pay the cost of testing. Littles contends that, in applying the *Streater* holding, he, too, was an indigent party when Flemings's paternity suit was filed and decided in 1982, and because of his inability to pay for a test, he was denied due process and "meaningful opportunity to be heard" on the paternity issue.

First, we point out significant procedural differences between the *Streater* case and the case at hand. There, the putative father asserted that he was indigent, and asked that the state be ordered to pay for the paternity tests. The trial court denied the defendant's request, no tests were performed and the court found the defendant to be the father. The putative father in *Streater* appealed the trial court's decision, raising the due process issue he ultimately prevailed on before the Supreme Court.

Here, Littles personally appeared at the 1981 county court proceedings, but there is nothing in the record or judgments in that action that shows he ever claimed indigency or asked the state to pay for the paternity test — even though Arkansas's law (unlike Connecticut's statute in *Streater)* permitted such payment by the county. *See* Ark. Stat. Ann. § 34-705.1 (Repl. 1962).[1] Instead, the county court judgment reflects Littles appeared in person, was ordered to deposit the cost of the paternity test and was informed that, if he failed to pay for the test, or if the test failed to exclude him as being the father, paternity would be established and support would be set at $50.00 per month. Accordingly, in its 1982 judgment, the county court found that Littles failed to pay for the paternity test, that he was found to be the infant's father and that he must pay $50.00 per month in child support. Littles filed no timely appeal from that paternity judgment, nor did he file post-trial motions for a new trial. *See Thomas* v. *Easley*, 277 Ark. 222, 640

[1] In fact, in the 1994 chancery court proceeding to request a paternity test and to set aside the 1982 judgment, Littles testified that the judge in the original paternity proceeding suggested that Littles should take the test, and Littles said, "I thought I could afford one when I was at the hearing."

S.W.2d 797 (1982); *Epperson* v. *Sharp*, 222 Ark. 456, 261 S.W.2d 267 (1953) (court held an appeal from county court in paternity cases must be filed within thirty days). While Littles seeks now, twelve years later, to assert he was indigent and unable to pay for a paternity test in the 1981 and 1982 paternity proceedings, this court has held that it will not go behind a judgment which is valid on its face, to raise such factual issues anew.[2] *Laurence, Gdn.* v. *Meux*, 282 Ark. 512, 669 S.W.2d 464 (1984).

Consistent with the foregoing analysis, we agree with Flemings's argument that, under Ark. Code Ann. § 9-10-115 (Supp. 1995), the chancellor in these circumstances had no authority to permit Littles to reopen or relitigate the paternity holding and underlying factual issues. Section 9-10-115 provides, in pertinent part, as follows:

> (b) The court shall not set aside, alter, or modify any final decree, order, or judgment of paternity where paternity blood testing, genetic testing, or other scientific evidence was used to determine the adjudicated father as the biological father.
>
> (c)(1) Upon request for modification of a judicial finding of paternity or a support order issued pursuant to § 9-10-120, *if the court determines that the original finding of paternity* or support order did not include results of scientific paternity testing, consent of the parents, or *was not entered upon a party's failure to comply with scientific paternity testing ordered by the court*, the court shall, upon request when paternity is disputed, direct the biological mother, the child, and the adjudicated or presumed father to submit to scientific testing for paternity, which may include deoxyribonucleic acid testing or other tests as provided by § 9-10-108.
>
> (2) In no event shall the adjudication or acknowledgement of paternity be modified later than five (5) years after such adjudication or execution of such acknowledgment.

---

[2] The dissenting opinion makes references to Littles as being indigent and to the entering of *ex parte* orders. Suffice it to say, the dissenting opinion reaches conclusions not established by the 1982 judgment, and the dissenting opinion merely raises factual issues which were put to rest by a valid 1982 judgment and proceeding in which Littles appeared and participated.

(Emphasis added.)

As discussed previously, the 1982 judgment reflects the county court's original finding of paternity was entered upon Littles's failure to comply with the scientific paternity testing ordered. Thus, under the plain language of § 9-10-115(c)(1), the chancery court had no authority to grant Littles's motion to modify the original judicial finding of paternity.

For the reasons hereinabove, we reverse and remand.

BROWN and ROAF, JJ., dissent; DUDLEY, J., not participating.

ANDREE LAYTON ROAF, Justice, dissenting. On July 21, 1981, a warrant was issued for the arrest of the appellee, Darryl A. Littles, as a result of the complaint filed against him by the appellant, Gina Felicia Flemings. The complaint falsely alleged that Littles was the father of Flemings's five-month-old daughter. Flemings and Littles were not married; Littles was nineteen years old, unemployed and living with his grandmother at the time.

A hearing was held on November 16, 1981; Littles appeared at this hearing without counsel. An order was entered on November 31, 1981, which reflected that Littles had been granted until January 16, 1982 to deposit the cost of a blood test with the child Support Enforcement Unit (CSEU) of Pulaski County. The amount to be deposited was not specified in this order. The order further provided that in the event Littles failed to pay by January 16, 1982, paternity would be established and support set at $50 per month.

On January 28, 1982, the paternity referee signed a judgment which established that Littles was the father of Flemings's child. The judgment further stated that Littles had "failed to pay for blood test."

In August 1994, Littles sent a handwritten letter to the chancellor in this case requesting that a blood test be done. He stated in his letter that he "strongly" believed that he was not the father of Flemings's child, and that he did not have the money to pay for the paternity test when it was ordered in 1981. He was charitable to Flemings in his letter; he said that he believed that Flemings had made an "honest mistake" and that only a paternity test could clear up the matter.

The trial court treated this letter as a motion and Flemings,

through the Pulaski CSEU, responded and asserted that because the original paternity judgment was entered "upon defendant's failure to comply with scientific testing," the trial court had no jurisdiction to modify the paternity judgment, pursuant to Ark. Code Ann. § 9-10-115 (1993 Repl).

In this instance, the trial court considered Littles's request for genetic testing more than twelve years after the judgment of paternity was entered in 1981. The chancellor, after a hearing, granted the request; a review of the abstract and record makes it abundantly clear why she did so in this case.

Littles was unemployed at the time of the entry of judgment. He appeared before the court without counsel at the initial hearing held on November 16, 1981. He testified that the hearing "went so quick" and that he agreed to the blood test because he did not believe that he was the father of Flemings's child. However, he was not told by the paternity referee or by the attorney for Flemings how much the test would cost. When he contacted CSEU after the hearing, he was told that he would have to pay the sum of $625 in advance to obtain this test. He could not afford to do so. Littles earned only $90.46 in 1981 and entered the Job Corps in Texas shortly after the initial hearing in November 1981. It is interesting to note that the test finally conducted in 1993 cost him only $238. This test conclusively determined that Littles could not be the father of Flemings's child.

In 1981, Ark. Stat. Ann. § 34-705.1 (Supp. 1985), provided that a trial court could direct that the parties submit to one or more blood tests to determine whether or not a defendant could be excluded as being the father of a child. The statute further provided that the cost of the test "*shall* be taxed as other costs in the case" or, in the court's discretion, "*may* be taxed against the county." *Id.* The statute further stated that whenever the court ordered such blood tests to be taken and one of the parties "shall *refuse* to submit to such tests," such facts shall be disclosed *upon the trial* unless good cause is shown to the contrary. *Id.* The paternity referee obviously did not comply with this statute in any respect when he ordered the paternity testing in November 1981 and entered the judgment of paternity *ex parte* in January 1982. The paternity judgment did not find that Littles refused to submit to the blood test, only that he failed to pay for the test. The paternity referee in 1981 gave an indigent young man, unrepresented by counsel, some sixty days to post the

substantial sum of $625, and entered judgment against him *ex parte* twelve days after he missed the sixty-day deadline.

In her arguments to the trial court, Flemings's counsel acknowledged that the United States Supreme Court had declared unconstitutional a Connecticut paternity statute which required the defendant to pay the costs of paternity testing in advance. *Little* v. *Streater*, 452 U.S. 1 (1981). She further stated that the Arkansas statute in effect in 1981 was constitutional because it provided for taxing the cost of the test to the case. Flemings's counsel conceded to the trial court that Littles "possibly was not given his rights — his due process rights under the statute, but his remedy was to appeal to the Supreme Court." However, she admitted that the file did not indicate that Littles was ever sent a copy of the paternity judgment entered against him.

The trial court found that Littles was precluded in 1981 from the testing due to his age and his inability to pay the cost of the test, and that the statute which required that the State advance the cost of testing was not followed. She set aside the judgment pursuant to Ark. Code Ann. § 9-10-115, which provides that the chancery court may vacate a paternity judgment when the original finding of paternity did not include results of scientific paternity testing or was not entered upon a party's failure to comply with scientific paternity testing ordered by the court.

The trial court determined that Littles's inability to pay for the blood test in advance did not constitute a "failure to comply with scientific testing ordered by the court." We review chancery cases de novo, and reverse only if the chancellor's findings are clearly erroneous. *Perryman* v. *Hackler*, 323 Ark. 500, 916 S.W.2d 105 (1996). Chancellors have broad powers to fashion any remedy that is reasonable and justified by the proof. *Id.* If the paternity referee in 1981 had followed the statute which *mandated* that the cost of blood testing be taxed in the case, no judgment of paternity would have ever been entered against Littles. Under the circumstances of this case, it was not clearly erroneous for the chancellor in 1995 to determine that Littles's inability to make a $625 payment ordered in flagrant violation of Arkansas law did not constitute the "failure to comply" with paternity testing contemplated by Ark. Code Ann. § 9-10-115(c)(1). It is the paternity referee, not Littles, who failed to comply with the paternity-testing statute in 1981. This failure constituted an abuse of discretion, and resulted in a denial of Littles's

right to due process in a very important and quasi-criminal proceeding. I would affirm.

BROWN, J., joins this dissent.

Ophelia RANDOLPH, Administratrix of the Estate of Melvalene Hanson, Deceased *v.* ER ARKANSAS, P. A., James Guthrie, Ouachita Clinic, Ltd., J. R. Kendall and Judson M. Hout

95-968 925 S.W.2d 160

Supreme Court of Arkansas
Opinion delivered July 15, 1996

Gary Eubanks & Associates, by: *James Gerard Schulze* and *Hugh F. Spinks*, for appellant.

Shackleford, Phillips, Wineland, & Ratcliff, P.A., by: *Dennis L. Shackleford* and *Teresa Wineland*, for appellees.

TOM GLAZE, Justice. This action was brought as a result of alleged medical malpractice that resulted in the wrongful death of Melvalene Hanson. Hanson's estate sued appellees, alleging Hanson had complained of chest and arm pains, and after having been examined and released by Doctors J. R. Kendall and Judson Hout on two separate occasions within four days, she died of a heart attack at home only a few hours after her second release from treatment. The gravamen of the estate's allegations of medical negligence was that the doctors failed to perform an electrocardiogram (EKG).

Before trial and during *voir dire* of the jury, a number of veniremembers indicated they knew the doctors, and the estate moved to disqualify those potential jurors who had had (or had) a relationship with them. One of those jurors, Melba George, served on the twelve-person jury, and is the subject of one of the points for reversal in this appeal. The estate's second issue for reversal concerns its out-of-state expert witness, Dr. James Goldstein, who testified that an EKG was essential in Hanson's circumstances, and Doctors Kendall and Hout had deviated from the standard of good medical care when no EKG was performed. Because the defense focused on Goldstein's lack of familiarity with the standard of care in Camden, Arkansas, the estate offered, and was denied, an instruction it believed would have better explained the so-called "locality rule" instruction the trial court gave the jury. The jury retired and returned a verdict in favor of the defendants, and the estate brings this appeal, asserting the two points raised below.

In the estate's first argument, it complains of seven different veniremembers who had had some type of social, working, or medical relationship with either Kendall or Hout. Four of these jurors did not serve on the jury, and several, who did serve, had not

been challenged peremptorily or for cause. Suffice it to say, the estate's argument centers on Melba George, who, the estate suggests, was challenged for cause and wrongfully allowed to serve; thus, we turn our attention to George. In doing so, we keep in mind the controlling principle that it is presumed that persons comprising the venire are unbiased and qualified to serve, and it is appellant's burden to prove otherwise. *Kemp* v. *State*, 324 Ark. 178, 919 S.W.2d 943 (1996). In addition, the proper test the court must employ when sorting through these juror-bias issues is whether the prospective juror can lay aside his impression or opinion and render a verdict based upon the evidence in court. *Wainwright* v. *State*, 302 Ark. 371, 790 S.W.2d 420 (1990), cert. denied, 111 S.Ct. 1123 (1990).

In the present case, the issue concerning Ms. George's bias stems from a series of questions and answers during *voir dire*. George responded to the court's query, whether anyone had any kind of ongoing business relationship with the defendants, by indicating that Dr. Kendall was her doctor. Ms. George had seen Dr. Kendall within the previous two to three weeks, and was under his care. The following pertinent colloquy took place:

> ESTATE'S ATTORNEY: I'm going to ask you the pertinent questions that I asked Mr. Philyaw about having to sit here and make a decision that would potentially adverse your doctor then going back to seek him in the future, would that make it difficult for you to be fair in a case like this for Ms. Randolph?
>
> GEORGE: I believe it would because I have to depend on him to tell me what I need to do to keep me living.
>
> ESTATE'S ATTORNEY: So, what you're telling us, as I understand it, is that because of that relationship, even though you would try it would be very difficult and in all probability you could not be fair because of that relationship?
>
> GEORGE: (No response.)
>
> COURT: In other words, you can't listen to the evidence and decide this strictly on what you hear in the courtroom?
>
> GEORGE: I could do that. But if it causes me to doubt my doctor in any way, I don't know if I could go back to him.

COURT: Well, this is different — All I want to know from you, ma'am, and from each of you, maybe we can get this out here right now, for those of you who are patients at the clinic with Doctor Hout or Doctor Kendall what we are asking, and I think we've asked it once before, your job as a juror if you are selected to serve is to try this case strictly on the evidence that's presented from the witness chair and whatever exhibits are introduced, that and only that, and what we are asking is can you do that, be fair to both sides? You start out as if not knowing anything about this particular case and try it simply on the evidence that's presented from the witness chair and the law as I give it in the form of instructions?

GEORGE: Yes.

George's initial response to the estate's *voir dire* raised the question of whether she could serve fairly, and the trial court properly pursued that matter, by asking if George could listen to the evidence and strictly decide the case on what she heard in the courtroom. George said that she could do that. Any reservations expressed by George in her response dealt only with her declaration that "if it causes me to doubt my doctor in any way, I don't know if I could go back to him." George, then again, told the court she could decide the case based strictly on the evidence and law presented in the courtroom. It has long been held that the qualification of a juror is within the sound discretion of the trial court, which has an opportunity to observe the venire members that the appellate court does not have, and the trial court will not be reversed unless the appellant demonstrates an abuse of discretion. *Moss* v. *State*, 280 Ark. 27, 655 S.W.2d 375 (1983); *Rumping* v. *Arkansas National Bank*, 121 Ark. 202, 180 S.W. 749 (1915). Here, the trial court followed the correct test in its *voir dire* of George, and acted well within its discretion to permit George to serve.

Before leaving the estate's first point, we acknowledge its argument for us to adopt a line of Alabama cases that hold the relationship of physician and patient constitutes *prima facie* evidence of probable prejudice on the part of the veniremember. *Dixon* v. *Hardey*, 591 So.2d 3 (Ala. 1991); *see also Boykin* v. *Keebler*, 648 So.2d 550 (Ala. 1994); *Bell* v. *Vanlandingham*, 633 So.2d 454 (Ala. 1994); *Wright* v. *Holy Name of Jesus Medical Center*, 628 So.2d 510 (Ala. 1993); *Roberts* v. *Hutchins*, 613 So.2d 348 (Ala. 1993). We reject

such suggestion, first, because we believe Arkansas's established law in questioning prospective jurors for bias is relevant and effective regardless of whose relationship or purported bias might be in issue. Second, the Alabama cases cited by the estate, in our view, would not avail the estate here a different result in any event. The Alabama Supreme Court specifically refused to adopt an absolute rule of exclusion where a patient may never serve as a juror in a case against his or her physician. *Dixon*, 591 So.2d at 8. Instead, the Alabama court has said that, once *prima facie* evidence of prejudice on the part of a potential juror has been presented, it is the trial court's function to question the juror further, so as to ascertain whether the juror can be impartial, *Id.* at 7, and the appellate court looks at the questions asked and the answers given to determine whether the trial court abused the discretion reserved to it. *Wright*, 628 So.2d at 513. In the circumstances now before us, the trial court did a thorough job in questioning and testing Ms. George's possible bias, and, whether analyzed under Arkansas's or Alabama's law, we conclude the trial court did not abuse its discretion in allowing her to serve.

The estate's second argument concerns the trial court's refusal to give a proffered instruction the estate claims would have clarified AMI 1501, which reads in relevant part as follows:

> In diagnosing the condition of and treating of a patient, a physician must possess and apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of his profession in good standing engaged in the same type of service or specialty in the location in which he practices or in a similar locality. A failure to meet this standard is negligence.

Because defendants focused on the estate's expert's (Dr. Goldstein's) lack of familiarity with the Camden area and its medical services, the estate, citing to language employed in *Gambill* v. *Stroud*, 258 Ark. 767, 531 S.W.2d 945 (1975), proffered the following instruction, which it argues explains the "similar locality" language in AMI 1501:

> In these instructions, when I have used the words "the same or similar locality" the similarity of communities should not depend on population or area but rather upon their similarities from the standpoint of medical facilities,

practices, and advantages.

We dispose of the estate's argument, first, by stating that AMI 1501, as given, covers the duty the defendants owed Hanson in this medical negligence case, and it is not error to refuse a proffered non-AMI instruction, even if it correctly states the law. *See Wharton* v. *Bray*, 250 Ark. 127, 464 S.W.2d 554 (1971). In addition, this court has expressly stated that the same or similar locality rule articulately expressed in AMI 1501 is proper, adequate, viable and not unduly restrictive on the evidence a plaintiff may introduce. *Gambill*, 258 Ark. at 769, 531 S.W.2d at 948. Accordingly, we believe the language contained in AMI 1501 is more than sufficient to have permitted the Hanson estate to develop the evidence and argue to the jury that her expert was entitled to credence based on his familiarity with similar localities in terms of medical facilities, practices, and advantages.

For the reasons set out hereinabove, we affirm.

DUDLEY, J., not participating.

SOUTHWESTERN GLASS COMPANY, Inc. and Waelder Oil & Gas, Inc. *v.* ARKANSAS OKLAHOMA GAS, CORPORATION

95-1177 925 S.W.2d 164

Supreme Court of Arkansas
Opinion delivered July 15, 1996

Harper, Young, Smith & Maurras, by: *S. Walton Maurras*, for appellant Southwestern Glass Co.

Warner, Smith, & Harris, PLC, by: *Joel D. Johnson*, for appellant Waelder Oil & Gas, Inc.

Daily, West Core, Coffman & Canfield, by: *Jerry Lee Canfield*, for appellee.

Barrett & Deacon, by: *J. C. Deacon* and *D. P. Marshall, Jr.*, amicus curiae.

TOM GLAZE, Justice. Southwestern Glass Company, Inc., operates a manufacturing facility within the city limits of Van Buren, Arkansas. It entered into a contract with Waelder Oil & Gas, Inc., for the sale of natural gas and the construction of a natural gas pipeline from Waelder's gas well to Southwestern's facility. Waelder agreed to deliver its natural gas exclusively to Southwestern. Gaines Construction Co., Inc., was engaged to do the actual construction

of the pipeline, which included crossing under a public street and within close proximity of an already existing natural gas pipeline owned by Arkansas Oklahoma Gas Corporation (AOG). AOG is a public utility that possesses a non-exclusive franchise entitling it to use the public rights-of-way in Van Buren.

In its effort to prevent construction of Southwestern's pipeline, AOG filed a complaint in chancery court requesting the defendants Southwestern, Waelder, and Gaines be enjoined from laying the pipeline because there was insufficient space for its safe installation, operation and maintenance. The chancellor granted a temporary restraining order on June 27, 1995, but set a hearing date for July 11, 1995, to determine whether the order should be dissolved or made permanent.

On the day of the scheduled hearing, AOG filed an amended complaint raising six new grounds for relief, and Southwestern again moved to dismiss. The court offered either to proceed with the hearing on all issues or to adjourn to give the defendants Southwestern, Waelder, and Gaines more time to prepare. The defendants chose to proceed. The hearing resulted in the court enjoining defendants from completing the gas line, and from that decision, Southwestern, Waelder, and Gaines (hereinafter defendants) bring this appeal.

First, we address the defendants' argument that AOG should have filed its action with the Public Service Commission (PSC), not in chancery court. We disagree. The PSC is vested with the authority to adjudicate individual disputes involving public rights which the Commission is charged by law to administer. Public rights which the Commission may adjudicate are those arising from the public utility statutes enacted by the General Assembly, and the lawful rules, regulations, and orders entered by the Commission in the execution of the statutes. *Ozarks Elec. Coop. Corp.* v. *Harrelson*, 301 Ark. 123, 782 S.W.2d 570 (1990). Because in the present case the issues surrounded the enjoining of Southwestern's private use of the public rights-of-way and not a public right arising from the public utility statutes, jurisdiction was properly in chancery court.

We now turn to Southwestern's arguments that (1) AOG had no standing to request an injunction against Southwestern's private use of the city's right-of-way, and (2) even if AOG had standing,

the chancellor was wrong in holding Southwestern could not construct its pipeline in the city's right-of-way. Because we find merit to the substantive portion of Southwestern's argument, we need not discuss the standing issue.

First, we point out that the chancellor's order enjoined Southwestern from boring its pipeline which would have crossed under an AOG line already located under South 28th Street. That street is bordered on the west by Southwestern's property and on the east by property owned by Dillmeier-Houle Land Co. In other words, Southwestern's and Dillmeier's common boundary line is located on the center line of South 28th Street.

Southwestern submits that South 28th Street and South 28th Circle were created by the dedication of an easement, and as an abutting property owner, Southwestern owned the fee underlying the street and could make use of that fee so long as it was not inconsistent with the city's easement. Cases cited by Southwestern support its contention. For example, this court in *Freeze, Mayor* v. *Jones & Harvel*, 260 Ark. 193, 539 S.W.2d 425 (1976), considered the validity of a Ft. Smith ordinance vacating and abandoning a block of Bernie Avenue, and in discussing the city's rights in dedicating easements, stated that the ownership of the fee in the Bernie Avenue right-of-way remained in the abutting owners together with all rights not inconsistent with the public use to which the property was dedicated. *See also Lincoln Hotel Co.* v. *McGehee*, 181 Ark. 1117, 29 S.W.2d 668 (1930). In the present situation, Southwestern says its pipeline is to pass under the area used by the city for street purposes and also in no way interferes with AOG's line. Thus, because Southwestern's private pipeline is consistent with the city's use of its right-of-way, the chancellor's injunction infringed on Southwestern's rights as fee simple owners.

AOG counters Southwestern's argument by urging Southwestern's proposed private gas line is in direct conflict with the city's dedicated use of its right-of-way. AOG relates that it is a public utility which provides natural gas service in Van Buren under a non-exclusive franchise issued by the city. It points out that it has a four-inch, high-pressure pipeline located within the right-of-way of South 28th Street and Southwestern's proposed pipeline would have to physically cross AOG's pipeline in order to reach its intended destination at Southwestern's facility. AOG argues Southwestern has to locate AOG's line, expose it and bore some twelve-to-eighteen inches above or below the line in order to construct

Southwestern's line. In sum, AOG contends Southwestern's conflict with the public use to which the property was dedicated is evident because Southwestern's proposed pipeline (1) has already necessitated AOG's locating its own line, (2) would require AOG to uncover its line to accommodate safe construction of the proposed private line, and (3) would result in the city and utility companies operating in the future within twelve-to-eighteen inches of a pressurized gas line.

Our review of the record reveals gas pipelines presently parallel and cross one another in the areas inside and outside of the city. The evidence also shows that the twelve-to-eighteen-inch distance at which the Southwestern line would cross under AOG's line is in conformity with both the U. S. Department of Transportation's Pipeline Safety Regulations and the Arkansas Gas Pipeline Code. We note, too, that the PSC has authority to regulate safety concerns accompanying construction and maintenance of Southwestern's proposed gas line, as is evidenced by Ark. Code Ann. §§ 23-15-201 — 214 (1987 and Supp. 1995). And finally, no evidence was introduced to illustrate AOG's line must be moved to accommodate Southwestern's line or that Southwestern's line would block or alter AOG's line in any way. *Cf. Langford* v. *Griffin*, 179 Ark. 574, 175 S.W.2d 296 (1929); *City of Osceola* v. *Haynie*, 147 Ark. 290, 227 S.W. 407 (1921).

The granting or denying of an injunction is a matter falling within the sound discretion of the trial court and its decision will not be reversed on appeal unless it is clearly erroneous. *Southeast Arkansas Landfill, Inc.* v. *State*, 313 Ark. 669, 858 S.W.2d 665 (1993). Because AOG failed to show how Southwestern's proposed pipeline would be in conflict or inconsistent with the city's public use of the dedicated easement and right-of-way, the chancellor was in error in enjoining the construction of Southwestern's line.

Accordingly, we reverse and remand for the reasons stated hereinabove.

Special Chief Justice JUDY SIMMONS HENRY joins in this opinion.

JESSON, C.J., and DUDLEY, J., not participating.

Thomas E. MALONE *v.* TRANS-STATES LINES, INC.

95-1116 926 S.W.2d 659

Supreme Court of Arkansas
Opinion delivered July 15, 1996

Walker Law Firm, by: *R. Scott Zuerker*, for appellant.

David B. Vandergriff, for appellee.

DONALD L. CORBIN, Justice. Appellant, Thomas E. Malone, appeals the judgment of the Sebastian County Circuit Court dismissing with prejudice his complaint against appellee, Trans-States Lines, Incorporated, for retaliatory discharge under the Workers' Compensation Law, Ark. Code Ann. §§ 11-9-101 to -1001 (Repl. 1996), and for discrimination in violation of the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §§ 16-123-101 to -108 (Supp. 1995). The trial court dismissed appellant's complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. Appellant asserts two points for reversal of the order of dismissal. Resolution of these arguments requires interpretation of the two aforementioned legislative acts. Jurisdiction is therefore properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(3). We reverse and dismiss in part and affirm as modified in part.

Appellant began employment with appellee as a truck driver in January 1990 and was first diagnosed with bilateral carpal tunnel syndrome in March 1993. He had surgery on his right hand in March 1994 and on his left hand in April 1994. Appellant was released to return to work in August 1994 with restrictions that he not load or unload his truck. Appellee refused to return appellant to work with these restrictions. A dispute arose between appellee and appellant, and appellee terminated appellant. Appellant received a full release to return to work in November 1994 with a five percent permanent physical impairment rating in each hand. Appellant filed a claim for workers' compensation benefits relating to the carpal tunnel syndrome. In addition to the aforementioned facts, the administrative law judge found that the carpal tunnel syndrome arose out of appellant's employment with appellee and that appellant was entitled to temporary total disability benefits for the period March 5, 1994, through August 18, 1994.

Appellant initiated the present action by filing a two-count complaint in circuit court. Count one of the complaint alleged a

cause of action under the Arkansas Civil Rights Act of 1993. Specifically, appellant alleged that appellee discriminated against him in the terms and conditions of his employment on the basis of appellant's physical disability. Count two of the complaint alleged a cause of action for retaliatory discharge based on appellant's filing of the workers' compensation claim.

Appellee relied on section 11-9-107 and moved to dismiss the complaint for lack of subject-matter jurisdiction and failure to state facts upon which relief can be granted. The trial court entered an order granting without explanation appellee's motion on both grounds. This appeal followed.

Appellant asserts two points for reversal. First, he argues the trial court erred in dismissing count one of his complaint because the exclusive remedy doctrine of section 11-9-107 does not apply to a claim of discrimination based on physical disability. Second, he argues alternatively that section 11-9-107 is unconstitutional in that it bars a civil rights action pursuant to the Arkansas Civil Rights Act of 1993. Appellant correctly concedes that count two of his complaint was properly dismissed due to section 11-9-107 and this court's decision in *Tackett* v. *Crain Automotive*, 321 Ark. 36, 899 S.W.2d 839 (1995), that section 11-9-107's annulment of a cause of action in tort for retaliatory discharge is applicable to cases in which the date of discharge is after July 1, 1993. The administrative law judge found that appellant was discharged after July 1, 1993. Thus, in this opinion we are only concerned with count one of appellant's complaint — the claim under the Arkansas Civil Rights Act of 1993. Because we agree with the trial court's ruling that the complaint does not state facts upon which relief can be granted, we do not reach the merits of appellant's arguments.

In reviewing the denial of a dismissal granted pursuant to Ark. R. Civ. P. 12(b)(6), 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. *Neal* v. *Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994). When the trial court decides Rule 12(b)(6) motions, it must look only to the complaint. *Id.* This court has summarized Arkansas' requirements for pleading facts as follows:

> Arkansas has adopted a clear standard to require fact pleading: "a pleading which sets forth a claim for relief . . . shall contain (1) a statement in ordinary and concise

> language of facts showing that the pleader is entitled to relief . . ." ARCP Rule 8(a)(1). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated that these two rules must be read together in testing the sufficiency of the complaint; facts, not mere conclusions, must be alleged. *Rabalaias* v. *Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and pleadings are to be liberally construed. *Id.*; ARCP Rule 8(f).

Hollingsworth v. *First Nat'l Bank & Trust Co.*, 311 Ark. 637, 639, 846 S.W.2d 176, 178 (1993).

Even when we liberally construe Malone's complaint, it alleges only conclusions. No facts are pleaded whatsoever. By way of illustration, we point out that the complaint alleges this conclusion: "Plaintiff has a physical disability within the meaning of the Arkansas Civil Rights Act of 1993." "Disability" is defined in the Act as "a physical or mental impairment that substantially limits a major life function[.]" Section 16-123-102(3). There is no allegation of facts to support the conclusion that appellant meets this definition of "disability." This is but one example of the insufficiency of the complaint due to the pleading of conclusions rather than facts. There are many others.

■ Because the complaint states only conclusions without facts, we agree with the trial court that the complaint must be dismissed for failure to plead facts under Rule 12(b)(6). However, we cannot agree that such a dismissal is with prejudice. It is well-settled that such a dismissal is to be without prejudice so that the plaintiff may elect whether to plead further or appeal. In this case, appellant was not afforded that election because the dismissal was with prejudice. *See Ratliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984). Accordingly, we affirm the trial court's order but modify it to reflect that the dismissal be without prejudice.

■ Appellant's failure to plead sufficient facts and the lack of explanation in the trial court's order renders any meaningful further appellate review a practical impossibility. While we are somewhat sympathetic to appellant's contention that he has asserted two distinct causes of action based on two distinct statutes, on this limited

record we cannot fully discuss the merits of appellant's arguments for reversal of the trial court's rulings regarding subject-matter jurisdiction. Suffice it to say that because appellant has asserted a cause of action in circuit court based in part on the Arkansas Civil Rights Act of 1993, we reverse that part of the order dismissing the complaint for lack of subject-matter jurisdiction.

That part of the order dismissing the complaint for lack of subject-matter jurisdiction is reversed and dismissed. That part of the order dismissing the complaint for failure to plead facts is affirmed as modified to be without prejudice.

Reversed and dismissed in part; affirmed as modified in part.

GLAZE, J., concurs.

DUDLEY, J., not participating.

TOM GLAZE, Justice, concurring. I concur. The first issue to be decided in this case is whether the Workers' Compensation Exclusive Remedy Doctrine in Act 796 of 1993 (Ark. Code Ann. § 11-19-107 (Repl. 1996)) bars a statutory discrimination action based upon physical impairment sought under Arkansas's Civil Rights Act (Ark. Code Ann. §§ 16-123-101, particularly -107). The trial court said yes, and I presume that is the reason it dismissed Malone's action *with* prejudice. I disagree with the trial court's decision on this legal point, but I still would dismiss *without* prejudice under ARCP Rule 12(b)(6) because I believe Malone's complaint fails to allege sufficient facts to support his civil rights claim.

Concerning whether Malone's civil rights claim in circuit court can survive the Exclusive Remedy Doctrine of the workers' compensation law, I would point out that § 11-9-107 *imposes a fine* against any employer who willfully discriminates regarding the hiring or tenure of any worker *on account of that worker's claim for benefits under the chapter.* Here, Malone's complaint is not based or couched in terms of his employer's retaliatory measure on account of Malone having sought Workers' Compensation benefits. Instead, Malone seeks relief, alleging his employer terminated him because of his physical disability. It is also significant to me that if Malone is precluded from pursuing an action under the Arkansas Civil Rights Act, he has no real remedy. Section 11-9-107 affords only remedies that penalize the employer and avail Malone nothing. In my view, the Exclusive Remedy Doctrine in no way conflicts with or bars a

properly established or alleged claim under the Civil Rights Act.

In sum, I conclude the trial court erred in deciding it had no subject-matter jurisdiction in this cause, and while I believe the trial court therefore erred in dismissing Malone's action with prejudice, I would dismiss Malone's complaint because it does not contain sufficient facts to support his civil rights claim.

James C. PLEDGER, Director of the Department of Finance and Administration *v.* MID-STATE CONSTRUCTION & MATERIALS, INC.

95-1130 925 S.W.2d 412

Supreme Court of Arkansas
Opinion delivered July 15, 1996
[Petition for rehearing denied September 30, 1996.]

Beth B. Carson, for appellant.

Jack, Lyon & Jones, P.A., by: *Eugene G. Sayre*, for appellee.

ANDREE LAYTON ROAF, Justice. This case involves the "isolated sale" tax exemption found in Ark. Code Ann. § 26-52-401(17). The appellee, Mid-State Construction & Materials, Inc.,

("Mid-State") challenged the assessment of gross-receipts (sales) tax on used motor vehicles and trailers it purchased in a sale of assets from another company. The appellant, Department of Finance and Administration, ("DFA") appeals from a summary judgment awarded to Mid-State; the chancellor determined that the isolated-sale exemption applied to the sale of used vehicles by sellers who are not regularly engaged in the business of selling vehicles. We reverse the chancellor's finding of an exemption.

In March 1993, Mid-State purchased all of the assets of a corporation also named Mid-State, which was engaged in the business of highway construction, production of asphalt and concrete, and stone quarrying. The seller corporation changed its name after the sale and dissolved; Mid-State then assumed the name of the seller and continued the same business activities using the assets acquired from the now defunct corporation. The assets purchased included furniture, fixtures, supplies, equipment, and 75 used motor vehicles and trailers. When Mid-State attempted to register title to the motor vehicles and trailers, it was informed by DFA that sales taxes would have to be paid on the market value of these items. The other assets purchased by Mid-State in the asset sale were not taxed by DFA, pursuant to the isolated-sale tax exemption. Mid-State was assessed $80,849.00 in state and local sales taxes on the value of the motor vehicles and trailers.

In May 1993, Mid-State filed a claim for refund with DFA and asserted that the sale of the used vehicles was exempt as an isolated sale pursuant to Ark. Code Ann. § 26-52-401(17). DFA denied the refund on the basis that used vehicle sales were excluded from the isolated-sale exemption. Mid-State filed a complaint for refund in Pulaski County Chancery Court in August 1993. Both parties filed motions for summary judgment. The sole legal issue before the trial court was whether the isolated-sale exemption applied to the sale of used vehicles by sellers who are not regularly engaged in the business of selling vehicles.

Mid-State, in its motion for summary judgment, asserted that the sale of the used motor vehicles and trailers constituted an isolated sale within the meaning of § 26-52-401(17), that DFA's administrative practice of excluding used motor vehicles from the isolated-sale exemption was an erroneous and illegal interpretation of sales tax law, that DFA had erroneously and illegally interpreted § 6 of Act 3 of 1991 and that promulgation by DFA of gross-

receipts tax regulation GR-49(c) was erroneous and illegal and should be declared void.

DFA, in its motion for summary judgment and also in its response to the motion by Mid-State, contended that since 1959 the General Assembly has specifically intended that the isolated sale of used motor vehicles be subject to sales and use tax; DFA traced the history of relevant tax legislation from the 1941 Sales Tax Act forward in support of this contention. DFA further argued that a non-repealer clause in Act 3 of 1991 relied upon by Mid-State had no application to an exemption which had not existed since 1959. DFA also asserted that the General Assembly has established a statutory sales-and-use-tax scheme which addresses vehicles separately from other tangible personal property. DFA further argued that it had acted within its authority to promulgate regulation GR-49(c) to clarify this legislative intent, and to rectify certain errors which occurred in compiling the 1957 and 1959 Acts and in the codification of the Arkansas Statutes in 1987. DFA finally contended that an absurd and unconstitutional result would occur if Mid-State's motion for summary judgment were granted, because individual in-state sales of used vehicles would be exempt from sales tax while such vehicles purchased from out-of-state individuals would be taxable. DFA asserted that the complimentary nature of the sales and use tax would thus be destroyed.

In its findings of fact and conclusions of law entered on June 30, 1995, the trial court determined that there was no genuine issue as to any material fact. The trial court concluded that the General Assembly did not intend to prohibit the applicability of the isolated-sale exemption to the transfer by one corporation to another of title to used motor vehicles and used trailers in the factual setting of a one-time asset purchase. The trial court determined that DFA had exceeded its legislative grant of rule making authority in adopting gross-receipts regulation GR-49(c). The chancellor also found that while this suit was pending, the General Assembly had enacted legislation effective February 13, 1995, which expressly provides that the benefit of the isolated-sale exemption is not available for the transfer of title to used motor vehicles or used trailers. However, he concluded that despite language in an emergency clause to the contrary, the 1995 legislation was a change and not a clarification of existing law and should not be applied retroactively to the March 1993 purchase by Mid-State.

After granting Mid-State's motion for summary judgment and denying DFA's motion, the trial court entered judgment in favor of Mid-State and ordered DFA to refund the amount of state and local sales taxes paid, plus interest. The sole issue on appeal is whether, at the time of the purchase by Mid-State, gross receipts from the sale of a used vehicle by a person not in the business of selling vehicles were exempt from sales tax pursuant to the isolated-sale exemption provided in Ark. Code Ann. § 26-52-401(17).

In order to answer this question, we must outline, as did DFA, the development of the relevant law regarding both sales and use tax. In so doing, we keep in mind the following settled rules regarding summary judgment and review of tax-exemption cases. Summary judgment is a remedy that should be granted only when it is clear, as in this instance, that there is no genuine issue of material fact to be litigated. *Wyatt* v. *St. Paul Fire & Marine Ins. Co.*, 315 Ark. 547, 868 S.W.2d 505 (1995). On appellate review, this court must only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leaves a material question of fact unanswered. *Reynolds* v. *Shelter Mut. Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799 (1993). All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.*

In cases which involve a claim of tax exemption, it is well settled that a presumption exists in favor of the taxing power of the state, and a taxpayer has the burden of establishing the right to an exemption beyond a reasonable doubt. *Pledger* v. *Baldor Int'l Inc.*, 309 Ark. 30, 827 S.W.2d 646 (1992). Tax exemptions must be strictly construed against exemption, and to doubt is to deny the exemption. *Id.* In addition, this court has stated that tax-exemption cases are reviewed de novo, and the appellate court does not set aside the findings of the chancellor unless they are clearly erroneous. *Id.*

1941 Sales Tax Act

In 1941, the General Assembly enacted the "Arkansas Gross Receipts Act of 1941." This was the first state sales tax, and the Act provided for a 2 percent sales tax on the gross proceeds or gross receipts from all sales of "tangible personal property." The term "seller" was defined in the Act as "every person making a sale in an

established business;" DFA has always construed "established business" as the business of selling. The Act provided for the taxes to be collected and paid to the Commissioner of Revenues by the seller, except with respect to the sale of new automobiles; instead of being collected by the automobile dealer, sales taxes on new automobiles were to be collected from the buyer at the time the automobile license was issued.

The Act further listed some 19 exemptions, including two that are relevant to this discussion. The first exempted the "gross receipts or gross proceeds derived from isolated sales not made by an established business." This "isolated sale" exemption has remained since 1941, and can be found at Ark. Code Ann. § 26-52-401(17); this is the exemption which Mid-State is claiming for its 1993 purchase of the used vehicles and trailers. The second exempted the proceeds from the sale of "second-hand and used personal property" on which sales tax had once been paid, and also where the used property was traded in as part of the purchase price of other tangible property.

DFA asserts, and we agree, that the isolated-sale exemption had no relevance to the sale of vehicles in the 1941 legislation, because no sales tax was imposed on used vehicles, and new vehicles were sold only by dealers, who were not entitled to the exemption.

Act 54 of 1945

In 1945, the General Assembly amended the 1941 Sales Tax Act to provide for the first time that used cars would be subject to the sales tax. The amendment provided that, as with new cars, the tax would not be collected by dealer, but would be paid at the time the vehicle license was issued. The 1945 act also contained two exemptions. The "registration exemption" applied to used cars which had been previously registered and taxed in Arkansas. The second exemption provided that "in no case shall the tax apply on a private sale of a used automobile where the seller is not engaged in business as a dealer." This exemption is referred to as the "private sale exemption," and would clearly be available to Mid-State if it were still in effect.

Use Tax Act of 1949

In 1949, the legislature enacted a compensating-use tax of two percent, to prevent "discrimination in favor of those who made

purchases of personal property in this state." *Morley, Comm. of Rev.* v. *E.E. Barber Constr. Co.*, 220 Ark. 485, 248 S.W.2d 689 (1952). This Act provided a general exemption from use tax for property specifically exempted from sales taxes. Thus, the private sale and registration exemption from the 1945 Sales Tax Act would apply to also exempt from the use tax used vehicles bought from out-of-state sellers. This legislation made no change in the sales-tax exemptions.

Act 19 of 1957

The only purpose of the 1957 Act was to increase the sales and use tax rate from two to three percent. This legislation made no substantive changes in either the sales or use tax statutes, however, the Act contained the following provision:

> Nothing in this Act shall be construed to repeal any exemption from the Arkansas Gross Receipts Act of 1941 or the Arkansas Compensation Tax Act of 1949.

The private-sale exemption would thus still be available for a sale of a used vehicle by a non-dealer, after 1957.

Act 260 of 1959

In 1959, the General Assembly amended the Gross Receipts statute to delete the exemption for the private sale of used vehicles. The registration exemption remained. The Use Tax statute was correspondingly amended to reflect the deletion of the private-sale exemption:

> Used Cars. All used cars shall, upon being registered in this state for the first time, be subject to the tax levied herein *irrespective of whether such car was purchased from a dealer or an individual.*

(Emphasis added.)

In § 3 of Act 260, the intent of the legislature is stated, and is clear and unequivocal:

> It is the intent and purpose of this Act to require that either the Arkansas Gross Receipts Tax levied by Act 386 of 1941, as amended, or the Compensating Tax levied by Act 487 of 1949, as amended, be paid upon *every used car,* excepting those cars upon which either the Arkansas Gross Receipts Tax or the Arkansas Compensating Tax has once been paid

as evidenced by previous registration in this State, *irrespective of whether such car was purchased from a dealer or from an individual.*

DFA contends, and we agree, that as a result of the 1959 Act, all sales of used vehicles became taxable, and only the registration exemption remained. The primary rule in construing legislation is to ascertain and give effect to the intent of the legislature, and when the intent is clear, there is no room for other interpretation or construction. *Graham* v. *Forrest City Housing Auth.*, 304 Ark. 632, 803 S.W.2d 923 (1991). In this instance, the General Assembly specifically and clearly provided that the private sales of used automobiles would be exempt from sales tax in 1945. The legislature just as clearly repealed this exemption by amending the sales and use tax statutes in 1959. Moreover, it is a rule of statutory construction that when a special act applies to a particular case, it excludes the operation of a general act. *Ballheimer* v. *Service Finance Corp.*, 292 Ark. 92, 728 S.W.2d 178 (1987). Thus, the general isolated-sale exemption has never been applicable to the sale of used vehicles because the legislature included the private-sale exemption, which applied specifically to used vehicles, in the same Act which first imposed a sales tax on such vehicles.

Codification Errors

DFA argues that Mid-State has based its claim of exemption in part upon certain codification errors involving the 1957 and 1959 Acts. Section 3 of act 260 of 1959, which clearly expressed the legislative intent that either sales or use tax be paid upon every used car except those previously registered and taxed in Arkansas, was never compiled, in either the sales or use tax statues. This statement of intent was included in the compiler's notes to the Use Tax statute, but was omitted from the notes to the sales tax section. *See* Ark. Stat. Ann. § 84-3105 and § 84-1903. Section 3 of Act 260 was also picked up by the codifier and included only in the use-tax section of the code as Ark. Code Ann. § 26-53-126(e)(1). Thus, although the private-sale exemption was deleted from the sales-tax statutes by the 1959 Act, this exemption was simply removed from the statute by the compiler; the language expressing the clear intent of the legislature that *all* used car sales be subject to sales or use tax except those entitled to the registration exemption was not included anywhere in the sales-tax statutes or in the subsequent sales-tax code provisions.

Mid-State also bases its claim for exemption upon the non-repealer statement included in the 1957 Act which simply raised the tax rates from 2 to 3 percent. This statement was not included in the Arkansas Statutes but was picked up by the codifiers of the 1987 Code, and included as a new subsection of the sales and use tax provisions. *See* Ark. Code Ann. § 26-52-510(d) and § 26-53-126(f). This provision states that "nothing in this section shall be construed to repeal any exemption from the Arkansas Gross Receipt Act § 26-52-101, et seq." DFA argues that the provision is extraneous, if not erroneous. Mid-State claims that this is evidence of the legislature's intent that the isolated-sale exemption for 1941 not be repealed with regard to the sales of used vehicles. We agree that the inclusion of the non-repealer section from the 1957 Act, which only raised the tax rates, can in no way support a claim of exemption which was specifically and clearly repealed by the legislature in 1959. The legislature also anticipated that such errors would occur when the Arkansas Statutes were codified in 1987. Arkansas Code Annotated § 1-2-103 (Repl. 1996), provides that all acts, codes, and statutes in effect on December 31, 1987 are repealed by the 1987 Arkansas Code unless:

> (1) Expressly continued by specific provision of this Code;
>
> (2) *Omitted improperly or erroneously as a consequence of compilation, revision, or both, of the laws enacted prior to this Code,* including without limitation any omissions that may have occurred during the compilations, revision, or both, of the laws comprising this Code; or
>
> (3) *Omitted, changed, or modified* by the Arkansas Code Revision Commission, *or its predecessors,* in a manner not authorized by the laws or the constitutions of Arkansas in effect at the time of the omission, change, or modification.
>
> (b) In the event one of the above exceptions should be applicable, *the law as it existed on December 31, 1987, shall continue to be valid, effective, and controlling.*

(Emphasis added.)

Act 3 of 1991

In 1991, the registration exemption was repealed. A non-repealer statement was included in this act.

Again, the non-repealer statement included in this legislation could not serve to resurrect an exemption which the legislature had clearly and specifically repealed thirty-two years before the 1991 Act.

Act 268 of 1995

The legislature amended both the sales and use tax statutes in 1995 to provide: "The exemption provided for in § 26-52-401 for isolated sales shall not apply to the sale of motor vehicles, trailers and semitrailers." The emergency clause contained in the Act stated:

> It is hereby found . . . that current law disallows the isolated sales exemption to a purchase of a motor vehicle or trailer; [the sales and use tax] provisions are in need of clarification to ensure the original legislative intent is fulfilled; and that Sections 6 and 7 of the Act should be effective immediately to prevent possible confusion among the taxpayers of the state.

The trial court determined that this amendment was a remedy available to the legislature at any time it saw the need to remove confusion in the existing statutes, and therefore could not serve to retroactively state the legislative intent of prior legislative sessions. We do not agree that Act 268 of 1995 is an attempt by the legislature to retroactively change existing law.

We have stated that the amendment of an act does not control the interpretation of another statute enacted prior to the amendment, nor does it change the meaning which the original statute acquired prior to the amendment. *Peterson Produce Co.* v. *Cheney, Commr.*, 237 Ark. 600, 374 S.W.2d 809 (1964). Further, the legislature can prospectively change the tax laws of this state, within constitutional limitations, but it does not have the power or authority to retrospectively abrogate judicial pronouncements of the courts of this State by a legislative interpretation of the law. *Federal Express Corp.* v. *Skelton*, 265 Ark. 187, 578 S.W.2d 1 (1979). However, we can look to changes to statutes made by subsequent amendments to determine legislative intent. *State Farm Mut. Auto. Ins. Co.* v. *Beavers*, 321 Ark. 292, 901 S.W.2d 13 (1995). In *Baldor Int'l Inc., supra*, we stated that the General Assembly, in enacting a 1985 Act, did not change the prior law but merely intended to clarify it and, therefore, the chancellor did not err in considering

the subsequent act. We conclude that here, the legislature has merely clarified the law as it has existed since 1959.

■ We hold that it has been the clear intent of the General Assembly since 1959 that the private sale of used motor vehicles be subject to the sales tax, and that the general isolated-sales exemption has no application to such sales. We conclude that Mid-State did not meet its burden of establishing the right to this exemption beyond a reasonable doubt. The trial court in this instance erred in granting summary judgment to Mid-State, and should have granted DFA's motion for summary judgment.

Because we hold that the legislature did not intend that the isolated-sale exemption be applied to the private sale of used vehicles, we need not consider whether DFA acted within its authority in promulgating regulation GR-49(c) or whether an unconstitutional and absurd result would occur if Mid-State is determined to be entitled to this exemption.

Reversed and remanded.

DUDLEY, J., not participating.

J. Michael STOLTZ, as Special Administrator
of the Estate of James Patrick Stoltz, Deceased *v.*
Nancy Elizabeth FRIDAY, et al.

94-1235 926 S.W.2d 438

Supreme Court of Arkansas
Opinion delivered July 15, 1996
[Petition for rehearing denied September 9, 1996.*]

*Special Chief Justice Henry Wilkinson and Special Justices John Elrod, Sidney McCollum, and Henry Wilson join. Jesson, C.J., and Dudley, Glaze, Corbin, and Brown, JJ., not participating.

Davidson Law Firm, Ltd., by: *Charles Darwin Davidson* and *Charles Phillip Boyd, Jr.*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Mike Huckabay* and *Beverly A. Rowlett*, for appellees.

ANDREE LAYTON ROAF, Justice. The appellant, J. Michael Stoltz, as special administrator, sued the appellees, Friday, Eldredge, & Clark, certain of its partners, and First Commercial Bank, for

negligence and breach of fiduciary duty in connection with the probate of the estate of James Patrick Stoltz. The Friday firm provided legal services in connection with the probate of the estate; the bank was designated trustee of a trust created under the will of the decedent. The trial court entered summary judgment in favor of Friday, Eldredge, & Clark and the individual attorneys and granted First Commercial Bank's motion to dismiss. In this appeal, the special administrator contends that the trial court erred in granting the motions for summary judgment and dismissal and in granting the Friday firm's motion to strike an amended complaint. We find no error and affirm.

J.P. Stoltz (Stoltz) died on December 18, 1977, at the age of 53. His will was prepared by the Friday firm and was executed on May 9, 1977. Stoltz's heirs were his wife, Judy, whom he married in 1974 after the execution of an antenuptial agreement prepared by the Friday firm, nine children from a previous marriage, and two sisters and their husbands. J. Stephen Stoltz (Stephen), the oldest son, was named executor in the will.

The primary asset of the estate was Polyvend, Inc., a metal-stamping company established by Stoltz. Additionally, in 1976, Stoltz had obtained two life insurance policies with a face value of $2,000,000 from First Pyramid Life Insurance Company (First Pyramid). Stoltz's will provided that after certain specific bequests, the majority of his estate would be placed in two trusts. The stock of Polyvend was to be placed in a "stock trust" of which Stephen was the sole beneficiary and trustee. The corpus of this trust, Polyvend, was to be distributed to Stephen if he was successful in operating the company for ten years. The remaining estate assets were to be placed in a "residuary trust" for the benefit of the other eight Stoltz children and other named trust beneficiaries. The residuary trust would also receive one half of the proceeds from any sale of Polyvend if it were sold within ten years of the establishment of the stock trust. The will named First Commercial Bank (First Commercial) as trustee of the residuary trust.

Stoltz's will was filed for probate on January 4, 1978. Stephen was appointed as executor, and the Friday firm served as his attorneys. Stephen applied for and received the $2,000,000 in life insurance proceeds in his individual capacity on January 19, 1978.

In 1987, certain of the residuary trust beneficiaries, including

J. Michael Stoltz (Michael), became concerned about the lack of progress being made in the probate of the estate and the fact that no distributions had been made to them in nearly ten years. They hired an attorney who filed a petition in September 1987 seeking to remove Stephen as executor of the estate. In connection with the prosecution of this petition, the heirs obtained copies of the estate files being maintained by the Friday firm and discovered, among other matters, that the estate had a potential claim to the life insurance proceeds paid in 1978 to Stephen and that the Friday firm had advised Stephen upon his appointment in January 1978 about potential conflicts of interest involved in his service as executor of the estate. In June 1988, the Friday firm was replaced as attorneys for the estate; however, Stephen continued to serve as executor.

A number of lawsuits have been filed in connection with the handling of this estate. Three are relevant to this appeal. In October 1988, six of the residuary trust beneficiaries, including Michael, filed suit in Faulkner County Chancery Court against Stephen, alleging that he breached his fiduciary duty to them while serving as executor of the estate and acting as trustee of the residuary trust created for their benefit. That action was concluded in June 1993 with the execution of a settlement agreement which released Stephen from liability both individually and as executor of the estate. On April 20, 1989, some of the same residuary trust beneficiaries filed suit in Pulaski County Circuit Court against First Pyramid for negligence, breach of contract, bad faith, and fraudulent concealment in connection with the payment of the $2,000,000 in insurance benefits to Stephen, rather than to the estate. Michael was appointed special administrator on January 30, 1990, for the limited purpose of pursuing this action against First Pyramid, and he was substituted as plaintiff. The jury award to the special administrator of $3,666,666 was reversed on appeal, based on the running of the statute of limitations on an action to recover on a life insurance policy. *First Pyramid Life Ins. Co.* v. *Stoltz*, 311 Ark. 313, 843 S.W.2d 842, cert. denied, 114 S. Ct. 290 (1992). While the case against First Pyramid was pending, the Friday firm attorneys agreed to allow the statute of limitations to be tolled against them as of January 9, 1990, in a tolling agreement signed on behalf of Michael, both individually and as special administrator, and other of the trust beneficiaries.

On May 3, 1993, Michael, as special administrator, filed the

action against the Friday firm which gives rise to the present appeal. His complaint asserted that the Friday firm and certain of its partners served as attorneys for the estate until June 30, 1988, and that they breached their fiduciary obligation to the estate, the heirs, and the trustees of the trusts created by the will of the deceased when they jointly represented entities with conflicting interests for a period of approximately ten years. These entities included Stephen, both in his individual capacity and as executor of the estate; First National Bank of Little Rock, both as the largest creditor of the estate and as the trustee of a trust created by the will of the decedent; First Pyramid; Polyvend Corporation, the largest asset of the estate; and Diversified Financial Services, Inc., the insurance agency which sold the First Pyramid life insurance policies to Stoltz.

The special administrator further contended that the estate suffered damages and loss of assets as a result of the undisclosed conflicts and the actions of the Friday firm, including: (a) the wrongful payment of $2,000,000 in life insurance proceeds to Stephen, (b) an over payment to the surviving spouse, despite a binding antenuptial agreement drafted by the Friday firm to prevent Stephen's removal as executor, (c) the making of personal loans to pay the estate's debts by heirs of the estate in order to avoid an otherwise necessary sale of Polyvend, which would have benefited the residuary trust heirs, (d) transactions which avoided funding the stock trust as directed by the will, but which artificially commenced the running of the ten-year term of the stock trust to the benefit of Stephen, (e) repayment of voluntary personal loans to the executor with virtually all of the residuary assets of the estate, and (f) the transferring of assets other than Polyvend stock to the stock trust.

The Friday firm defendants filed a motion for summary judgment, asserting that: (a) the plaintiff had no cause of action against the defendants because of the absence of contractual privity, (b) the release of Stephen, individually and as executor of the estate, in connection with the Faulkner County Chancery Court action constituted a release of the defendants, (c) the plaintiff's action was barred by the statute of limitations, and (d) the plaintiff's action was barred because he failed to file suit on or before May 1, 1993, the date specified in the tolling agreement.

First Commercial was added as a defendant by an amended complaint filed on December 29, 1993. First Commercial filed a

motion to dismiss and asserted that any claim against it was barred by the statute of limitations. The bank also contended that the special administrator lacked standing to bring an action against it because the estate was not a beneficiary of the residuary trust.

In granting the Friday firm's motion for summary judgment, the trial court found that: (1) no privity existed between the plaintiff and the defendants justifying a claim of breach of duty, the defendants, as attorneys for the estate, owed no fiduciary duty to the heirs and beneficiaries in the absence of fraud and misrepresentation, and no allegations of fraud on the part of the defendants had been made; (2) the release of Stephen in the Faulkner County lawsuit filed by the individual trust beneficiaries also specifically released his agents and employees and therefore served as a release of the Friday firm as his attorneys; and (3) the statute of limitations barred the action.

The trial court granted First Commercial's motion to dismiss, finding that the bank had repudiated the trust, and that, in any event, the statute of limitations had also run on the plaintiff's complaint against the bank.

Before we consider the merits of Michael's arguments, we first note that in reaching its decision, the trial court seemed to confuse the fact that the special administrator of the estate filed this action, not the individual heirs and trust beneficiaries. There is only one plaintiff in this case, as pointed out to the trial court by the special administrator in a motion for reconsideration. That plaintiff is J. Michael Stoltz, as special administrator of the estate. The residuary trust beneficiaries are not parties to this action. The personal representative, in his complaint, prayed for damages which *he* suffered. Consequently, we do not consider the allegations concerning damages suffered by trust beneficiaries or heirs of the estate to be relevant, or to provide a basis for preventing summary judgment. Only two of the plaintiff's allegations pertain to the harm suffered by the estate and not the individual beneficiaries — the loss to the estate of the $2,000,000 in insurance benefits and the overpayment to the surviving spouse. The estate has not been damaged by the actions which in effect resulted in estate assets being placed in one trust rather than the other.

1. Summary judgment

The standard for review of a summary judgment is

whether the evidentiary items presented by the moving party in support of the motion left a question of material fact unanswered and, if not, whether the moving party is entitled to judgment as a matter of law. *National Bank of Commerce* v. *Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996). We view all proof in the light most favorable to the party opposing the motion, resolving all doubts and inferences against the moving party. *Id.* In this case, even assuming the facts alleged in the complaint are true, the Friday firm is entitled to summary judgment as a matter of law on all of the claims properly advanced by Michael as special administrator of the estate.

We agree that the statute of limitations bars the action against the Friday firm and its attorneys. The applicable statute of limitations for legal malpractice is the three-year period provided in Ark. Code Ann. § 16-56-105 (1987). *Wright* v. *Compton, Prewett, Thomas & Hickey*, 315 Ark. 213, 866 S.W.2d 387 (1993). Further, the statute of limitations for fraud and breach of fiduciary duty actions is also three years. *Alexander* v. *Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995); Ark. Code Ann. § 16-56-105 (1987). In *Chapman* v. *Alexander*, 307 Ark. 87, 817 S.W.2d 425 (1991), this court stated that it has been the rule since 1877 that the statute of limitations applicable to malpractice actions begins to run, in the absence of concealment of the wrong, when the negligence occurs, and not when it is discovered. *See also Ford's Inc.* v. *Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989). In *Chapman*, we noted that one "current trend" in such actions is the "termination of employment" rule, which provides that the statute of limitations does not begin to run until the attorney-client, doctor-patient, or other professional-client relationship has ended. However, we concluded that our traditional rule has a countervailing fairness about it, and elected to maintain it.

In his letter opinion, the trial court found that the statute of limitations had run for three reasons. He first concluded that Michael signed the tolling agreements prior to his appointment in 1993 as special administrator for the purpose of suing the Friday firm, and the agreement was therefore of no effect. The trial court further found that because the attorney who primarily dealt with the estate withdrew from the Friday firm before the signing of the last tolling agreement, the agreement was not effective as to him, and that any derivative action against the other members of the firm would also be barred. The trial court finally concluded that the

action was barred by the general running of the statute because only one of the acts complained of by the plaintiff occurred within three years of the effective date of the tolling agreements, and this act, a transfer of assets to the stock trust in February 1988, occurred at a time that the plaintiff was represented by counsel. He concluded that any fiduciary duty owed by the Friday firm terminated when the plaintiff employed counsel.

Michael argues that the action is not barred by the statue of limitations for several reasons. He contends that the Friday firm is estopped from asserting the limitations as a defense because of their fiduciary obligations to the estate beneficiaries. He further asserts that the last element essential to his cause of action did not occur until either the discharge of the Friday firm in June 1988 or until the estate was later closed and the executor discharged, and his action would be timely under either alternative. He analogizes the Friday firm's continued representation of the estate and its alleged repetitive tortious conduct to the "continuous treatment" doctrine of medical negligence cases. He finally contends that the limitations period as to the life insurance proceeds was tolled while the verdict in the action against First Pyramid was on appeal to the Supreme Court.

We do not agree that we should depart from the holding of *Chapman* and its predecessors simply because the acts complained of by Michael occurred during the probate of an estate. The probate of an estate can last for a number of years. Here, the acts complained of concern very separate and distinct transactions which occurred over the course of ten years. We can readily distinguish the probate of an estate from the holding in *Wright* v. *Compton, Prewett, Thomas & Hickey*, 315 Ark. 213, 866 S.W.2d 387 (1993), where we determined that the statute of limitations did not commence until the date of the last act performed by an attorney in a business reorganization which took several months to complete. In *Wright*, we said that to require a plaintiff to bring suit against an attorney before a lengthy transaction is completed could deny the attorney the chance to effectuate the proper result. Clearly, the probate of an estate does not involve a single transaction. Based on our holding in *Chapman*, even if the tolling agreements are effective, the general statute of limitations has run as to all claims asserted by Michael except one. The trial court found, and it is undisputed, that the transfer of Stocco stock to the stock trust in February 1988 was the

only alleged negligent act occurring within three years of January 9, 1990, the effective date of the first tolling agreement. Michael does not contest this finding; he in essence argues against the application of our traditional limitations rule and asks that we adopt an alternative to the traditional rule; we decline to do so.

The insurance proceeds were paid to Stephen in January of 1978. The settlement with the widow of Stoltz was entered into in September 1978. All other acts Michael complains of except the transfer of Stocco stock occurred prior to January 9, 1987. The three-year statute of limitations had thus run as to all of these claims before the effective date of the tolling agreements.

As to the transfer of the Stocco stock from the estate to the stock trust, the trial court determined that this occurred within three years of the first tolling agreement. However, he determined that the statute of limitations had run on this claim because the tolling agreements were of no effect; he also concluded that the Friday firm had no duty to beneficiaries of the estate.

The substance of this claim is as follows. Michael asserts that a substantial portion of Polyvend stock was placed in Stocco, Inc., a company created for the purpose of holding the Polyvend stock. He contends that the Polyvend stock was pledged as collateral for a $1.5 million debt owed to First Commercial and that the transfer of Polyvend stock to the holding company allowed the estate to appear solvent and thus facilitated the transfer of Polyvend to the stock trust, to the benefit of Stephen, prior to closing of the estate. Michael asserts in his complaint that the transfer of Stocco stock to the stock trust occurred after the petition to remove Stephen as executor had been filed and without notice to either the probate court or the trust beneficiaries. Again, Michael Stoltz represents only the estate, not the heirs or trust beneficiaries. He has not demonstrated any injury to the estate resulting from the transfer of Polyvend (Stocco) stock to the stock trust. The dispute over the running of the statute of limitations is thus irrelevant with respect to this claim.

Because we determine that the trial court was correct in holding that the statute of limitations barred the action against the defendants, we do not reach the issues raised by Michael regarding privity and the duty owed by the attorneys for the executor to the estate and its beneficiaries, or regarding the effectiveness of the

tolling agreements and the release of Stephen executed by the individual trust beneficiaries.

2. Amended Complaint

Michael also contends that the trial court erred by granting the Friday firm's motion to strike the amended complaint filed on February 25, 1994. On February 15, 1994, the trial court entered an order directing that the plaintiff file a more definite and certain amended complaint and directing that the complaint specifically set out the acts or omissions of certain defendants. On February 25, 1994, the plaintiff filed an amended complaint in response to this order. Subsequently, the defendants, other than First National Bank, moved to strike the complaint.

The defendants asserted that the amended complaint went beyond the trial court's order and should be stricken, because it attempted to change the plaintiff's theory of recovery to the prejudice of the defendants in view of the pending motion for summary judgment. They contended that the plaintiff's original complaint did not sufficiently plead fraud and that the word fraud was used for the first time in this amended complaint. The trial court granted the motion, noting that in view of its order granting summary judgment, its order directing the plaintiff to file a more definite complaint was withdrawn.

Michael submits on appeal that a party may amend its pleading at any time. Ark. R. Civ. P. 15(a). Rule of Civil Procedure 15(a) provides in part:

> With the exception of pleading the defenses mentioned in Rule 12(h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding.

Michael does not argue that the trial court abused its discretion in striking the amended complaint; his argument simply ignores all but the first sentence of the rule. However, Rule 15(a) clearly contemplates that the opposing party may object and the court may strike the amended pleading. Further, the trial court is vested with broad

discretion in allowing or denying amendments to pleadings. *Cawood v. Smith*, 310 Ark. 619, 839 S.W.2d 208 (1992). Here, the amendment was filed nearly one year after the original complaint was filed, and it was filed while the Friday firm's motion for summary judgment was pending. The trial court's ruling on the motion for summary judgment would also be dispositive of the claims asserted in the amended complaint, and we cannot say that the trial court abused its discretion in striking this pleading.

3. Motion to dismiss

For his final point, Michael argues that the trial court erred in granting the motion to dismiss filed by First Commercial. The trial court stated in a letter opinion that the motion was granted because the trust had been repudiated and, in any event, the statute of limitations had run on the plaintiff's complaint.

On appeal, Michael contends that a bank officer stated in a deposition that the bank occupied a trustee relationship with the Stoltz children in January 1990. He also asserts that as special administrator, he had standing to pursue this cause of action against the bank on behalf of the trust beneficiaries. However, he does not explain how being in a fiduciary relationship with beneficiaries in another trust affects the bank's repudiation.

In a separate declaratory-judgment action regarding the administration of the estate, First Commercial was named a defendant. The beneficiaries of the trust in question were either plaintiffs or defendants in that case. In its answer served in October 1988, First Commercial stated that it was named as trustee of the residuary trust, but that it had never been contacted to serve in such capacity. First Commercial stated that it had never accepted the role of trustee and would decline to serve if so requested. Michael simply does not dispute that the beneficiaries had notice of the bank's repudiation of the trust. First Commercial was sued more than five years after the October 1988 answer, by amended complaint filed on December 29, 1993. Further, Michael and other trust beneficiaries asserted that Stephen, rather than First Commercial, had acted as trustee of the residuary trust in the action they filed against Stephen in Faulkner County Chancery Court in October 1988. Clearly, the statute of limitations has run as to any action against First Commercial in this instance.

Moreover, we again note that the trust beneficiaries are

not parties to this action, and the estate was in no way damaged by the inaction of the bank. Only the individual beneficiaries of the trust could claim damages resulting from the mismanagement of trust funds or the breach of the trustee's fiduciary duty.

Affirmed.

Special Chief Justice HENRY WILKINSON and Special Justices JOHN ELROD, SIDNEY MCCOLLUM, and HENRY WILSON join in this opinion.

JESSON, C.J., DUDLEY, GLAZE, CORBIN, and BROWN, J.J. not participating.

Michael BRANCH *v.* STATE of Arkansas

CR 96-737 925 S.W.2d 427

Supreme Court of Arkansas
Opinion delivered July 15, 1996

J.F. Atkinson, Jr., for appellant.

No response.

PER CURIAM. Appellant Michael Branch, by his attorney, has filed for a rule on the clerk.

His attorney J. F. Atkinson, Jr., admits that the failure to file the record in time was due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DUDLEY, J., not participating.

Ricky DAFFRON *v.* STATE of Arkansas

CR 96-14 926 S.W.2d 662

Supreme Court of Arkansas
Opinion delivered July 15, 1996

James Law Firm, by: *William Owen James, Jr.*, and *Kelli S. Cashion*, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant Ricky Daffron, through his counsel, seeks permission to file a supplemental abstract and substituted brief in connection with his appeal of the denial of a Rule 37 petition. The State asks that we deny Daffron's motion because counsel for the State pointed out in its brief that Daffron failed to abstract the order denying his Rule 37 petition and argued that the case should be affirmed on this basis.

The State acknowledges that in *Wilson* v. *State*, 306 Ark. 179, 810 S.W.2d 337 (1991), this court permitted appellant's counsel to file a supplemental abstract and brief in a Rule 37 appeal, under identical circumstances. However, the State asks that we adopt the rationale of *Jones* v. *McCool*, 318 Ark. 688, 886 S.W.2d 633 (1994), in which we turned down a pro se appellant's request to file a supplemental abstract and brief in order to cure an abstract deficiency. *Jones had failed to include an abstract of any part of the record in his brief.* In the *Jones* per curiam opinion we said:

> Nearly a month after the appellee State filed its brief, appellant filed a motion seeking to amend the brief to include an abstract. The motion is denied. *Once the appellee has filed its brief, it is too late to file a motion to amend the appellant's brief.*

(Emphasis supplied.) No authority is given in *Jones* for this declaration, perhaps because none exists under either our present Rule 4-2(b)(2), the former Rule 9(e)(2), or the cases which have interpreted those rules in this context.

The rationale of *Jones* seems to be that a pro se appellant should not be afforded the same opportunity to correct a deficient abstract as is an appellant represented by counsel. We said as much, unfortunately, in *Wilson, supra*, where we granted counsel's motion to supplement abstract, but added the following caveat:

> If appellant had been proceeding pro se and had submitted a deficient abstract, we would not hesitate to affirm pursuant

> to our Rule 9 since a litigant who elects to proceed pro se is required to conform to the rules of procedure. *Peterson* v. *State*, 289 Ark. 452, 711 S.W.2d 830 (1986). Where the error was made by appointed counsel, however, we will permit the abstract to be supplemented.

Pro se litigants are of course required to conform to the rules of procedure. However, Rule 4-2(b)(2) provides:

> *Whether or not the appellee has called attention to deficiencies in the appellant's abstract,* the Court may treat the question when the case is submitted on its merits. If the Court finds the abstract to be flagrantly deficient, or to cause an unreasonable or unjust delay in the disposition of the appeal, the judgment or decree may be affirmed for noncompliance with the Rule. *If the Court considers that action to be unduly harsh, the appellant's attorney may be allowed time to revise the brief, at his or her own expense, to conform to Rule 4-2(a)(6).* Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. *Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct.*

(Emphasis supplied.)

This rule clearly contemplates the filing of a substituted brief by an appellant after an appellee's brief has been filed, *even when, as in the present case, the appellee has called attention to the abstract deficiency in its brief.* The rule *further* provides that the appellee be afforded the opportunity to revise or supplement its brief at the expense of the appellant or the appellant's counsel. We routinely grant an appellant's request to file a substituted brief when a case is not ready for submission. *Dixon Ticonderoga Co.* v. *Winburn Tile Mfg.*, 322 Ark. 817, 911 S.W.2d 955 (1995). Of course, this court has the discretion to deny a request to file a substituted brief if an unreasonable or unjust delay in the disposition of the appeal will result or if it is not unduly harsh to affirm the case without reaching the merits of the appellant's argument. This is a far cry from the bald assertion in *Jones* that it "is too late to file a motion to amend" after the appellee's brief has been filed.

The State also contends that the opinion in *Jones* is consistent with our holdings that an appellant may not supplement an

abstract in a reply brief. *See Harris* v. *State*, 315 Ark. 398, 868 S.W.2d 58 (1993). However, Rule 4-1(b) provides that an appellant's reply brief "shall not include any supplemental abstract *unless permitted by the court upon motion*." (Emphasis supplied.) Further, in *Harris*, we noted that Harris requested in his reply brief that he be permitted to supplement his abstract but that his request "was without a *prior timely motion*, and as a matter of course, would not (and did not) come to the court's attention until after this case was submitted to the court for decision." (Emphasis supplied.)

The State argues that it is unfair to allow an appellant to supplement his abstract after the appellee has pointed out the deficiencies in the form of a meritorious procedural argument in its brief, and that this practice should be stopped. This is in effect an argument for a substantial change in our Rules 4-1 and 4-2.

However, Daffron has filed a motion to supplement abstract and file substituted brief *pursuant to our present Rule 4-2(b)(2). As* his case *has not yet been* submitted to this court for decision, his motion is timely filed and is granted.

DUDLEY, J., not participating.

Timothy G. EVANS *v.* STATE of Arkansas

CR 96-649 925 S.W.2d 428

Supreme Court of Arkansas
Per Curiam Opinion delivered July 15, 1996
Concurring Opinion delivered July 15, 1996

TOM GLAZE, Justice, concurring. To my recollection, this court has never allowed appointed counsel to withdraw because the defendant filed some type of complaint against counsel either in another court or with the Professional Conduct Committee. Obviously, to permit withdrawals in these circumstances fosters the filing of frivolous complaints against attorneys that will result in delays in direct appeals. Defendants have postconviction remedies available for serious complaints concerning an attorney's ineffectiveness. We should not start authorizing such counsel withdrawals, especially, as here, where the defendant has filed a civil action, alleging grounds

having no merit for disqualifying counsel from representing defendant in the direct appeal. If the court granted this withdrawal, it could expect many more such motions in the future, and the court would be obliged to grant them. That would be a mistake.

For the foregoing reasons, I would deny counsel's motion.

NEWBERN and ROAF, JJ., join this concurrence.

Scotty Ray GARDNER *v.* Honorable Russell ROGERS

CR 96-777 926 S.W.2d 848

Supreme Court of Arkansas
Opinion delivered July 15, 1996

Dennis R. Molock, for petitioner.

No response.

PER CURIAM. Scotty Ray Gardner seeks a writ of prohibition ordering the Circuit Court of Arkansas County to discharge him from custody and to refrain from conducting any proceedings con-

cerning his case. Mr. Gardner's failure to demonstrate the Circuit Court's lack of jurisdiction precludes the issuance of the writ.

On October 23, 1991, Mr. Gardner pleaded guilty to two counts of criminal attempt to commit first-degree murder. He was sentenced to thirty years' imprisonment on each charge. The sentences were ordered to run consecutively, and seven years of each sentence were suspended.

Mr. Gardner sought a writ of *habeas corpus* in the United States District Court for the Eastern District of Arkansas. On January 9, 1996, an order was entered by that Court which stated in part:

> Accordingly, it is hereby ordered that petitioner be brought before the State trial court within thirty (30) days of this order for arraignment and at that time be given an opportunity to enter his pleas to the charges against him. If he pleads not guilty to either or both of said Counts, the State will commence the trial on said charge or charges within one-hundred twenty (120) days of the entry of said not-guilty plea or pleas. * * * if the State fails . . . to commence any trial of Petitioner occasioned by his not guilty plea or pleas within one-hundred twenty (120) days after the entry of said plea or pleas, the writ of habeas corpus shall issue and said petitioner will thereupon be forthwith released from custody and discharged from the pending charges.

According to Mr. Gardner's petition he pleaded not guilty to both counts on January 22, 1996. His petition mentions that he requested a continuance but that the time should not have been charged against him as it resulted from his having been transferred to a prison facility in Texas, thus hampering his ability to prepare for trial. He does not state the duration of the continuance, nor does he indicate that he has sought relief from the Circuit Court in which he is to be tried. He claims solely that, due to the expiration of more than 120 days from the date of the guilty pleas, this Court should prohibit the Circuit Court from trying him.

A petitioner seeking a writ of prohibition in this Court must produce a record sufficient to show the writ is clearly warranted. *Davis* v. *State*, 319 Ark. 171, 889 S.W.2d 769 (1994); *Beasley* v. *Graves*, 315 Ark. 663, 869 S.W.2d 20 (1994). Our law is well established that prohibition is an extraordinary writ and is never issued to prohibit a trial court from erroneously exercising its

jurisdiction, but is issued only when it is proposing to act in excess of its jurisdiction. *Davis* v. *State, supra. See, e.g., Rhodes* v. *Capeheart,* 313 Ark. 16, 852 S.W.2d 118 (1993). A writ of prohibition is an extraordinary remedy which issues only when the lower court is wholly without jurisdiction, there are no disputed facts, there is no adequate remedy otherwise, and the writ is clearly warranted. *State* v. *Pulaski County Circuit-Chancery Court,* 316 Ark. 473, 872 S.W.2d 854 (1994).

Mr. Gardner has not produced a record showing that the Trial Court lacks jurisdiction over him, or the crime with which he is charged.

Petition denied.

Larry JOHNSON *v.* STATE of Arkansas

CR 96-748 925 S.W.2d 427

Supreme Court of Arkansas
Opinion delivered July 15, 1996

Jeffery H. Kearney, for appellant.

No response.

PER CURIAM. Petitioner, Larry Johnson, by his attorney, Jeffery H. Kearney, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry* v. *State,* 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases,* 295 Ark. 964 (1979) (per curiam).

A copy of this per curiam will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases,* 265 Ark. 964.

DUDLEY, J., not participating.

Raymond C. McCREADY *v.* STATE of Arkansas

CR 96-763 924 S.W.2d 813

Supreme Court of Arkansas
Opinion delivered July 15, 1996

Alvin Schay, for appellant.

No response.

PER CURIAM. Appellant, Raymond C. McCready, by his attorney, Alvin Schay, has filed a motion for a rule on the clerk. Appellant filed a timely notice of appeal from the denial of his petition for postconviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. His attorney admits by motion that the record of the postconviction proceedings was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion is therefore granted.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DUDLEY, J., not participating.

Jessie Earl HILL *v.* STATE of Arkansas

CR 96-270 931 S.W.2d 64

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Norman Mark Klappenbach, for appellant.

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

ROBERT H. DUDLEY, Justice. Jessie Earl Hill was convicted of capital murder and sentenced to life without parole. There is no merit in any of his nine arguments for reversal, which we discuss in four groupings.

Hill, aged nineteen, was a suspect in a crime committed in Camden and discussed leaving Arkansas with his friend, Demarcus Tatum, aged eighteen. On the afternoon of January 17, 1995, Hill and Tatum went to Donny Ray Moss's house where they asked Donald Thrower if they could borrow his 1990 Nissan Maxima automobile. Thrower refused to let them borrow his car, but agreed to let his cousin, Arbrady Moss, drive them to the bus station in Camden. Hill, Tatum, and Moss got into the Nissan. After going only a short distance Hill told Moss he wanted the car. Moss refused. Hill struck Moss in the head with a marble rolling pin. Moss pleaded with Hill to stop, but he continued. Moss fell into a roadside ditch. Hill and Tatum took the Nissan and left but, after going only a short distance, decided to return and get Moss. Moss was still alive and begged for help. Hill put Moss in the trunk of the car.

Hill and Tatum got back inside the car. By this time, they had decided to go to a friend's house in Cedar Rapids, Iowa. Tatum drove until they reached Cohen Trail in Grant County, where they stopped to dispose of Moss's body. Tatum opened the trunk and found Moss still alive. Hill lifted Moss out of the trunk and beat him with a juice bottle. They left Moss on Cohen Trail and continued their flight to Cedar Rapids.

The Nissan broke down near Adair, Oklahoma, and Hill and Tatum had it towed to Osborn's Garage in Adair, where they sold it for $150.00. When questioned at the garage about blood that was in the trunk, Tatum said it came from a deer. Hill and Tatum used the last of the proceeds from the sale of the car to buy bus tickets to Kansas City. Upon arriving in Kansas City, they had no money and no transportation, so they decided to steal a car in order to continue their journey to Cedar Rapids. They saw a woman near her car in a parking garage, grabbed her, stabbed her, and took her purse and car keys. When a security guard came on the scene, they ran back

to the bus station, where they were apprehended.

Tatum, an accomplice, confessed to the above. Donny Ray Moss testified that he was present on January 17, when Hill and Tatum attempted to borrow Donald Thrower's Nissan automobile, and that he saw Hill and Tatum leave his house in Camden with Arbrady Moss, the victim, driving the Nissan. Bob Adams, the Sheriff of Grant County, testified that Moss's corpse was found on Cohen Trail on January 19, 1995, two days after Moss was last seen in Camden in the Nissan. Underneath the corpse were pieces of broken glass that were identical to broken glass later found in the trunk of the Nissan. A fruit jar was found seven feet from Moss's corpse. A tooth was found in the trunk of the Nissan that matched the tooth missing from Moss's jaw. A rolling pin with hair and a dried blood-like substance was found in the car trunk. A considerable amount of dried blood was found in the trunk. Dr. Charles Kokes, a pathologist, observed fifteen individual lacerations to the victim's head and gave his expert opinion that Moss died from multiple blunt blows to the head. He further testified that the victim had been struck in the jaw area with a blow or blows that had loosened his teeth. In sum, the accomplice, Tatum, testified that Hill committed capital murder, and his testimony was corroborated.

I.

By pretrial motion Hill asked the trial judge to exclude evidence of an earlier murder in Camden with which he was charged and to exclude all evidence of the offenses he committed in Kansas City. No evidence of the earlier murder in Camden was introduced, and we need not further discuss that part of the motion. In the part of the motion material to this appeal, Hill moved to have evidence of the offenses in Kansas City excluded because those offenses occurred after the capital murder charged in this case; they were not relevant to this case; and, even if relevant, the probative value was substantially outweighed by the danger of unfair prejudice. *See* Ark. R. Evid. 401, 402 & 403. The trial judge refused to rule until the context of the evidence was shown and commented: "Normally in the guilt phase, evidence of the crime would not be admissible but in the sentencing phase the evidence would be admissible." In sum, the trial court validly found the pretrial motion too broad and declined to rule before he knew the full context of the evidence. The result of the ruling was that specific objections became neces-

sary at trial. *Massengale* v. *State*, 319 Ark. 743, 894 S.W.2d 594 (1995).

During the guilt phase of the trial, accomplice Tatum testified: "We started walking around [after getting off the bus in Kansas City] looking for a car. We were looking to steal a car. We did steal a car." Hill objected on the ground that the evidence was not relevant. The trial court overruled the objection. Later, Tom Pruden, a detective with the Kansas City, Missouri, Police Department testified that Hill confessed, in material part, as follows: "Me and Mark [accomplice Tatum] needed to go to Iowa so we decided we needed a car. A girl came down this alley. I grabbed her. She acted like she wanted to yell. I told her to be quiet, then stepped on the ice and fell to the ground. I put my hand over her mouth and grabbed her. Mark got the purse and the security guard came up. I let her go and walked off. I didn't see if Mark had a knife. I did not cut her. I did not intend to hurt her." Before this evidence was admitted, Hill objected to the introduction of the confession on the ground that the confession was involuntary and that it was not relevant. After a *Denno* hearing, the trial court overruled the objection. Still later, the victim of the crimes in Kansas City took the stand to describe the event, and Hill objected on the ground that her testimony was not relevant and was prejudicial. At trial Hill never asked the trial court to weigh probative value versus prejudice, *see* Ark. R. Evid. 403; therefore, the trial court did not make such a ruling. Further, Hill did not ask to limit the evidence of the crimes in Kansas City to the facts that would show only flight by the accused. On appeal, he assigns the rulings on relevancy and voluntariness as error.

[redacted] Hill argues that the crimes committed in Kansas City were not relevant to the crimes charged in this case. The general rule is that evidence of other crimes committed by the accused, but not charged and joined in the same information and not a part of the crime charged, is not admissible in evidence. *Haynes* v. *State*, 309 Ark. 583, 832 S.W.2d 479 (1992). However, there are limited circumstances in which the State can offer evidence of other crimes in its case-in-chief. *Gustafson* v. *State*, 267 Ark. 278, 590 S.W.2d 853 (1979). Evidence of other crimes is admissible in the State's case-in-chief when it is probative of the accused's participation of the crime charged. *Price* v. *State*, 267 Ark. 1172, 599 S.W.2d 394 (Ark. App. 1980) (citing *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d

804 (1954)). Flight from the scene of a crime is relevant and admissible circumstantial evidence that may be considered in determining guilt. *Jones* v. *State*, 282 Ark. 56, 665 S.W.2d 876 (1984). Here, the proof showed that Hill murdered the victim in Arkansas and was attempting to flee to Iowa. By the time he got to Missouri he was without a car or money, so he committed crimes to get a car and money so that he could continue his flight. The evidence of other crimes was relevant proof of flight.

Hill contends that the Missouri crimes have no independent relevance because they were committed two days after the murder charged in this case. This argument was decided adversely to Hill's position in *Murphy* v. *State*, 255 Ark. 90, 498 S.W.2d 884 (1973), when, in holding that evidence of flight may be admissible even though it did not occur immediately after the crime charged, we wrote:

> In connection therewith evidence as to the conduct of the accused during the period of his flight including any criminal conduct constituting an inseparable part of the flight *such as obtaining money or transportation is generally held admissible. See State* v. *Ross*, 92 Ohio App. 29, 108 N.E.2d 77 (1952), and *State* v. *Martin*, 175 Kan. 373, 265 P.2d 297 (1953). Furthermore, evidence of flight after the commission of a crime is generally admissible *even though it does not occur immediately after the crime. Commonwealth* v. *Liebowitz*, 143 P. Super. 75, 17 A.2d 719 (1941).

Id. at 92-93, 498 S.W.2d at 886 (emphasis supplied).

Finally, a trial court has considerable discretion to determine admissibility of evidence of other crimes, and will not be reversed on appeal unless it has abused such discretion. *Bennett* v. *State*, 297 Ark. 115, 759 S.W.2d 799 (1988), *cert. denied*, 445 U.S. 905 (1990).

Hill asks us to reverse the trial court on a Rule 403 weighing, but that issue was neither raised nor ruled upon at trial. An issue cannot be raised for the first time on appeal. *Stewart* v. *State*, 320 Ark. 75, 894 S.W.2d 930 (1995).

Hill next contends that the trial court erred in allowing evidence of the other crimes because his confession to the crimes committed in Kansas City was involuntary. In determining whether

a confession was involuntarily given, an appellate court will make an independent determination of the evidence, based on the totality of the circumstances. *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987). However, Detective Pruden unequivocally testified that Hill was given the *Miranda* warnings, waived his rights, and "had no hope of reward or fear of punishment." *Scherrer* v. *State*, 294 Ark. 227, 234, 742 S.W.2d 877, 881 (1988). The trial judge was in the best position to determine the credibility of the witnesses at the *Denno* hearing, and his determination that Hill voluntarily confessed was not clearly erroneous. *See, e.g., Misskelley* v. *State*, 323 Ark. 449, 468, 915 S.W.2d 702, 712 (1996).

II.

Four points for reversal involve discretionary rulings by the trial court. Two of these rulings involved motions for continuance. The grant or denial of a motion for a continuance rests in the sound discretion of the trial court and will be reversed only on a showing of abuse of that discretion. *Hill v. State*, 321 Ark. 354, 902 S.W.2d 229 (1995). Motions for continuance are governed in part by Ark. R. Crim. P. 27.3, which requires a showing of good cause. In addition, the trial court should consider the diligence of the movant, the likely effect of the testimony sought, the probability of obtaining the witness in the event of a postponement, and the filing of an affidavit stating not only what facts the witness would prove but also that the movant believes them to be true. *Hill v. State*, 321 Ark. at 356, 902 S.W.2d at 230. Hill's first continuance motion was made three days before trial. In it, he asked for more time to interview three witnesses whose names had just been disclosed. The ruling did not constitute reversible error because none of the three witnesses testified; consequently, Hill could not have suffered any prejudice as a result of the ruling. In this same motion Hill additionally contended that he needed more time to obtain blood tests, but at the hearing on the motion it was admitted that no arrangements for any type of blood test had been made. The trial court denied the motion, finding that Hill had not acted with diligence and that he had made no showing that a blood test would enhance the defense. Hill has not shown these findings of fact to be in error. Since he did not act with diligence and made no showing that a test would enhance the defense, we hold that the trial court did not abuse its discretion in making the ruling. *See, e.g., Lukach* v. *State*, 310 Ark. 38, 834 S.W.2d 642 (1992).

At the conclusion of the State's case Hill again sought a continuance, this time to find a witness who would testify that Tatum, the accomplice, had said that he "beat the system." The trial court denied the motion, finding that the jurors had already been informed of Tatum's plea bargain and that the testimony would add nothing to the defense. There was no proffer to show that the alleged statement meant anything other than Tatum had entered into a plea bargain, received a sentence of twenty years, unlike Hill, and had avoided the risks of a death sentence or life sentence without parole.

Hill next argues that the trial court abused its discretion in refusing to grant sequestered *voir dire*. If there is a potential for prejudice, the trial court is free to order sequestered *voir dire*, but that decision is a matter left to the trial court's sound discretion. *Logan* v. *State*, 300 Ark. 35, 776 S.W.2d 341 (1989). Hill contends that he would have gotten more honest answers if the jurors had been sequestered, but made no proffer to substantiate the argument and offers no examples of jurors' responses during *voir dire* that appear to be less than honest. Accordingly, we cannot say the trial court abused its discretion. *See Heffernan* v. *State*, 278 Ark. 325, 645 S.W.2d 666 (1983).

Prior to trial Hill filed a motion to exclude from evidence all photographs of the victim. The trial court sustained the objection to one of the photographs, but admitted the others. On appeal, Hill argues the trial court abused its discretion in admitting photograph two, depicting the victim's body at a roadside; photograph three, depicting a close-up of the victim's wounds; and photograph four, depicting a close-up of the victim's head wounds. He contends the three photographs were more prejudicial than probative under Ark. R. Evid. 403.

We have repeatedly held that the balancing of probative value against prejudice is a matter left to the sound discretion of the trial court, and this decision will not be disturbed absent a showing of manifest abuse. *Haynes* v. *State*, 309 Ark. 583, 832 S.W.2d 479 (1992). The admission and relevancy of photographs is also a matter within the sound discretion of the trial court. *Robinson* v. *State*, 269 Ark. 90, 598 S.W.2d 421 (1980). An essential element of the charge against Hill was the degree of intent; whether he caused Moss's death "under circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. § 5-10-

101(a)(1) (Repl. 1993). The nature and extent of a victim's wounds are relevant to a showing of intent, which may be inferred by the type of weapon used; the manner of use; and the nature, extent, and location of the wounds. *Garza* v. *State*, 293 Ark. 175, 735 S.W.2d 702 (1987). The photographs admitted by the trial court showed where the victim's body was dumped and the nature, extent, and location of the trauma suffered by the victim. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

III.

Hill was charged with capital murder, kidnapping, and felony theft by receiving. The theft-by-receiving charge was nolle prossed. The trial court instructed the jury on capital murder and kidnapping. The jury returned guilty verdicts on both charges, but the trial court entered a judgment of conviction for capital murder only. In this point for reversal Hill contends it was error for the trial court to refuse, before trial, to dismiss the charge of kidnapping because a conviction for both kidnapping and capital felony murder would constitute double jeopardy. The argument is without merit. An accused may be charged and prosecuted for different criminal offenses, even though one offense is a lesser-included offense, or an underlying offense, of another offense. *Hill* v. *State*, 314 Ark. 275, 281-82, 862 S.W.2d 836, 840 (1993). However, a defendant so charged cannot be convicted of both the greater and lesser offenses. *Id.*; Ark. Code Ann. § 5-1-110(a) (Repl. 1993). Thus, at the time of Hill's trial, a defendant could be charged and tried for capital felony murder and the underlying felony of kidnapping, but could not be convicted of both charges. *Martin* v. *State*, 277 Ark. 175, 177, 639 S.W.2d 738, 739 (1982); *see also* Ark. Code Ann. § 5-1-110(d) (Supp. 1995) (providing for multiple convictions for lesser-included offenses of certain offenses). Here, the jury found Hill was guilty of both capital murder and kidnapping, but the trial court entered a judgment of conviction for capital murder only. Therefore, there was no double jeopardy.

IV.

The remaining points for reversal are not of sufficient merit to call for detailed discussion. Hill assigns as error the trial court's refusal to give an instruction on manslaughter involving emotional disturbance. However, he offered no evidence of such a disturbance, and we have said that it is not error to refuse to charge

a jury on manslaughter involving emotional disturbance when there is no evidence of such disturbance. *Frazier* v. *State*, 309 Ark. 228, 828 S.W.2d 838 (1992). He argues that the trial court erred in denying his motion for a directed verdict. At trial, he moved for a directed verdict on the ground that kidnapping was not proven beyond a reasonable doubt. He did not argue below, as he does now on appeal, that the evidence was insufficient to corroborate the testimony of the accomplice. It is well settled that an appellant cannot change his argument on appeal. *Stewart* v. *State*, 320 Ark. 75, 894 S.W.2d 930 (1995); *see also Walker* v. *State*, 318 Ark. 107, 883 S.W.2d 831 (1994) (argument not reached when defendant argued at trial that there was insufficient evidence for a verdict of either first-degree murder, second-degree murder, or manslaughter but argued on appeal that he lacked the culpable mental state).

Finally, pursuant to Supreme Court Rule 4-3(h), all rulings on objections, made by either party, which were adverse to Hill, have been examined. None of them constitutes reversible error.

Affirmed.

STATE of Arkansas *v.* John WILCOX

95-1166 927 S.W.2d 337

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Asst. Att'y Gen., for appellant.

Doug Norwood, for appellee.

TOM GLAZE, Justice. Appellant John Wilcox pled guilty to driving while intoxicated, first offense, before a special or temporary judge in municipal court. The judge delayed sentencing until the return of the regular sitting judge, Doug Schrantz. The special judge indicated Judge Schrantz would impose the use of an interlock ignition device in Wilcox's car. Such a device connects a motor vehicle ignition to a breath-alcohol analyzer and prevents the ignition from starting if a driver's blood-alcohol level exceeds the calibration setting on the device.

Before the date of his sentencing, Wilcox petitioned the Benton County Circuit Court for a writ of certiorari or prohibition to prohibit Judge Schrantz from imposing an interlock device as a part of Wilcox's sentence. The circuit court found that the ignition interlock device law, Ark. Code Ann. § 5-65-118(a)(1) (1993), violated the Equal Protection Clause and issued a writ prohibiting the municipal court from utilizing the statute. The state brings this appeal, seeking reversal.

We do not reach the issue concerning the constitutionality of § 5-65-118 because the circuit court had no authority to issue a writ of prohibition preventing that statute's enforcement. First, as this court has said repeatedly, a writ of prohibition is an extraordinary writ and is only granted when the lower court is wholly

without jurisdiction, there are no disputed facts, there is no adequate remedy otherwise, and the writ is clearly warranted. *State* v. *Pulaski County Circuit-Chancery Ct.*, 316 Ark. 473, 872 S.W.2d 854 (1994); *see also* 73 C.J.S. Prohibition 521 (prohibition is not available to prevent proceedings where a statute or ordinance is not clearly unconstitutional and where the question of the constitutionality of a statute does not go to the fundamental jurisdiction of the court). Prohibition involves jurisdictional issues, and for the writ to issue, it must appear that the trial court is about to act in a matter beyond its jurisdiction and the petitioner has no other remedy to prevent the threatened usurpation of power. *Rodriguez* v. *Adkisson, Judge*, 254 Ark. 128, 491 S.W.2d 814 (1973). Stated differently, prohibition is designed to prevent a court from exercising jurisdiction not possessed by it or power not otherwise authorized by law when there is no other adequate remedy by appeal or otherwise. *Municipal Ct. of Huntsville* v. *Casoli*, 294 Ark. 37, 740 S.W.2d 614 (1987).

Wilcox concedes that, when (or if) the Rogers Municipal Court imposed the interlock device as part of his sentence, Wilcox could appeal his conviction judgment to the Benton County Circuit Court where he could obtain a *de novo* trial and contest, constitutionally and otherwise, the imposition of such a device.[1] In addition, Wilcox admits, as he must, that the Rogers Municipal Court had jurisdiction to try his DWI offense, and this court has held that a writ of prohibition should not be granted even if part of the order is beyond the jurisdiction of the judge, since those questions can be properly raised on appeal. *Miller* v. *Lofton*, 279 Ark. 461, 652 S.W.2d 627 (1983). Because the Rogers Municipal Court had jurisdiction to try Wilcox's DWI prosecution, and Wilcox can appeal that court's decision to circuit court, the Benton County Circuit Court erred in issuing a writ prohibiting that inferior court from utilizing § 5-65-118 in sentencing Wilcox.

In conclusion, we mention Wilcox's argument that this court lacks jurisdiction to hear this appeal. Wilcox is wrong. The court has jurisdiction under Ark. R. App. P. 2(a)(2); *see also Municipal Court of Huntsville*, 294 Ark. 37, 740 S.W.2d 614.

---

[1] We note that, in his argument in circuit court, Wilcox said that all the local circuit judges were not utilizing the device in DWI cases.

We reverse the Benton County Circuit Court's decision issuing a writ of prohibition and remand with directions to vacate its writ.

Alvin Ray WILLIAMS *v.* STATE of Arkansas

CR 95-194 930 S.W.2d 297

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Ed Webb, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Alvin Ray Williams, appeals the judgment of the Pulaski County Circuit Court convicting him of first-degree murder and sentencing him to imprisonment for life. Jurisdiction of this appeal is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Appellant's two points for reversal are a challenge to the sufficiency of the evidence and a constitutional challenge to our bifurcated proceedings in criminal cases. We find no merit to the arguments and affirm the judgment of conviction which was entered pursuant to a jury verdict.

I. MOTION FOR DIRECTED VERDICT

Appellant's first point of error is the denial of his motions for directed verdict. At the close of the state's case, appellant moved for a directed verdict on two grounds: that the evidence established appellant's defense of justification and that the evidence was insufficient to establish his intent to purposely cause the victim's death. After the trial court denied appellant's motion, appellant called a single witness in his behalf. Appellant then renewed his earlier

motion for directed verdict, which the trial court denied.

Appellant's initial motion was sufficiently specific to apprise the trial court of the particular grounds for the motion as required by A.R.Cr.P. Rule 33.1. Appellant's renewal motion was therefore likewise sufficient to preserve this point for appellate review. *Key* v. *State*, 325 Ark. 73, 923 S.W.2d 865 (1996). We observe that, although appellant's abstract is flagrantly deficient because it does not include the motions for directed verdict and does not indicate in any manner that the motions were made, *Moncrief* v. *State*, 325 Ark. 173, 425 S.W.2d 776 (1996), the state cured this deficiency by including the motions in its supplemental abstract. *See generally* Ark. Sup. Ct. R. 4-2(b); *see also Johnson* v. *State*, 319 Ark. 3, 888 S.W.2d 661 (1994).

We recently stated our standard of review for directed-verdict motions:

> This court treats the denial of a motion for directed verdict as a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict; substantial evidence must be forceful enough to compel a conclusion one way or the other beyond suspicion and conjecture. On appellate review, it is only necessary for this court to ascertain that evidence which is most favorable to appellee, and it is permissible to consider only that evidence which supports the guilty verdict.

Choate v. *State*, 325 Ark. 251, 254-55, 925 S.W.2d 409, 411 (1996) (quoting *King* v. *State*, 323 Ark. 671, 916 S.W.2d 732 (1996) (other citations omitted)).

Appellant admitted that he shot and killed the victim. He defended his actions on the basis that his actions were justified — that he used only such force as he reasonably believed necessary to prevent the victim from killing him. Consequently, the only issues we need determine in reviewing the evidence are whether there is substantial evidence to support a finding that appellant acted "[w]ith a purpose of causing the death of another person" as required by Ark. Code Ann. § 5-10-102(a)(2) (Repl. 1993), and whether there was substantial evidence to support a finding of justification.

A. PROOF OF PURPOSE

As applied to this case, the requisite mental state is purposely causing the death of another. Section 5-10-102(a)(2); *see Walker* v. *State*, 324 Ark. 106, 918 S.W.2d 172 (1996). "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. 1993).

The law is well-settled that 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. *Williams* v. *State*, 321 Ark. 635, 906 S.W.2d 677 (1995). The intent necessary to sustain a conviction for first-degree murder may be inferred from the type of weapon used, from the manner of its use, and the nature, extent, and location of the wounds. *Walker*, 324 Ark. 106, 918 S.W.2d 172.

The law is also well-settled that circumstantial evidence of a culpable mental state may constitute substantial evidence to sustain a guilty verdict. *Crawford* v. *State*, 309 Ark. 54, 827 S.W.2d 134 (1992) (citing *Farris* v. *State*, 308 Ark. 561, 826 S.W.2d 241 (1992), and *Davis* v. *State*, 251 Ark. 771, 475 S.W.2d 155 (1972)). However, in order for circumstantial evidence alone to constitute substantial evidence, it must exclude every other reasonable hypothesis consistent with innocence. *Key*, 325 Ark. 73, 923 S.W.2d 865. Once the evidence is determined to be sufficient to go to the jury, the question of whether the circumstantial evidence excludes any other hypothesis consistent with innocence is for the jury to decide. *Id.*

That appellant caused the victim's death with a single 9mm gunshot wound to the chest is not disputed. The following circumstances established by the evidence in this case were sufficient for the jury to infer that appellant acted with the purpose of causing the victim's death. One witness had struggled with the victim prior to the victim's death; this witness did not see a gun on the victim, but did see appellant with a gun just prior to the killing. Another witness argued with the victim prior to the murder. She testified that she did not see the victim with a gun during their argument but later saw appellant pull a gun from his pants and try to point it at the victim's head; she also saw the gun up in the air "and it was just going ever which way." This witness also testified that appellant

initiated the altercation with the victim. Another witness, who was babysitting at the house next door to where the murder occurred, testified that she saw and heard people talking loudly in the yard; she later heard gunfire and saw one person chasing the other around a parked car; she saw the person who was doing the chasing holding a gun and heard the other person say "[p]lease don't shoot me"; she also saw the man who had the gun leave the scene. A neighbor testified that he saw someone shooting at the victim while the victim tried to duck and dodge the bullets. The neighbor stated that the shooter would pause, look under the car to locate the victim's feet, and then rise to fire another shot. The officer who arrested appellant found him hiding under some bushes a block from the murder scene; the officer could hear appellant breathing heavily and noticed where appellant had covered himself with leaves.

In short, after using a handgun to shoot the victim while the victim was pleading for his life and dodging and ducking bullets, appellant fled from the scene and was found to be hiding from police. From these circumstances, the jury could reasonably infer that appellant acted with the purpose of causing the victim's death. *See Williams*, 321 Ark. 635, 906 S.W.2d 677; *see also Crawford*, 309 Ark. 54, 827 S.W.2d 134. Any conflicts and inconsistencies in the evidence were for the jury to resolve as factfinder, and not for the trial court to resolve on a directed-verdict motion. *Williams*, 321 Ark. 635, 906 S.W.2d 677.

B. PROOF OF JUSTIFICATION

Appellant contends that the statement he gave to the police established that his actions were justified. Appellant maintains that the evidence in this case proves that the victim was the one who initiated the confrontation; that appellant believed the victim was about to kill him; and that he and the victim began wrestling, after which appellant took the gun away from the victim and killed him in self-defense. One who asserts the defense of justification of a homicide must show not only that the person killed was using deadly physical force, but that he responded with only that force which was necessary and that he could not have avoided the killing. Ark. Code Ann. § 5-2-607 (Repl. 1993); *Ricketts* v. *State*, 292 Ark. 256, 729 S.W.2d 400 (1987). The jury was instructed accordingly by the trial court and rejected appellant's defense. This rejection is supported by the same evidence we discussed in affirming the jury's finding that appellant acted purposefully in this case — appellant

was the only one seen with the gun, the victim pleaded for his life, appellant continued to shoot at the victim as the victim dodged bullets, and appellant fled the scene.

Because, when we review the denial of a motion for directed verdict, we need only consider the evidence that supports the jury's verdict without weighing it against any evidence favorable to the accused, we conclude there is substantial evidence to support the jury's finding of appellant's guilt. *See Williams*, 321 Ark. 635, 906 S.W.2d 677. Accordingly, the trial court did not err in denying the motion for directed verdict.

II. CONSTITUTIONAL CHALLENGE TO ACT 535 OF 1993

Appellant filed a pretrial motion challenging as unconstitutional on both state and federal grounds Act 535 of 1993, codified at Arkansas Code Annotated §§ 16-97-101 to -104 (Supp. 1995), which provides for bifurcated proceedings of the determinations of guilt and punishment in felony cases. The trial court denied this motion in an omnibus hearing. Appellant's motion included nine arguments, all of which are argued on appeal and none of which has merit. Accordingly, we conclude the trial court did not err in denying appellant's motion.

We do not reach the merits of many of these arguments because they are all essentially one-sentence assertions with no citation to supporting authority and without explanation as to how the cited portions of the constitutions have been violated. We do not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well-taken. *Roberts* v. *State*, 324 Ark. 68, 919 S.W.2d 192 (1996). This rule is consistent with the well-established principle that statutes are presumed to be constitutional and the burden of proving otherwise rests with the party challenging the statute. *Id.* When an appellant does not explain how a particular statute offends his constitutional rights, we do not consider his deficient contentions. *Id.*

A. ABSENCE OF APPELLATE REVIEW OF SENTENCING

Appellant contends that the Act violates the Eighth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article 2, Section 9 of the Arkansas Constitution because it does not provide for appellate review of the sentence ultimately imposed. Appellant argues that the absence of appellate review of a sentence contravenes the ban on cruel and unusual punishment.

Appellant's argument is entirely without merit as it is based upon a false premise. The Act does not prohibit or interfere with our practice of reviewing sentencing proceedings when sentencing issues are properly presented. Indeed, as the state points out, we have recently reversed a case for evidential errors that occurred in the sentencing phase. *Rush* v. *State*, 324 Ark. 147, 919 S.W.2d 933 (1996). As for review of the ultimately imposed sentence, we do not usually review the length of a sentence that is within legal limits except in limited circumstances not relevant here. *Henderson* v. *State*, 322 Ark. 402, 910 S.W.2d 656 (1995). Finally, we note that appellant makes no contention whatsoever that his sentence is erroneous or that error occurred in the sentencing phase of his trial.

B. SUNSET PROVISION

When enacted in 1993, Act 565 contained a "sunset" provision, whereby the Act would expire on June 30, 1997. Appellant argues that the sunset provision violates the due-process and equal-protection clauses of the United States and Arkansas Constitutions. This argument is rendered moot because the sunset provision was repealed by Act 892 of 1995. This court does not address moot arguments. *Johnson*, 319 Ark. 3, 888 S.W.2d 661.

C. VOID FOR VAGUENESS

Citing the Fourteenth Amendment to the United States Constitution and Article 2, Sections 3 and 18 of the Arkansas Constitution, and without any explanation, appellant argues that the bifurcation process is void for vagueness, fails to give adequate notice of the proscribed conduct, and denies due process and equal protection of the laws. Appellant argues further that criminal laws are to be strictly construed.

This argument is likewise wholly without merit. First,

the Act does not proscribe any conduct at all; rather, it provides for remedial criminal procedures. Generally, we construe procedural laws liberally to achieve their remedial objectives. Second, appellant fails to articulate any particular argument about how the Act is vague or violates his due-process and equal-protection rights. We do not address such deficient contentions, even though they are constitutional ones. *Roberts*, 324 Ark. 68, 919 S.W.2d 192.

D. EX POST FACTO

Appellant contends the Act violates the Ex Post Facto Clauses of the United States and Arkansas Constitutions because it applies to criminal acts that occurred before its effective date. We have previously considered this argument in the federal context and concluded it was entirely without merit. *Williams* v. *State*, 318 Ark. 846, 887 S.W.2d 530 (1994). Because our state constitution's *ex post facto* clause is essentially identical to the federal clause, for the same reasoning expressed in *Williams*, 318 Ark. 846, 887 S.W.2d 530, we hold the Act does not violate the state *ex post facto* clause.

E. MODEL INSTRUCTIONS

Appellant argues his state and federal due-process and equal-protection rights were violated because the Act's bifurcation process was made applicable before the Arkansas Model Jury Instructions for Criminal Cases was amended. Appellant does not cite any authority for this contention, nor does he make a convincing argument supporting it. Accordingly, we do not address this deficient contention. *Roberts*, 324 Ark. 68, 919 S.W.2d 192.

F. GUILTY PLEA

Appellant argues that the Act gives the prosecutor the ultimate decision as to whether a defendant can plead guilty and therefore violates the state and federal due-process and equal-protection clauses. This argument is based upon a false premise. It is the trial court that decides whether it will accept the defendant's guilty plea in accordance with A.R.Cr.P. Rules 24.4 to 24.6. Moreover, a defendant does not have an absolute right to plead guilty. *Numan* v. *State*, 291 Ark. 22, 722 S.W.2d 276 (1987).

G. VICTIM-IMPACT EVIDENCE

Appellant argues that the Act is unconstitutional because it allows the admission of generic victim-impact evidence

in violation of *Payne* v. *Tennessee*, 501 U.S. 808 (1991). We have recently discussed *Payne* and upheld our victim-impact statute applicable in capital cases, Ark. Code Ann. § 5-4-602(4) (Repl. 1993). *Kemp* v. *State*, 324 Ark. 178, 919 S.W.2d 943 (1996). However, appellant cites no authority, nor makes any argument that *Payne* applies to non-capital sentencing procedures. Accordingly, we do not address this argument. *Roberts*, 324 Ark. 68, 919 S.W.2d 192.

H. VOIR DIRE

Appellant argues that the Act does not allow for *voir dire* of potential jurors concerning whether they can consider the full range of penalties upon conviction. Appellant contends this violates his state and federal right to a fair and impartial jury. Appellant's argument is, however, based on an entirely false premise. The Act does not purport to restrict *voir dire* examination of prospective jurors.

I. MISDEMEANOR CONVICTIONS

Appellant contends that the Act conflicts with the Habitual Offender Statute, Ark. Code Ann. § 5-4-501 (Supp. 1993), because the Act allows for the admission of misdemeanor convictions during the sentencing phase while the Habitual Offender Statute does not allow consideration of misdemeanors for enhanced sentencing purposes. Appellant argues that this alleged conflict renders the Act unconstitutional as violative of the state and federal due-process clauses. Appellant does not cite any authority for this contention, nor does he make a convincing argument supporting it. Accordingly, we do not address this deficient contention. *Roberts*, 324 Ark. 68, 919 S.W.2d 192.

In accordance with Ark. Sup. Ct. R. 4-3(h), the record has been reviewed for adverse rulings objected to by appellant but not argued on appeal, and no such errors were found. For the aforementioned reasons, the judgment of conviction is affirmed.

Marilyn FLORENCE, Age 9; Vernice Price, Age 8; and Robert Matthews, Age 6, By Their Mother Elsie Matthews and Elsie Matthews, Individually *v.* Captoria TAYLOR

95-1170 926 S.W.2d 666

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Heather Patrice Hogrobrooks, for appellants.

No response.

PER CURIAM. The request of Heather Patrice Hogrobrooks, attorney for appellants, for oral argument in this matter was received by the Clerk of the Supreme Court on February 8, 1996. Oral argument was scheduled for September 3, 1996, at 9:00 a.m. On July 26, 1996, Ms. Hogrobrooks moved for a continuance of the oral argument, and the motion was denied by this court on August 5, 1996. Prior to the scheduled oral argument, there is no record in the Clerk's office that she had any additional communication with that office concerning her appearance. Ms. Hogrobrooks did not appear at oral argument on September 3, 1996.

Ms. Hogrobrooks is directed to appear before this court on September 23, 1996, at 9:00 a.m. and show cause why she should not be held in contempt of this court for failure to appear for oral argument in this matter at the scheduled time and date.

Order issued.

Rocky W. ARNOLD *v.* STATE of Arkansas

CR 96-885 926 S.W.2d 665

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Keith Watkins, for appellant.

No response.

PER CURIAM. Appellant, Rocky W. Arnold, by his attorney, Keith Watkins, has filed a motion for a rule on the clerk. Mr. Watkins admits by motion that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion is therefore granted.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Marilyn FLORENCE, Age 9; Vernice Price, Age 8; and Robert Matthews, Age 6, By Their Mother Elsie Matthews and Elsie Matthews, Individually *v.* Captoria TAYLOR

95-1170 928 S.W.2d 330

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Heather Patrice Hogrobrooks, for appellants.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Scott M. Strauss*, for appellee.

ROBERT L. BROWN, Justice. This case arises from a dismissal of the complaint of appellants Elsie Matthews on behalf of Marilyn Florence, age 9; Vernice Price, age 8; and Robert Matthews, age 6; and Elsie Matthews, individually. The matter was dismissed with prejudice by the trial judge on motion of appellee Captoria Taylor for the "repeated failure" of appellants and their counsel to attend trial. Appellants now appeal and assert that the dismissal denied them their constitutional rights to an impartial tribunal as well as to notice, opportunity to be heard, and access to the courts. They further contend that the dismissal constituted an abuse of the trial judge's power. We disagree and affirm the dismissal.

The pertinent facts are these. The matter was set to be tried before a jury in Lee County Circuit Court on August 30, 1995. At 9:10 a.m. on August 29, 1995, appellants filed a motion for a continuance, showing that a necessary witness was unavailable for trial, that a nephew and cousin of the appellants had drowned two days before, that appellants' counsel had three "criminal cause numbers" that were set for trial in St. Francis County on August 30, 1995, and that appellants' counsel had briefs due in this court on August 31, 1995. The motion further alleged that appellee's counsel had been informed of the need for a continuance on August 28, 1995.

Neither appellant Elsie Matthews nor her attorney, Heather Patrice Hogrobrooks, appeared for jury trial at 9:00 a.m. on August 30, 1995. At 9:13 a.m. on that date, a hearing was held. The trial judge stated that he had been faxed a copy of the appellants' motion for continuance mid-morning on August 29, 1995, and that he had communicated with counsel for appellee who objected to the motion. The judge stated that he told appellee's counsel he would not entertain the motion without an opportunity for counsel to be heard. The judge stated he next telephoned counsel for appellants and informed her that counsel for appellee objected to the motion and that he would not consider the motion "without both parties either being before the court on a conference call on the telephone or in person." The judge added that he heard nothing further from appellants' counsel.

Counsel for appellee then advised the trial judge that the matter had been set for jury trial three times. The first time, appellants and their counsel failed to appear on the day of the trial, and the trial judge continued the matter on his own motion. The record reflects that this occurred on September 13, 1994. A few months later, appellants' counsel moved for a continuance two days before the jury trial which had been set. That motion was granted. Now, appellee's counsel maintained, appellants and their counsel had again failed to appear, while appellee had witnesses en route and family present and was prepared to go to trial. Appellee's counsel further noted that the circuit clerk's office had been erroneously advised by Ms. Hogrobrooks's secretary on August 29, 1995, that a jury panel should not be called due to a continuance. Appellee's counsel moved to dismiss the matter.

The trial judge refused to grant the motion for continuance on the basis that it had never been presented for consideration and granted the appellee's motion to dismiss. The judge added that he had telephoned the trial judge in Forrest City and determined from him that Ms. Hogrobrooks did not have a case scheduled for trial in that city on August 30, 1995. Ms. Hogrobrooks disputes that fact and filed an Order Certifying Court Attendance, which verified that she had three of her cases set for trial in Forrest City on that date and that she appeared in order to answer those cause numbers.

The appellants argue as their first point on appeal that they were denied their constitutional rights to due process and equal protection because (1) the trial judge did not inform them that their trial was still scheduled for August 30, 1995; and (2) the trial judge had decided before the reported hearing that he would dismiss the matter with prejudice. Neither argument has merit.

The trial judge specifically stated for the record that he had advised appellants' counsel that he would not consider the continuance motion without both counsel appearing in person or by conference call. This did not occur. Further, this court has made it very clear that it is incumbent upon the movant to obtain a ruling on a motion. *Carpetland of Northwest Arkansas, Inc.* v. *Howard*, 304 Ark. 420, 803 S.W.2d 512 (1991). That was not done in this case. In short, there was nothing to suggest to appellants or their counsel that the matter would not be tried on August 30, 1995. Secondly, the record reflects, as does the Order of Dismissal, that appellee's counsel made the motion to dismiss the cause. Nothing in the record before this court indicates that the trial judge had predetermined the motion before the reported hearing. We, of course, are limited in our review to the record before this court. *Edwards* v. *State*, 321 Ark. 610, 906 S.W.2d 310 (1995).

For their second issue, appellants argue lack of notice of the possibility of dismissal as well as an impingement of their opportunity to be heard on that issue and their access to the courts. This argument also is meritless. To be sure, a cornerstone of our legal system is that a person not lose his or her life, liberty, or property without notice and an opportunity to be heard. *Greene* v. *Lindsey*, 456 U.S. 444 (1982). But it is basic that the mere filing of a motion does not continue a jury trial, and the trial judge expressly conveyed this point to counsel for the appellants the day before the trial. Counsel simply failed to appear at trial or to obtain the

necessary continuance order and, thus, should have known that dismissal might well be a natural consequence of her actions.

The United States Supreme Court has held that failure to appear is a ground for dismissal even though notice of dismissal as a possible sanction was not given to counsel. *Link* v. *Wabash R.R. Co.*, 370 U.S. 626 (1962). In *Link*, the district court entered an order of dismissal when the petitioner failed to attend a pretrial conference which he knew about but which, he contended, he was too busy to attend. The Court, in upholding the district court's dismissal, held that specific notice of possible dismissal and a hearing regarding the same were not required by due process:

> Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 246. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

370 U.S. at 632. This court has also recognized the inherent power of the trial courts to dismiss a case for failure to pursue it with diligence. *See, e.g., Gordon* v. *Wellman*, 265 Ark. 914, 582 S.W.2d 22 (1979); *Chandler* v. *Furlow*, 209 Ark. 852, 192 S.W.2d 764 (1946). The appellants, nevertheless, rely on *Southwestern Water Co.* v. *Merritt*, 224 Ark. 499, 275 S.W.2d 18 (1955), where this court reversed a chancellor's dismissal of a case due to delay in prosecution. That case, though, did not involve two unexcused failures by counsel and a party to attend a jury trial, and, accordingly, it is simply inapposite to the case at hand.

The appellants also point us to *Cagle* v. *Fennel*, 297 Ark. 353, 761 S.W.2d 926 (1988), where we affirmed a dismissal of a matter

for counsel's failure to appear at deposition twice and to pay the attendant costs. Appellants maintain that in *Cagle* the trial judge pointedly warned counsel of the potential for dismissal, which did not occur in the instant case. We do not read *Cagle* as requiring such a warning prefatory to dismissal in all cases, though that circumstance did exist under the *Cagle* facts. Rather, we are persuaded by the *Link* rationale quoted above that under certain circumstances, notice, or indeed a warning of dismissal, is not required.

For their final point, the appellants urge that the trial judge abused his inherent power by dismissing the case. We disagree. A trial judge clearly has the inherent power to dismiss a case for failure to prosecute. *Gordon* v. *Wellman, supra*; *Chandler* v. *Furlow, supra*; *Thompson* v. *Foote*, 199 Ark. 474, 134 S.W.2d 11 (1939). This was the third time that this cause had been set for jury trial and the second time that the appellants and their counsel had failed to show up on the day of trial. The expense and work involved in trial preparation by defense counsel and the Lee County Circuit Clerk's office on those two occasions, no doubt, played a part in the trial judge's decision to dismiss, as it should have. But in addition to that, the trial judges of this state have an obligation to assure that their courts are conducted in an orderly and correct manner and that their courts are treated with respect and dignity. There is no question that two unexcused failures to appear for trial flies in the face of the respect due our judicial system.

The appellants posit that the dismissal penalizes them for their attorney's actions and that perhaps sanctions against their counsel is a more appropriate course of action as an alternative to dismissal. We are aware of cases that hold that appropriate action against a neglectful attorney was the better course to follow for an appearance failure as opposed to the drastic step of dismissal. *See, e.g., Jackson* v. *Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977); *Moore* v. *St. Louis Music Supply Co.*, 539 F.2d 1191 (8th Cir. 1976). However, where two unexcused failures to attend a jury trial have occurred, this evidences either a course of extended neglect by counsel or willful disregard of court procedures.

Bearing the two failures in mind, we are drawn to the language of the Supreme Court in *Link* v. *Wabash R.R. Co., supra*:

> There is certainly no merit to the contention that dis-

> missal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.

370 U.S. at 633-634. *See also Chalkley* v. *Henley*, 178 Ark. 635, 12 S.W.2d 18 (1928). We hold that no abuse of discretion occurred.

Affirmed.

George JONES, Jr. *v.* STATE of Arkansas

CR 96-922 926 S.W.2d 665

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Davis H. Loftin, for appellant.

No response.

PER CURIAM. Appellant George Jones, Jr., by his attorney, Davis H. Loftin, has filed a motion for rule on the clerk. We treat this as a motion for a belated appeal. Mr. Loftin states by motion that he miscalculated the number of days in which to file a notice of appeal and, as a result, filed the notice one day late.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the

motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion is therefore granted.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Michael LEE *v.* STATE of Arkansas

CR 96-869 926 S.W.2d 665

Supreme Court of Arkansas
Opinion delivered September 9, 1996

James Dunham, for appellant.

No response.

PER CURIAM. Petitioner, Michael Lee, by his attorney, James Dunham, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to a mistake on his part.

We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Terry v. State*, 272 Ark. 243, 613 S.W.2d 90 (1981); *In Re: Belated Appeals in Criminal Cases*, 295 Ark. 964 (1979) (per curiam).

A copy of this per curiam will be forwarded to the Committee on Professional Conduct. *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964.

Lindell TANNER *v.* STATE of Arkansas

CR 96-965 926 S.W.2d 666

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Richard R. West, for appellant.

No response.

PER CURIAM. Appellant, Lindell Tanner, by his attorney, has filed for a rule on the clerk. His attorney, Richard R. West, admits that the failure to file the record in time was due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. See our Per Curiam opinion dated February 5, 1979, *In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Edward M. OWENS *v.* Robert D. MAY, Jr., Janice Kimberly May, Louis G. Peralta, and Janice A. Peralta

96-720 926 S.W.2d 850

Supreme Court of Arkansas
Opinion delivered September 9, 1996

Jeff Rosenzweig, for appellant.

Joe Perry, for appellee Robert D. May, Jr.

Charles Allen and *Frank J. Wills, III*, for appellee Janice Kimberly May.

Charles Banks, for appellees Louis G. Peralta and Janice A. Peralta.

PER CURIAM. On June 21, 1996, Edward M. Owens filed a petition for writ of certiorari, requesting this court to order the court reporter to complete the appeal record herein by lodging the sealed records and transcripts so as to provide (i) a clerical basis to receive the part of the record sealed below and (ii) a schedule for the court reporters to complete their transcripts. Those sealed tran-

scripts were received by the supreme court clerk on June 24, 1996. This court denied Owens's petition on July 8, 1996, without comment.

On July 9, 1996, Owens moved for reconsideration and clarification of this court's denial of his petition for writ of certiorari, which we now deny; at the same time, we add that the court's denial on July 8 was entered because Owens never alleged any omissions or errors in the record, nor did he allege the sealed transcripts would not be timely filed. In fact, those transcripts were timely filed prior to this court's decision on July 8, 1996, denying Owens's petition for writ of certiorari.

This court points out that its ruling is limited to the issue ruled upon by the chancellor, which appears to be the chancellor's denial of Owens's request to intervene. No ruling appears in the record denying Owens's right to open evidence sealed during the custody proceeding. In sum, this court, by denying Owens's petition for writ of certiorari, does not decide whether the sealed transcripts lodged by the chancellor and court reporter should be opened. *See Cupples Farms Partnership* v. *Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992); *Cf. Stephens* v. *Stephens*, 306 Ark. 59, 810 S.W.2d 946 (1991).

David FERRELL *v.* STATE of Arkansas

CR 95-1243 929 S.W.2d 697

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Daniel D. Becker, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

BRADLEY D. JESSON, Chief Justice. David Ferrell was convicted of capital murder and sentenced to life without parole. He raises seven issues on appeal, none of which have merit. We therefore affirm his conviction.

The issue that must be addressed prior to all others is Ferrell's claim that the evidence was not sufficient to support his conviction. *See Passley* v. *State*, 323 Ark. 301, 915 S.W.2d 248 (1996). This requires a detailed recitation of the facts presented at trial. On January 14, 1994, Paul Loyd, a resident of Hot Springs, was reported missing. He was last seen on his way to meet with Ferrell (his roommate), and a man named Wayne Hortman. According to Loyd's brother, who filed the missing person report, Loyd was meeting with Ferrell and Hortman for the purpose of trading his motorcycle to them in exchange for drugs.

The Hot Springs Police Department opened a file on Loyd's disappearance but there was no significant activity on the case for a number of weeks. However, in March of 1994, Wayne Hortman was being questioned by the police on a matter unrelated to the Loyd case. Hortman was often in trouble with the law and routinely provided information in exchange for lenient treatment. On this occasion, he told the officers that he was visiting Ferrell about two weeks after Loyd's disappearance when Ferrell handed him an SKS semi-automatic rifle and told him to "do something with it." Hortman took the gun home and put it in his garage. Some weeks later, Ferrell noticed the gun in Hortman's garage and became angry that Hortman had not gotten rid of it. Ferrell tried to destroy the gun by slamming it against a tree. When that proved unsuccessful, he went with Hortman to the Highway 270 bridge over Lake Hamilton and threw the gun into the water. During that same time period, the Bureau of Alcohol, Tobacco and Firearms was investigating Ferrell on a matter unconnected with Loyd's disappearance.

In the course of the investigation, Agent Glen Cook discovered that, in March of 1993, Ferrell had purchased an SKS rifle bearing the serial number 2401610.

Based upon the foregoing information, divers searched Lake Hamilton in hopes of finding the gun. In April of 1994, an SKS rifle with serial number 2401610 was recovered from the lake. A few weeks later, on June 1, 1994, a couple walking in a wooded area of Hot Spring County came across a piece of tape attached to a tree. Written on the tape were the words, "pack all rats together." A short time thereafter, they saw what appeared to be a skeleton with bits of shredded clothing around it. In fact, it was a partially decomposed human body. Investigators were called to the scene and recovered several items of clothing, including a belt with the name "Paul" on the back. They also recovered two bullet fragments and four shell casings. The medical examiner, through the use of dental records, identified the remains as those of Paul Loyd.

Loyd's death was treated as a homicide and Ferrell and Hortman were charged with capital murder. At trial, the State presented, in addition to the above mentioned evidence, the testimony of five witnesses who said that Ferrell had confessed to shooting Loyd. Other witnesses testified that Ferrell strongly suspected Loyd of being an undercover narcotics officer. Medical examiner Dr. Charles Kokes testified that, due to the decomposition of the body, he could not conclusively determine the cause of death. However, he observed that nothing about Loyd's wounds was inconsistent with death by gunshot. He further stated that three small holes in the back of the jacket and shirt Loyd had been wearing were consistent with bullet entry. An expert from the State Crime Lab found traces of lead around the holes in the jacket and shirt which indicated bullet entry. Firearms expert Joseph Mason testified that he could conclusively match three of the shell casings found at the scene to Ferrell's SKS rifle. He was unable to make a conclusive match of the bullet fragments, but he said that the bullets came from the same type of weapon as the SKS.

At the close of the State's case, and again at the close of all evidence, Ferrell moved for a directed verdict on the grounds that the proof was insufficient to establish that a homicide occurred and insufficient to connect him to the crime. A directed verdict is a challenge to the sufficiency of the evidence. *Jacobs* v. *State*, 317 Ark. 454, 878 S.W.2d 734 (1994). On appeal, our task is to determine

whether the verdict is supported by substantial evidence. Substantial evidence is that which is forceful enough to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Drummond* v. *State*, 320 Ark. 385, 897 S.W.2d 553 (1995). We review the evidence in a light most favorable to the appellee and consider only that evidence which supports the verdict. *Williams* v. *State*, 321 Ark. 635, 906 S.W.2d 677 (1995).

Ferrell argues that the case against him was based largely on his confessions to third persons and that these confessions were not corroborated by evidence that a homicide occurred. Ferrell is referring to the *corpus delicti* rule which requires the State to prove, independent of a confession, the following two elements: 1) an injury or harm constituting the crime, and 2) that the injury or harm was caused by someone's criminal activity. *Hart* v. *State*, 301 Ark. 200, 783 S.W.2d 40 (1990). See also Ark. Code Ann. § 16-89-111(d) (1987). In a murder case, this means that the State must prove the deceased came to his death at the hands of another person. *Weaver* v. *State*, 324 Ark. 290, 920 S.W.2d 491 (1996). There is substantial evidence in this case, independent of Ferrell's confessions, that Loyd met his death through an act of homicide. The three holes in Loyd's shirt and jacket consistent with bullet entry; the lead traces around the holes; the bullet fragments and shell casings found at the scene; the discovery of Ferrell's gun in Lake Hamilton; the matching of the shell casings with Ferrell's gun; and the opinion of the medical examiner, all point to death by gunshot. We hold that the State has sustained its burden of proof.

We turn now to Ferrell's allegations of error during the *voir dire* process. First, he argues that the trial judge should have granted his motion to conduct individual sequestered *voir dire*. The extent and scope of *voir dire* is left to the sound discretion of the trial judge and the trial judge's ruling will not be disturbed on appeal, absent an abuse of discretion. *Henry* v. *State*, 309 Ark. 1, 828 S.W.2d 346 (1992). At trial, Ferrell based his motion on a fear that the panel would be tainted by hearing his questions to other venirepersons regarding their attitudes toward the death penalty. However, he does not make this argument on appeal, and for good reason. He did not receive the death penalty, so the basis for that argument is moot. Instead, he claims prejudice because a potential juror became emotionally upset during the *voir dire* process. We decline to address this argument because Ferrell did not present it to the trial court as

a basis for his motion. A party cannot change his argument on appeal. Even in a case in which a sentence of life without parole has been imposed, the appellant is bound by the scope of the argument he made at the trial level. *Pike* v. *State*, 323 Ark. 56, 912 S.W.2d 431 (1996).

Ferrell's second claim that error occurred during *voir dire* concerns the trial judge's failure to excuse four jurors for cause. We will not address his argument as it pertains to venirepersons Bultena, Efrid, and Passette. Those potential jurors were excused by Ferrell through the use of peremptory challenges. The loss of peremptory challenges cannot be reviewed on appeal. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). The only claim available to Ferrell concerns venirewoman Puckett, who actually sat on the jury after she was challenged for cause. *See Kemp* v. *State*, 324 Ark. 178, 919 S.W.2d 943 (1996). During *voir dire*, Ms. Puckett was questioned by the defense regarding her views on the death penalty. Her answers were somewhat inconsistent and, in an attempt to pin her down, counsel's questions became rather pointed. Ms. Puckett became upset and began to cry. Ferrell moved to strike her for cause. The trial judge questioned Ms. Puckett regarding the matter and she explained that she was not angry but "didn't want to be talked to like that." The motion to strike was denied, with the judge finding that the *voir dire* questions were confusing to Ms. Puckett and that she was an intelligent juror who had served well in the past.

A trial court's refusal to strike a juror for cause will not be reversed absent an abuse of discretion. *Nooner* v. *State*, 322 Ark. 87, 907 S.W.2d 677 (1995). A juror is presumed unbiased and qualified and it is the appellant's burden to prove otherwise. *Kemp* v. *State*, *supra*. The sole basis upon which Ferrell challenged Ms. Puckett was the fact that she became emotionally upset during *voir dire*. A reading of the record shows that Ms. Puckett was not hysterical or angry. The trial judge, who was in the best position to observe her demeanor, found that she was simply confused by the questioning. Under these circumstances we find no abuse of discretion in allowing Ms. Puckett to sit on the jury.

The next argument we address concerns the manner in which Ferrell was charged in the information. The State alleged that Ferrell had committed capital murder by either of two alternative means: 1) in the course of and in furtherance of a robbery, and 2) with premeditation and deliberation. Prior to trial, Ferrell asked

the court to require the State to elect between the two methods. His argument was that he would be forced to develop a "two-pronged" defense. On appeal, his argument has changed. He now claims that there was insufficient evidence to support the theory that the murder occurred during the course of a robbery. Once again, we decline to address an argument which was not made to the trial court. *See Pike* v. *State, supra.* The record does not reveal that Ferrell presented this argument to the court as a basis for his motion, nor did he move to direct a verdict on that aspect of capital murder, nor did he object to the jury instruction which allowed the jury to consider that theory.

The remaining issues involve evidentiary rulings by the court. Ferrell objected on the ground of hearsay to the medical examiner's use of dental records to identify Loyd's body. The medical examiner explained that use of such records was a common and medically accepted way of identifying human remains. The trial judge allowed the evidence. We do not reverse a trial judge's ruling on a hearsay question absent an abuse of discretion, *Bowen* v. *State*, 322 Ark. 483, 911 S.W.2d 555 (1995), and we find no abuse of discretion here. Facts or data relied upon by an expert need not be admissible in evidence if they are of a type reasonably relied on by experts in the particular field. *See* A.R.E. Rule 703. In *Scott* v. *State*, 318 Ark. 747, 888 S.W.2d 628 (1994), a medical examiner relied on a neurosurgeon's report in forming his opinion. The appellant made a hearsay objection. We held that, while a jury may choose to give less weight to an expert's opinion formed in reliance on outside data, the expert's opinion is not rendered inadmissible by reliance on such data.

Next, Ferrell argues that the trial court should have granted a continuance when, on the fifth day of trial, Wayne Hortman unexpectedly took the stand as a State's witness. The day before, the State had said that Hortman would assert his rights under the Fifth Amendment if he was called to testify. However, the State subsequently entered into a plea bargain with Hortman, reducing the charges against him to hindering apprehension. In exchange, Hortman offered his testimony against Ferrell.

It is the movant's burden to show good cause for a continuance. *Verdict* v. *State*, 315 Ark. 436, 868 S.W.2d 443 (1993). A trial court's denial of a continuance will not be overturned absent an abuse of discretion. *Oliver* v. *State*, 312 Ark. 466, 851 S.W.2d 415

(1993). We find no abuse of discretion here. Hortman was on the State's witness list and Ferrell had been provided with a copy of Hortman's previous statements. Ferrell should have been prepared for the possibility that Hortman would testify. In any event, Ferrell was able to conduct an effective cross-examination of Hortman, impugning his credibility with the fact that he had plea bargained in exchange for his testimony, that he had numerous prior convictions, that he had a history as a drug addict, and that there were inconsistencies in his previous statements. During the cross-examination, the court allowed a fifteen-minute recess for additional preparation. Under the circumstances, Ferrell simply cannot show that he was prejudiced by the court's ruling. He does not say, with any degree of specificity, what he would have done differently had a continuance been granted. *See Goins* v. *State*, 318 Ark. 689, 890 S.W.2d 602 (1995).

Finally, Ferrell claims that there were two instances during trial in which the prosecutor made an improper comment on his right to remain silent. During voir dire, the State was posing general questions to the panel in an attempt to explain trial procedure. The following statement was made:

> After opening statements, the State, because it has the burden of proof, is required to proceed with its case first. The state will call its witnesses, put on its evidence, and at the close of all evidence on behalf of the state, the defense may or may not call witnesses.

Ferrell objected to the statement that the defense may or may not call witnesses on the ground that it was "improper." He asked for a mistrial, which the trial judge denied. A mistrial is a drastic remedy that should be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing the trial or where any possible prejudice cannot be removed by admonishing the jury or some other curative relief. *Wilkins* v. *State*, 324 Ark. 60, 918 S.W.2d 702 (1996). The prosecutor's comment in this instance does not merit a mistrial. It is not an attempt to impeach Ferrell by reference to his post-arrest silence, as prohibited by *Doyle* v. *Ohio*, 426 U.S. 610 (1976). The same can be said for the prosecutor's remark during opening statement that Ferrell "talked from time to time with various law enforcement officers and always had a different story. . . ."

Ferrell also contends that a State's witness made a comment which warranted a mistrial. During ATF Agent Glen Cook's testimony, he was discussing a statement Ferrell had given him. The following took place:

> Q. During your interview with Mr. Ferrell, did his expressions change or did he make any expressions to you during any portion of the statement?
>
> A. At the conclusion of the interview, which is this last paragraph, when he stated that when he returned home, Loyd was gone, he started smiling.
>
> Q. Had he been smiling at any time prior to that during the interview?
>
> A. One other incident when — where he refused to make a statement —

At that point, Ferrell asked for a mistrial, which the trial judge denied. Even if Cook's comment is construed as a reference to Ferrell's post-arrest silence, the reference was inadvertently elicited while Cook was attempting to explain Ferrell's demeanor, and the prosecution did not dwell on the reference. Under such circumstances, we will not reverse a trial court's decision to deny a mistrial. *Dansby* v. *State*, 319 Ark. 506, 893 S.W.2d 331 (1995); *Tarkington* v. *State*, 313 Ark. 399, 855 S.W.2d 306 (1993).

In accordance with Arkansas Supreme Court Rule 4-3(h), the record of the trial has been examined for rulings adverse to the defendant on objections, motions, and requests by either party, and we find no reversible error.

Affirmed.

Reginald REECE *v.* STATE of Arkansas

CR 96-81 928 S.W.2d 334

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Keil & Goodson, by: *John C. Goodson*, for appellant.

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

BRADLEY D. JESSON, Chief Justice. The appellant, Reginald

Reece, was convicted of robbery and sentenced as an habitual offender to forty years' imprisonment. He raises two points on appeal, neither of which has merit. We affirm the trial court.

The State adduced the following proof at trial. Ramona Johnson, a security guard at the Wal-Mart store on State Line Road in Texarkana, followed the appellant into the store when it opened on December 10, 1994. She recognized the appellant because she had caught him shoplifting cigarettes earlier in July and had banned him from the premises.

Once inside, Johnson followed appellant and observed him stuff two cartons of Marlboro cigarettes down his pants. When appellant passed the checkout counter and attempted to walk out the door, Johnson stopped and confronted him. Initially, appellant denied having any cigarettes on his person, but later admitted to having them, explaining that he had brought the cartons from home. Johnson then took appellant's arm and escorted him to the service desk. After appellant pushed Johnson in the chest, other Wal-Mart employees gathered and ushered him to a back room pursuant to the store's customary practice. Appellant cursed and fought with them along the way, grabbing one employee's necktie. Once in the back room, the appellant challenged one to a fight. The employees held appellant until officers arrived. In his statement to police, appellant admitted that he went into the store with the intention of stealing the cigarettes, but denied using any force during the incident.

Appellant first argues that his sentence of forty years' imprisonment under the facts in his case constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. We cannot reach this issue because appellant made no objection at the time his sentence was imposed. *See Fellows* v. *State*, 309 Ark. 545, 832 S.W.2d 847 (1992). We have repeatedly held that, where the record reflects a total absence of any objections after the jury's findings and sentencing are read by the court, we will not consider issues of such nature raised for the first time on appeal. *Id.*; *Williams* v. *State*, 303 Ark. 193, 794 S.W.2d 618 (1990); *Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989); *Neal* v. *State*, 298 Ark. 565, 769 S.W.2d 414 (1989); *Withers* v. *State*, 308 Ark. 507, 825 S.W.2d 819 (1992). While appellant did file a motion for new trial, he did not raise this constitutional argument in his motion. Even constitutional arguments not raised before the trial

court will not be considered by this court on appeal. *Moore* v. *State*, 323 Ark. 529, 915 S.W.2d 284 (1996). Appellant's second allegation of error is that the trial court erred in proceeding with his trial when he was absent from the courtroom. On the first day of appellant's jury trial, both sides announced they were ready to proceed, and a jury was selected and impaneled. On the second day of trial, appellant, who was on bail, did not appear. His attorney stated for the record that appellant was aware that he was to reappear at 9:00 a.m. When the attorney requested a continuance, the trial judge inquired whether he could demonstrate that appellant would likely appear within some reasonable time. After appellant's attorney stated that he could not give this reassurance, the trial court refused to grant a continuance. Appellant appeared at the trial some two hours late and after several of the State's witnesses had testified. He apologized and stated that he had overslept. Appellant acknowledged that he understood that it was his responsibility to timely attend his trial.

It is true that a criminal defendant possesses the privilege of being present in person and by counsel whenever any substantial step is taken in his case. *Bell* v. *State*, 296 Ark. 458, 757 S.W.2d 937 (1988); *Whittaker* v. *State*, 173 Ark. 1172, 293 S.W. 397 (1927). Arkansas Code Annotated § 16-89-103 (a)(1) (1987) further provides that, "If the indictment is for a felony, the defendant must be present during the trial." However, section 16-89-103(a)(2) provides:

> If [the defendant] escapes from custody after the trial has commenced or, *if on bail, shall absent himself during the trial, the trial may either be stopped or progress to a verdict, at the discretion of the prosecuting attorney.* However, judgment shall not be rendered until the presence of the defendant is obtained.

(Emphasis added.) Pursuant to this provision, we have held that where the defendant is on bail and absents himself, the trial may proceed. *Lee* v. *State*, 56 Ark. 4, 19 S.W. 16 (1892); *Cox* v. *City of Jonesboro*, 112 Ark. 96, 164 S.W. 767 (1914). This rule applies once trial has commenced, and does not apply to flight before trial. This distinction between flight before and after trial is indeed a rational one. Commencement of trial marks the point at which the costs of delaying the proceedings are likely to increase and helps to assure that any waiver of presence after that is knowing and voluntary. *See*

Crosby v. *United States*, 506 U.S. 255 (1993) (discussing Fed. R. Crim. P. 43). This provision also deprives a defendant of the option of terminating his trial if it appears that he will receive a guilty verdict. *Id.*

In *Johnson* v. *State*, 270 Ark. 247, 604 S.W.2d 927 (1980), *cert. denied* 450 U.S. 981 (1981), on the day of trial, the trial court held a suppression hearing in Johnson's case. Johnson was present for the hearing. After the hearing, the trial court announced a ten-minute recess. When court reconvened, Johnson was absent. Following a one-hour recess, the court reconvened again, and Johnson was still absent. Efforts to contact him at his residence were unsuccessful. The trial court ruled that Johnson's trial had commenced and that the trial could proceed in his absence. We affirmed the trial court on the basis that Johnson had voluntarily absented himself from trial and had waived his right to be present.

As in *Johnson*, the appellant's trial had indeed commenced when he became voluntarily absent. A jury had been selected and sworn, and both sides had announced that they were ready for trial. Under these circumstances, we cannot say that the trial court erred in allowing appellant's trial to proceed.

Affirmed.

Cedric Gerald MOORE *v.* STATE of Arkansas

CR 96-95 929 S.W.2d 149

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Mark Ferguson, for appellant.

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

ROBERT H. DUDLEY, Justice. Cedric Gerald Moore was convicted of kidnapping, attempted rape, and theft of property. We summarily affirm the judgment of conviction because the abstract is flagrantly deficient. *See* Ark. Sup. Ct. R. 4-2(b)(2).

The abstract contains only the information, immaterial motions and orders involving the appointment and substitution of counsel, and an order reflecting an earlier mistrial. It contains no references to the testimony, arguments, rulings, instructions, jury's findings, or the judgment of conviction. When an appellant's abstract is flagrantly deficient we summarily affirm the judgment of conviction pursuant to Rule 4-2. *Edwards* v. *State*, 321 Ark. 610, 906 S.W.2d 310 (1995). Enigmatically, the transcript does not contain any of the testimony, argument, instructions, or rulings, and the points for reversal, which involve alleged ineffective assistance of counsel, do not assert trial court error. Affirmed.

John Henry MOSLEY *v.* STATE of Arkansas

CR 95-1345 929 S.W.2d 693

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Mark S. Cambiano, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. John Henry Mosley was charged with having committed the crimes of rape and incest against his nineteen-year-old daughter. The jurors heard evidence on both charges. They were instructed on the crime of incest, but were additionally instructed that they were to consider the charge of incest only if they had a reasonable doubt about Mosley being guilty of the crime of rape. The jury found Mosley guilty of rape. The trial court sentenced Mosley, a six-time offender, to forty years in prison. He raises eight points for reversal, none of which have merit.

Two of Mosley's arguments involve evidentiary rulings during the State's case-in-chief. In the first of these arguments Mosley contends that the trial court erred in allowing the prosecutrix to testify that, beginning when she was fifteen, Mosley on a number of occasions committed the crime of rape against her and that he threatened to kill her if she told of the assaults. He predicates his argument on Ark. R. Evid. 404(b), which provides:

> (b) Other Crimes, Wrongs, or Acts. 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.

It is settled that the list of exceptions set out above is exemplary and not exhaustive. *White* v. *State*, 290 Ark. 130, 140, 717 S.W.2d 784, 789 (1986). It is also settled that the rule permits introduction of testimony of other criminal activity if it is "independently relevant to the main issue — relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal — then evidence of that conduct may be admissible with a proper cautionary instruction by the court." *Id.* at 140, 717 S.W.2d at 789 (quoting *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980)). In *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987), in affirming a ruling allowing evidence of prior sexual abuse of the victim by the defendant, we wrote:

> [W]e will allow such testimony to show similar acts with the same child or other children in the same household when it is helpful in showing a "proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship." . . . Such evidence helps in proving the depraved sexual instinct of the accused.

Id. at 71, 732 S.W.2d at 455 (citations omitted). *See also Young* v. *State*, 296 Ark. 394, 396-97, 757 S.W.2d 544, 546 (1988) (stating "in trials for incest or carnal abuse the State may show other acts of intercourse *between the same parties*") (emphasis in the original).

During the State's case-in-chief, the trial court additionally admitted proof that, eleven years earlier, Mosley pleaded guilty to the crime of carnal abuse of his six-year-old stepdaughter. Mosley initially contends that the trial court erred in allowing the evidence because it was not disclosed in a timely manner. *See* Ark. R. Crim. P. 17. The facts simply do not support Mosley's argument. The facts show that the information alleged Mosley was a habitual offender, and he was advised of this specific conviction early enough for him to file a motion *in limine* asking the trial court to exclude proof of it. In addition, at a pretrial hearing on the motion, his counsel admitted that the State had provided notice of this conviction "in a very timely manner." Under these facts, we have no hesitancy in holding that the trial court correctly ruled that notice of the conviction was given in a timely manner.

Mosley alternatively argues that the prior conviction was not relevant even though it involved his stepdaughter. *See Young* v. *State*, 296 Ark. 394, 757 S.W.2d 544 (1988). The trial court considered both the similarity of the prior conviction to the current charges of rape and incest and the parental relationship of Mosley with both of the victims and correctly applied Rule 404(b). In *Alford* v. *State*, 223 Ark. 330, 335, 266 S.W.2d 804, 807 (1954), we wrote that evidence of a prior similar offense in cases where the charge involves unnatural sexual acts shows not that the accused is a criminal but that he has a depraved sexual instinct. And in *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987), we approved allowing evidence of similar acts with the same or other children in the same household when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship.

Mosley next contends that the trial court erred in refusing to declare a mistrial. The facts leading to the argument are as follows. In addition to the case now on appeal, Mosley was a suspect in the murder of Pamela Felkins. At a pretrial hearing on this case, the State agreed that evidence related to the murder and its investigation was not relevant. At trial, Max Young, one of the officers who investigated this case, testified that a superior officer briefed him on the alleged rape in this case, and he, in turn, responded to the superior that he had a photograph of Mosley. Mosley moved for a mistrial on the ground that Young had testified about the murder investigation.

A mistrial is an exceptional remedy to be used only where any possible prejudice cannot be removed by an admonition to the jury. *Free* v. *State*, 293 Ark. 73, 732 S.W.2d 452 (1987). The decision to grant a mistrial rests within the discretion of the trial judge, and it should be granted only when the prejudice is so manifest that the trial cannot in justice continue. *Novak* v. *State*, 287 Ark. 271, 277, 698 S.W.2d 499, 503, *reh'g denied* (1985). The standard of review on appeal is whether the trial court abused its discretion. *Free* v. *State*, *supra*. Here, the officer did not testify about the murder or the investigation of the murder, nor did he mention that Mosley was a suspect in the murder. Further, there is no overt nexus between the fact that the officer had somehow obtained a photograph of Mosley and the fact that Mosley was a suspect in a murder. In sum, Mosley has not shown that the trial court abused its discretion in the ruling.

We do not reach Mosley's remaining points for reversal because of various procedural bars. In one of those points he contends that he did not receive effective assistance of counsel. This issue was not raised in the trial court, and it may not be raised in a direct appeal until it has been considered below. *Sumlin* v. *State*, 319 Ark. 312, 891 S.W.2d 375 (1995).

Two of his remaining points for reversal involve the trial court's refusal to allow him to introduce three photographs of the prosecutrix and the trial court's refusal to allow him to question the prosecutrix about the photographs. Before trial, the State objected to introduction of the pictures. The trial court ruled that the photographs were not relevant and, further, that any value they might have would be outweighed by their prejudicial effect. Mosley has not supplied reproductions of the photographs with his abstract.

It might be possible to review the question of relevancy without copies of the pictures. *See Qualls* v. *State*, 306 Ark. 283, 812 S.W.2d 681 (1991). However, even if the pictures were relevant, an issue we do not decide, we are in no position to review the trial court's weighing of probative value against prejudice without viewing the pictures. *See Coney* v. *State*, 319 Ark. 709, 894 S.W.2d 583 (1995). Thus, we affirm this point under Ark. Sup. Ct. R. 4-2(a)(6) and (c).

Mosley argues that the trial court erred in ruling that he could not question the victim about the pictures. However, he made no offer of proof about who took the pictures, when they were taken, why they were taken, where they had been kept, or how he obtained them, and the substance of the evidence the victim might have given about the pictures is not obvious. *See* Ark. R. Evid. 103(a)(2). Thus, we affirm on this point for failure to make an offer of proof. *See Boykin* v. *State*, 270 Ark. 284, 603 S.W.2d 911 (1980).

Mosley also argues that the trial court erred in excluding the testimony of Paul Wafford. It is argued that Wafford would have testified that at one time the prosecutrix had falsely accused him of rape. However, Mosley did not file a motion stating that he wished to offer this evidence at trial, and he did not make a timely offer of such evidence, even though it was governed by the Rape Shield Statute. *See* Ark. Code Ann. § 16-42-101(c)(2)(C) (Repl. 1994); *Lindsey* v. *State*, 319 Ark. 132, 890 S.W.2d 132 (1994); *Laughlin* v. *State*, 316 Ark. 489, 872 S.W.2d 848 (1994). Since Mosley did not file the motion, the State moved *in limine*, just before trial commenced, to bar Mosley from putting on Wafford's testimony about false sexual allegations. The State expressly asserted that the testimony was prohibited by the Rape Shield Statute, that Mosley had failed to file a written motion as required by the statute, and that no *in camera* hearing had been held. The trial court excluded the testimony. Mosley responded that he wished to make a proffer of Wafford's testimony, but the trial court stated that the jury was waiting and it wished to proceed with oral arguments. Mosley made a proffer after he rested his case.

The argument is procedurally barred because Mosley did not file a motion as required by the Rape Shield Statute. He contends that his arguments made at the time the State presented its motion *in limine* were sufficient to comply with the Rape Shield Statute. We cannot agree. The crux of the State's argument was that

the testimony was barred because Mosley failed to file the required motion, and Mosley's principal response was that the testimony was not governed by the Rape Shield Statute. Consequently, the trial court did not timely hear a specific offer of the proposed evidence, did not make a relevancy determination of that proposed evidence, and did not weigh its probative value against prejudice. In *Sterling* v. *State*, 267 Ark. 208, 590 S.W.2d 254 (1979), we stated, "The purpose of such hearing is to review the evidence to determine whether it is relevant for trial purposes. Unless the court hears such evidence, it cannot properly determine its relevancy." *Id.* at 210, 590 S.W.2d at 255. Since he failed to timely make an offer of proof and since the trial court made no determination of relevancy, the matter is procedurally barred on appeal.

Mosley next contends that the trial court should have granted a new trial because of juror irregularity or, at the least, should have conducted "further inquiry" into juror irregularity. We do not reach the merits of either argument. First, Mosley did not move for a new trial. That issue was not raised in the trial court, and we do not consider it for the first time on appeal. *Bowen* v. *State*, 322 Ark. 483, 911 S.W.2d 555, *reh'g denied* (1996). The trial court did conduct an inquiry into alleged juror irregularity and found Mosley's witness was not credible. Mosley does not take issue with the questions asked by the trial court and does not take issue with the finding that his witness was not credible, but contends that the trial court should have made "further inquiry" into the matter. However, he did not ask the trial court to inquire further. An appellant cannot raise an issue for the first time on appeal. *Woods* v. *State*, 323 Ark. 605, 916 S.W.2d 728 (1996).

Affirmed.

Walter Glenn CARTER *v.* STATE of Arkansas

CR 95-933 929 S.W.2d 690

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Wayne Emmons and *Chandler Law Firm*, by: *Edward Witt Chandler*, for appellant.

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

TOM GLAZE, Justice. Appellant Walter Carter was charged with the capital murder of Charles Mettler, the burglary of Mettler's residence, and the battery of Carter's wife, Denise, who was present at Mettler's house at the time of the killing. Carter raised the insanity defense, but the jury convicted him of the capital murder and burglary charges, and Carter was sentenced respectively to life imprisonment without parole and twenty years.[1]

In this appeal, Carter first claims the trial court erred in denying his motion for continuance on the date of trial. In his motion, Carter requested more time to obtain a mental evaluation to show he was incompetent to stand trial. To understand Carter's argument and the trial court's ruling, we review the pretrial events that took place from the time Carter first requested a mental evaluation. That request was granted by the trial court on April 18, 1994, and an evaluation was conducted. Upon Carter's request, a second evaluation was ordered on May 3, 1994. On June 8, 1994, the State Hospital submitted its report, stating that Carter was not mentally ill at the time of the crime, and that he was competent to stand trial. Nevertheless, Carter requested further continuances on July 5, 1994 and August 22, 1994, which were also granted. The July and August 1994 court orders reflect that new counsel, Mr. Wayne Emmons, had entered an appearance on Carter's behalf.[2] Those orders extended pretrial dates from August 22, 1994 to October 4, 1994. Meanwhile, State Hospital doctors, John Anderson and O. Wendell Hall, filed another report with the court, on September 29, 1994, finding Carter was malingering and suffered only from a personality disorder. Again, the doctors concluded Carter was competent to stand trial and did not lack the capacity to appreciate the

[1] The battery charge was not tried.

[2] The record reflects that Mr. Emmons was contacted by Carter's family sometime in May 1994, and while Emmons's name appears in the July 5 and August 22 orders, he asserted in an October 7, 1994 motion that he was not hired until September 9, 1994, when counsel received $15,000.00.

criminality of his conduct at the time he beat Mettler to death.

The record next reflects yet another of Carter's continuance motions filed on October 7, 1994. In that motion, Mr. Emmons and co-counsel, Edward Chandler, asserted that they had had their first "lengthy" meeting with Carter on October 3, 1994, at the Marion County Jail, and appeared at the scheduled October 4, 1994 pretrial hearing to request a further extension in setting a trial date. Carter's October 7 motion set out a host of reasons, both personal and business, but the most relevant appeared to be that counsel had just been hired, Carter had been unavailable to them, and counsel had just received the State Hospital's report.[3] At the October 4 hearing, the trial court proceeded to set a trial date for November 7, 1994, but, after doing so, it promptly granted another of Carter's continuance motions on November 1, 1994. That November 1 order extended trial to the court's next term in 1995. In the meantime, another State Hospital forensic evaluation report was filed with the court on November 7, 1994, reflecting that Carter was malingering and diagnosed with a personality disorder.

Given the foregoing continuances, Carter then petitioned for expenses to hire Jonathan J. Lipman, a neuropharmacologist, and Marsha H. Little, a clinical neuropsychologist. On January 12, 1995, the trial court granted an award of $2,500 to hire Dr. Lipman, but denied any monies for Dr. Little.[4] On January 20, 1995, Carter again moved for a continuance, complaining he had not had the time and money to adequately prepare for trial. Once again, Carter's motion was granted, and this time, the trial court set a new trial date for May 1, 1995.

Carter filed yet another motion for continuance on April 26, 1995, wherein he claimed further evaluation was needed. The record reflects this motion was not presented to or acted on by the trial court, but Carter filed the same request again on May 1, 1995, the day of trial. Attached to Carter's May 1 motion was the hand-

---

[3] Other reasons given for continuance were that counsels had other case commitments taking their time and they had personal trips scheduled for Alaska, Texas, and Marion County, Arkansas.

[4] In checking the transcript, we do not find where Carter was declared indigent for expense purposes, but nonetheless, the trial court awarded funds anyway. We note that Carter does not challenge the amount awarded in this appeal. Carter was declared indigent for appeal purposes on August 18, 1995.

written affidavit dated April 30, 1995, of Marsha H. Little, wherein she stated Carter's competency to stand trial is questionable because he is unable to process information in an accurate way. Little's affidavit further related that Carter's ability to confer with his attorneys was impaired and he was unable to effectively assist in his own defense.

In denying Carter's motion, the trial court stated Carter had waited until the last minute to ask for another continuance and the affidavit he submitted was vague and failed to provide sufficient information for the court to formulate a judgment as to Carter's competency. The trial court further indicated Carter could have obtained the information he was now seeking months before, but failed to do so. Nonetheless, the trial court invited Carter to put on testimony in opposition to the State's proof, which showed Carter was competent to stand trial. Carter declined to do so.

■ We have repeatedly held that a continuance is addressed to the sound discretion of the trial court, and a decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Bowen* v. *State*, 322 Ark. 483, 911 S.W.2d 555 (1995); *Dansby* v. *State*, 319 Ark. 506, 893 S.W.2d 331 (1995). We would also point out, as did the trial court below, that an accused is presumed competent to stand trial, and the burden of proving incompetence is on the accused. *Bowen*, 322 Ark. at 505. The trial court here gave Carter numerous continuances, months, and opportunities to obtain proof bearing on his competency to stand trial, but he waited until the last scheduled day of trial to submit a brief handwritten statement by his clinical neuropsychologist, stating in conclusory fashion that Carter's competency to stand trial was "questionable," and that Carter was unable to effectively assist in his own defense. The trial court clearly gave Carter every opportunity to prepare his defense for trial and did not abuse its discretion in denying the last of Carter's many continuance motions. Having said that, we point out that the trial court also enunciated that because insanity remained an issue in the case, it would enter an appropriate order during trial if it became convinced trial should not proceed. These remarks of the trial court bring us to Carter's second argument that the trial court erred in refusing a mistrial motion after Carter attempted suicide during trial.

The following events took place, leading to Carter's request for mistrial. After all evidence had been presented and before the court

had reconvened on the fourth day of trial, the trial court was informed that Carter, while in custody, had overdosed on medication. The trial court, giving no reason, informed the jury the trial would be continued until May 10, 1995. It also admonished the jury not to read media accounts of the trial or talk to people concerning the trial. By May 10, Carter had been released by the hospital, and he returned to trial. However, before trial reconvened, Carter's counsel moved to be allowed to reopen Carter's case to offer his suicide attempt as further proof of his insanity. The trial court stated it would grant counsels' request, but it would then be required to allow the state to reopen its case to show how Carter had attempted suicide on other occasions when accused of crimes. Counsel then withdrew the motion to reopen their case.

Defense counsel then moved for mistrial, stating they had had difficulty in conversing with Carter during trial. Counsels' examples were that when they asked Carter, "How do you feel? Are we doing better?" he responded, in a blank kind of way, "Mr. Chandler, how are we doing?" Also when asked what are you doing or what are you thinking about, he replied, "I'm praying."

In denying Carter's mistrial motion, the trial court stated as follows:

> The Court has had the opportunity to view you in consultation with your client through the substantive portions of the trial. We are down to closing arguments at this point. [Carter] seemed very capable of helping, aiding and assisting you in discussing strategy and I have noted that and observed that throughout the trial.
>
> Further, I have had the benefit of the testimony of four so-called experts. I have listened to the expert testimony and am persuaded that Mr. Carter is competent to stand trial, and that's a decision for the court.

A mistrial is an extreme remedy that should only be granted when justice cannot be served by continuing the trial *Morgan* v. *State*, 308 Ark. 627, 826 S.W.2d 271 (1992); *Taylor* v. *State*, 303 Ark. 586, 799 S.W.2d 519 (1990). Further, a defendant cannot be allowed to abort a trial and frustrate the process of justice by his own acts. *Morgan*, 308 Ark. 627, 826 S.W.2d 271.

In the present case, the trial court based its denial both on

expert testimony, and its own observations of Carter during trial and Carter's interaction with his attorneys. While Carter's counsel contended his client did not respond to questions posed to Carter as counsel thought Carter should have, the record actually shows Carter made appropriate responses. The trial court later denied a motion to reevaluate Carter which was made before sentencing based on its previous findings.

Carter cites *Drope* v. *Missouri*, 420 U.S. 162 (1974), and argues due process is violated when a trial court fails to make further inquiry into the defendant's competency and fails to give adequate weight to defendant's suicide attempt and pretrial showing of irrational behavior. However, *Drope* is distinguishable in significant ways. There, the trial court had not determined Drope's competency to stand trial, but instead, uncontradicted evidence showed that Drope had manifested irrational behavior before trial. Here, Carter had been thoroughly evaluated and found to be a malingerer, without psychosis, and competent to proceed to trial. Also, in *Drope*, the defendant was absent from his trial after his suicide attempt; here Carter was present. Again, unlike *Drope*, the trial court here had previously determined Carter's competency prior to trial and was able to observe Carter's ability to consult with counsel both before and after his attempted suicide.

■ We also note Carter's reliance on *Pate* v. *Robinson,* 383 U.S. 375 (1966), where the Court held the uncontradicted evidence of Robinson's disturbed behavior over a long period raised sufficient doubt of his competence to stand trial, and it remanded the case for a new trial. However, *Pate*, too, is distinguishable from the situation presented here. In *Pate*, four witnesses expressed the opinion that Robinson was insane. The only contrary evidence presented by the state was a stipulation by a doctor who offered the opinion that Robinson knew the nature of the charges against him and was able to cooperate with counsel, but made no finding of sanity. Again, here Carter had been evaluated on several occasions and found competent. Carter also was found to be a malingerer. While Carter had been afforded adequate time to obtain further evidence bearing on his competency in advance of trial, he failed to do so. In sum, the trial court had ample evidence and reasons to deny Carter's motion for mistrial.

■ Finally, Carter argues that the trial court should have granted his motion for directed verdict with respect to burglary, and

premeditation and deliberation for capital murder. We do not, however, reach this issue because Carter is procedurally barred since he failed to renew his motion at the close of this case. *Heard* v. *State*, 322 Ark. 553, 910 S.W.2d 633 (1995).

For the reasons above, we find no error and, after noting the record of the trial has been reviewed pursuant to Ark. Sup. Ct. R. 4-3(h), we affirm.

Larry C. DONIHOO *v.* STATE of Arkansas

CR 95-1194 931 S.W.2d 69

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Garnet E. Norwood, for appellant.

Winston Bryant, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Larry C. Donihoo was convicted of multiple counts of statutory rape and violation of a minor in the first degree and sentenced to 90 years in prison. He appeals, urging that the trial court erred in refusing to sever the counts, in allowing photographs and a videotape of sex acts into evidence, in allowing a state witness to testify about matters which surprised him, and in permitting references to parole eligibility by the State in closing argument. The points on appeal are without merit, and we affirm.

The State presented the following evidence at trial. Christina Ward, the victim, testified that she was born on July 6, 1977, and that Donihoo moved in with her and her mother, Jacque Ward, when Christina was three. She testified that Donihoo acted like a father towards her, but that he made her perform oral sex and have sexual intercourse with him after the family moved to East 48th Street in Texarkana in 1989, when she was about 13. She estimated that this happened sometimes two to three times a week while her mother and brother were at work. She testified that she did not tell her mother at the time because Donihoo told her that he would kill her if she told anyone. Christina testified that before the family moved to East 48th Street, Donihoo would fondle her and that these early occurrences began when she was three.

Christina also identified herself and Donihoo in certain polaroid photographs admitted into evidence. She stated that Donihoo began to take photographs of them on East 48th Street, and she added that four photographs entered into evidence, two of which depicted sexual acts and two of which show Christina posing naked, were taken before her 14th birthday on July 6, 1991. The State introduced other photographs of Donihoo and Christina engaged in sexual intercourse, and Christina testified that these pictures were

also taken before her 14th birthday.

Donihoo, according to Christina, engaged in sexual activity with her on her 14th birthday, when her mother and brother left to go get her birthday present. She testified that after she turned 14 the family moved to Crosby, Texas, then to Georgia, and finally back to Texarkana in 1993. They rented a house from John Yarberry on Highway 71 South, and Donihoo had continual sexual relations with her at that location while her mother was at work.

Christina also described how Donihoo used a video camera to record his sexual activities with her, which included tying her to a bed and having sexual intercourse with her. Christina stated that she did not want to do any of the acts depicted on the tape and objected to them. She testified that she was at least 16 when the tape was made.

On cross-examination, counsel for Donihoo introduced 27 polaroid photographs depicting sexual conduct between the pair or nudity or various stages of undress and asked Christina specific questions about how old she was when the pictures were taken. She answered that all of the pictures taken on East 48th Street were taken before her 14th birthday. Defense counsel further cross-examined Christina on whether she consented and was a willing partner in the sexual conduct with her stepfather.

At trial, Jacque Ward, the victim's mother, confirmed the moves of the family and the years that they took place. She testified that she returned home from work on or about February 8, 1994, and Christina told her about her sexual activity with Donihoo and that she was pregnant. Ward testified that when she heard that, she immediately called Donihoo who was working in Zachary, Louisiana. She told him that Christina was pregnant, and she asked if he was the father. Donihoo admitted that he was. Two days later, medical tests confirmed that Christina was eight-and-a-half weeks pregnant with twins. The pregnancy was aborted.

Ward testified that on the day after she learned about Donihoo's relationship with her daughter, she went to the Miller County Sheriff's Department with the polaroid photographs and the videotape depicting sexual activities between Christina and Donihoo. Ms. Ward also confirmed which photographs were taken at the East 48th Street address and that the videotape was made at the leased residence on Highway 71 South.

The State called Edward Dacey, a senior product engineer with Polaroid Corporation, to testify about when the polaroid film used in the photographs was manufactured. Based on the code on the back of the film, he was able to determine the approximate date. He testified that the film had a 12-month product life, which provided a time frame within which the photographs were taken. Thirty-five photographs were made in either September or October of 1990 when Christina was 13.

Donihoo took the stand in his own defense. He admitted sexual conduct with Christina but testified that it began only after she turned 14. He also admitted taking all the photographs but one and paying Christina for sexual favors.

The jury found Donihoo guilty on four counts of statutory rape (Ark. Code Ann. § 5-14-103(a)(3) (Repl. 1993)), and three counts of violation of a minor in the first degree (Ark. Code Ann. § 5-14-120 (Repl. 1993)). The jury deadlocked on three charges of forcible rape, and a mistrial was declared on those charges. The jury assessed 40 years imprisonment on each of the statutory rape counts and ten years on each charge of violating a minor. The trial court ran part of the statutory rape sentences consecutively which resulted in a total prison term of 90 years.

I. Severance

Donihoo primarily contends in his first point that the Rape Shield Statute was improperly applied in a trial for both statutory rape and violation of a minor because the statute is not applicable to a charge of violating a minor. *See* Ark. Code Ann. § 16-42-101(b) (Repl. 1994). Thus, he asserts, severance should have been granted to enable him to introduce Christina's prior sexual conduct for purposes of the violation-of-a-minor charges. He was prejudiced, he argues, by not being able to do so because that evidence would have confirmed that Christina consented to the sexual activity and that he in no way forced or compelled her to engage in sexual intercourse or deviate sexual activity. The State counters that Donihoo is foreclosed from mounting the severance issue as it relates to the Rape Shield Statute because no motion to sever raising this precise argument was abstracted.

A general motion to sever, however, was abstracted, and that motion states that severance "is necessary and appropriate for a fair determination of the Defendant's innocence of each offense."

Donihoo's counsel later raised the Rape Shield argument during trial in connection with the violation-of-a-minor charges when he was foreclosed from presenting proof of other sexual conduct, and that argument is referred to in the abstract of trial testimony. The trial court noted that it had withheld ruling on the matter until it heard the evidence. The Rape Shield argument relating to the severance motion is also contained in the abstract of Donihoo's motion for a new trial. We conclude that the abstract is not flagrantly deficient, and we will address the issue.

We agree with Donihoo that the Rape Shield Statute does not apply to charges for violation of a minor, but Donihoo's argument must fail for two reasons. First, he failed to proffer evidence of Christina's other sexual conduct. Without that proffer, this court has no way of deciding if the evidence was relevant. *Lindsey* v. *State*, 319 Ark. 132, 890 S.W.2d 584 (1994); *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985). In addition to that, Donihoo sought to show that Christina engaged in sexual conduct with another man in part to prove that she was a willing participant in her sexual relationship with Donihoo and did not do so out of fear or because of threats. Consent, however, is not a defense to violation of a minor in the first degree. *See* Ark. Code Ann. § 5-14-120 (Repl. 1993). Thus, any evidence of prior sexual conduct in connection with the violation-of-a-minor charges would have been irrelevant. The trial court did not abuse its discretion in refusing to sever these counts. *See Evans* v. *State*, 317 Ark. 532, 878 S.W.2d 750 (1994).

On a final note, Donihoo insists in this argument that there was no substantial evidence of physical force or threat and that the photographs clearly show a girl of 16 years rather than one under the age of 14. Any argument of insufficient evidence is not preserved for review because Donihoo only made a general motion for directed verdict at the close of the State's case and did not renew the motion at the conclusion of all the evidence. *Baxter* v. *State*, 324 Ark. 440, 922 S.W.2d 682 (1996); *Mitchell* v. *State*, 323 Ark. 116, 913 S.W.2d 264 (1996); *Heard* v. *State*, 322 Ark. 553, 910 S.W.2d 663 (1995).

II. Photographs and Videotape

Donihoo next argues that he was prejudiced by the admission of the photographs and videotape into evidence. His abstract, how-

ever, does not contain either the photographs or the videotape. Supreme Court Rule 4-2(a)(6) provides:

> Whenever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and attach it to copies of the abstract filed in the court and served upon opposing counsel, unless the requirement is shown to be impracticable and is waived by the Court upon motion.

Ark. Sup. Ct. R. 4-2(a)(6).

Donihoo has failed to abstract those photographs that he contends were prejudicial. Nor has he shown that the abstract requirement was waived by this court. Those photographs were necessary to a clear understanding of the objection that forms a basis for this appeal. *Coney* v. *State*, 319 Ark. 709, 894 S.W.2d 583 (1995). With only one record on appeal and seven justices, it is essential that the material parts of the record be abstracted. *Id.* We conclude that the issue as it relates to the photographs is not preserved for our review.

The omission of the videotape from the abstract requires a somewhat different analysis. A bulky videotape does not readily lend itself to abstracting in a brief the way photographs do. But we have held that failure to abstract the prejudicial parts of a videotape precludes our consideration of the videotape on appeal. *Edwards* v. *State*, 321 Ark. 610, 906 S.W.2d 310 (1995). That is certainly a lapse in the instant case. In addition, the evidence in this case shows that the videotape was made when Christina was older than 14. Indeed, Christina testified that she was at least 16 at the time. Hence, Donihoo's argument that the videotape shows Christina as 14 or older was not contested by the State or a bone of contention between the parties. There is no basis for reversal on this point.

III. Discovery Violation

Donihoo next contends that the State violated Rule 17.1 (a)(i) of the Arkansas Rules of Criminal Procedure when it failed to disclose to him before trial that John Yarberry had viewed the videotape of Donihoo having sexual relations with Christina. He argues that the error was compounded when the State presented

testimony that Yarberry was disgusted by Donihoo's actions.

Defense counsel did object to Yarberry's testimony at trial on the basis that he was surprised by it, but made no additional request for a recess or continuance. The State responded that it had listed Yarberry as a witness prior to trial and provided that information to defense counsel. The trial court overruled defense counsel's objection. During Donihoo's cross-examination of Yarberry, Yarberry testified that he and Donihoo were friends and that he had not seen anything amiss in Donihoo's family life. On re-direct, the State elicited testimony that Yarberry was disgusted by the videotape and would not have associated with Donihoo if he had known about his sexual activity with Christina. Donihoo's counsel then objected to Yarberry's opinion on relevancy grounds. The State responded that Donihoo's counsel opened the door with his line of questioning because he left the impression that Yarberry and he were still good friends and that he believed nothing was wrong with Donihoo's family life.

Arkansas Rule of Criminal Procedure 17.1(a)(i) requires the State to disclose the names and addresses of the witnesses it intends to call, but it does not require the State to disclose the substance of their expected testimony. *Holloway* v. *State*, 310 Ark. 473, 837 S.W.2d 464 (1992); *Cox* v. *State*, 36 Ark. App. 173, 820 S.W.2d 471 (1991). Furthermore, this court has stated that a defendant cannot rely on discovery as a total substitute for his or her own investigation. *Heard* v. *State*, 316 Ark. 731, 876 S.W.2d 231 (1994). The trial court did not abuse its discretion in overruling Donihoo's objection to the discovery violation.

Nor did the trial court err in permitting Yarberry to testify about his reaction to the photographs and videotape. Donihoo's counsel elicited from Yarberry that he was a friend and did not perceive anything was wrong with Donihoo's family life. To blunt this testimony, the State was perfectly within its rights to ask Yarberry's opinion of Donihoo after viewing the videotape. *Cf. Gooden* v. *State*, 321 Ark. 340, 902 S.W.2d 226 (1995). There was no error in this regard.

IV. Parole Argument

Donihoo finally contends that the prosecuting attorney violated due process when he argued the possibility of parole in the penalty phase of trial. During closing arguments, the prosecutor

explained that Donihoo will serve only one fourth of his sentence if he is a model prisoner. Donihoo, however, failed to object to this argument at trial, which precludes this court from reviewing the issue. *See Byrum* v. *State*, 318 Ark. 87, 884 S.W.2d 248 (1994); *Marshall* v. *State*, 316 Ark. 753, 875 S.W.2d 814 (1994). Accordingly, we will not address it.

Affirmed.

Larry Earl ESMEYER *v.* STATE of Arkansas

CR 95-1027 930 S.W.2d 302

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Murphy, Post, Thompson, Arnold & Skinner, by: *J.T. Skinner* and *Tom Thompson*, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Deputy Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Larry Earl Esmeyer appeals his convictions for first-degree murder and attempt to commit first-degree murder, and his sentence of 70 years' imprisonment. He argues that the jury was tainted, that the prosecuting attorney failed to disclose exculpatory evidence, that statements given to the police should have been suppressed, and that admission of his waiver-of-rights form into evidence and cross-examination into his justification defense were prejudicial. We find no merit in any of these points, and we affirm.

The appeal arises out of the shooting death of Rita Passmore and the wounding of her companion, Mark Williams. On June 3, 1994, Passmore and Williams were traveling in a black Pontiac Grand Prix on a gravel road called Scroggins Road in Independence County. They almost collided with Esmeyer, who was traveling in the opposite direction in a white Ford Tempo and who was angered by the incident. Esmeyer turned his car around and followed Passmore and Williams down Scroggins Road. According to witnesses, it was a high-speed chase. Esmeyer testified at trial that he first lost the black car, then spied it parked in a parking lot beside a Church of Christ. He pulled up beside the car and talked to Passmore, who was the driver. At that point, the stories of Esmeyer and Williams diverge. Esmeyer testified that Passmore cursed and said Esmeyer could not tell her how fast to drive, that she did not care at all about Esmeyer's grandchildren, who might be placed in jeopardy by her driving, and that he should get out of her way. According to Esmeyer, Passmore then pulled a gun, and he ducked, pulled his own .22 caliber revolver from under the seat, and came up shooting. He shot Passmore five times in the head at close range and killed her. He also wounded Williams in the back of the head. The level of alcohol in Passmore's body according to the medical exam-

iner, was consistent with the consumption of about two beers.

At trial, Williams denied that either he or Passmore had a gun but later admitted that he and Passmore had been drinking beer and smoking marijuana. After the shooting commenced, he exited his side of the car and ran first to the church and then to the home of Hazel Sharp. Williams forced his way inside the home, and Ms. Sharp called 911. She later related to police officers that the white car had been chasing Williams. She testified that she initially heard shots coming from the Church of Christ parking lot and subsequently heard three more shots as Williams was entering her house.

The following day on June 4, 1994, a composite drawing of the assailant was composed by police officers with Williams's help. The composite drawing was aired by a regional television station on the 10:00 p.m. news that same day. Esmeyer saw the telecast, and at about 12:45 a.m. the following morning, he called his first cousin, Mike McDougal, who worked for the Independence County Sheriff's Department. He asked Officer McDougal if he was looking for a white Ford Tempo, and after McDougal responded affirmatively, Esmeyer told the deputy sheriff that he owned one. Officer McDougal asked Esmeyer if he had shot anyone, and Esmeyer answered that he needed to talk to him.

Officer McDougal contacted Officer Jeff Everetts, also of the Sheriff's Department, and the two men went to Esmeyer's home. They advised Esmeyer of his *Miranda* rights and had him execute a waiver-of-rights form. Esmeyer then answered questions about the location of the gun before invoking his right to counsel. After asking for counsel, he made additional comments to the deputy sheriffs. Esmeyer was arrested and charged with capital murder and attempted capital murder. Following a jury trial, he was convicted of first-degree murder, for which he received 40 years, and attempted first-degree murder, for which he received 30 years. The trial court ran the two sentences consecutively.

I. Tainted Jury Panel

Esmeyer's first point on appeal arises out of the jury selection. During the selection of the alternate jurors, it was brought to the trial court's attention that a potential juror, Robert Loggains, may have made inappropriate comments in the presence of other jurors. Two of Esmeyer's daughters testified that they had heard Loggains, who was being questioned as a potential alternate juror, say "[L]ook

at that killer between his two high-dollar attorneys." Loggains testified that he did not make the statement or form any opinion about the case. The trial court, nevertheless, excused Loggains for cause.

After a recess, the prosecuting attorney told the trial court that Loggains apparently made additional statements as he was leaving the courtroom. Officer Alan Cockrill of the Sixteenth Judicial District Drug Task Force testified that he heard Loggains speaking down a stairwell to one or more persons in the basement area where the jurors were located. Officer Cockrill heard Loggains state that he should have kept his mouth shut, for if he had done so, he could have "hung" Esmeyer. He also called Esmeyer a "yankee." A woman responded that Esmeyer was from the area, but Loggains answered that Esmeyer had been up North long enough to learn "their ways." Loggains also called Esmeyer a murderer.

The parties continued *voir dire* until the last alternate was seated. The trial court then asked Esmeyer's counsel if he was going to move for a mistrial based on Loggains's comments. Counsel stated that he was not seeking a mistrial at that point and expressed satisfaction with the composition of the jury.

Following that, remaining members of the *venire* were asked by the trial court whether they heard Loggains's remarks. Four members stated that they had heard various remarks from a man who fit Loggains's description. They testified that they generally ignored Loggains even though they had heard him say that he had made up his mind.

Esmeyer then moved for a mistrial on the basis that the jury was tainted. The prosecuting attorney responded that there had been extensive *voir dire* with regard to the seated jury and that the jurors had indicated that they had not heard anything when asked by the court. At that point, the trial court began questioning the jurors individually. Each juror denied hearing Loggains's comments. One alternate juror, Holly Gage, testified that she heard a man fitting Loggains's description make a racial comment that had nothing to do with the case, but she stated that what she heard would not affect her ability to serve as a juror. The trial court then announced that it was satisfied with the jury and denied the motions for declaration of a mistrial and to quash the jury. The court specifically ruled that there was not sufficient evidence, after speaking to each juror, to show that the panel was tainted.

Esmeyer now contends that the trial court abused its discretion in denying the motions to quash the panel or for declaration of a mistrial. A jury, though, is presumed to be unbiased and qualified to serve, and the burden is on the appellant to show otherwise. *Cooper* v. *State*, 324 Ark. 135, 919 S.W.2d 205 (1996); *Franklin* v. *State*, 314 Ark. 329, 863 S.W.2d 268 (1993); *McFarland* v. *State*, 284 Ark. 533, 684 S.W.2d 233 (1985). It is for the trial court to decide whether the jurors are qualified, and that finding will not be reversed absent a showing of abuse of discretion. *Goins* v. *State*, 318 Ark. 689, 890 S.W.2d 602 (1995); *Cooper* v. *State*, *supra*; *Franklin* v. *State*, *supra*; *McFarland* v. *State*, *supra*. In addition, a mistrial is a drastic remedy and appropriate only when the error is beyond repair and cannot be corrected by any curative relief. *Goins* v. *State*, *supra*. The trial court has broad discretion in deciding the issue. *Id.*

A scenario comparable to the instant case occurred in *Goins* v. *State*, *supra*. In that case, this court declined to reverse the trial court's refusal to remove jurors for cause where the trial court had given the defendants the opportunity to explore the bias of jurors. In *Goins*, the defendants did not object to any of the jurors, and they did not identify any juror on appeal who should not have been seated. The same holds true in the case before us. Here, the trial court gave Esmeyer the opportunity to question the jurors about Loggains's comments, but he did not do so. Moreover, he did not object to any specific juror and did not give his reasons for failing to do so. Hence, no prejudice was shown, and any assertion that the jury was tainted is speculative and does not rise to the level necessary to reverse the trial court's decision.

II. Discovery Violation

Esmeyer next contends that the prosecuting attorney violated due process and Ark. R. Crim. P. 17.1(d) by not disclosing exculpatory evidence. *See also Brady* v. *Maryland*, 373 U.S. 83 (1963). He specifically complains that during Officer Jeff Everetts's testimony at trial, the police officer revealed that a month or two after the shooting, he had heard that a pistol involved was hidden in an outhouse by the church. He went to investigate but found no gun. Officer Everetts admitted that he did not write about this rumor and his later search in his investigative notes. Based on this revelation, Esmeyer moved for a declaration of a mistrial at the close of the State's case due to the State's failure to notify him of the gun rumor. He complained that he had insufficient time to make an

independent search of the outhouse and, thus, was denied the opportunity to search for the most critical piece of evidence to his claim of self-defense.

The State counters that Officer Everetts testified that he searched Williams, Passmore, and their vehicle for weapons but found none. The State also points to Officer Alan Cockrill's testimony that he searched the outhouse on the day of the shooting. Officer Cockrill testified that there were cobwebs on the outhouse door but that he went ahead and looked for a gun inside the facility.

In sum, the State argues, first, that the rumored gun was not exculpatory because the grounds were searched and no gun was found. Searches transpired on the day of the shooting and also some time later. The State further emphasizes that Esmeyer knew about the rumor because during Officer McDougal's testimony, which preceded Officer Everetts's, Esmeyer's counsel asked:

> DEFENSE COUNSEL: During your investigation did you acquire any knowledge about Rita Passmore having a gun during this incident?
>
> McDOUGAL: Only hearsay, sir.
>
> DEFENSE COUNSEL: Well, did you receive information from another officer concerning Rita Passmore having a gun in the vehicle on this day in question?
>
> McDOUGAL: All I've heard to that has been strictly rumor.
>
> DEFENSE COUNSEL: Well, no, let me ask you. Did you receive this from another officer?
>
> McDOUGAL: Yes, I did.
>
> DEFENSE COUNSEL: Who was that?
>
> McDOUGAL: Officer Henderson.
>
> . . . .
>
> DEFENSE COUNSEL: As a matter of fact, did officer Henderson not tell you that he had heard it was thrown in that outhouse?
>
> McDOUGAL: Yes, sir. That's correct.

This colloquy occurred before Officer Everetts's testimony. Yet the

motion for mistrial based on the discovery violation was not made until after the conclusion of the State's case.

The denial of Esmeyer's mistrial motion should be affirmed for two reasons. It is true that information held by police officers is imputed to the prosecuting attorney. *Lewis* v. *State*, 286 Ark. 372, 691 S.W.2d 864 (1985). But a failure to disclose that information will not warrant a reversal of a conviction absent a showing of prejudice. *Alford* v. *State*, 291 Ark. 243, 724 S.W.2d 151 (1987); *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986). When the State fails to provide the information, the burden is on the appellant to show that the omission was sufficient to undermine the confidence in the outcome of the trial. *Bray* v. *State*, 322 Ark. 178, 908 S.W.2d 88 (1995). Prejudice, though, does not exist when the defendant already has access to the information that the State did not disclose. *See Johninson* v. *State*, 317 Ark. 431, 878 S.W.2d 727 (1994). That is the circumstance in the case at hand.

But in addition, Esmeyer did not object to the testimony by Officer McDougal in a timely manner but waited until the close of the State's case. We have held that mistrial motions must be made at first opportunity. *Turner* v. *State*, 325 Ark. 237, 926 S.W.2d 843 (1996); *Johnson* v. *State*, 325 Ark. 197, 926 S.W.2d 837 (1996). The trial court was correct in denying the motion.

III. Miranda Violation

For his next point, Esmeyer urges that certain of his statements must be suppressed due to *Miranda* violations. At the ensuing suppression hearing, Officer McDougal testified that when he and Officer Everetts arrived at Esmeyer's house during the early morning hours of June 5, 1994, Esmeyer was informed that they were investigating the Passmore shooting, and he was read his *Miranda* rights. Esmeyer initialed and signed the waiver-of-rights form. Officer Everetts then asked if the gun was in the house, and Esmeyer responded that it was not in the residence (Statement # 1). Officer Everetts testified that when he asked Esmeyer if he knew where the gun was, he replied that he did and that he would take the police officers to it in the morning (Statement # 2).

At that time, Esmeyer requested to speak to an attorney, and questioning about the crime ceased. He was placed under arrest and taken to the Sheriff's Department. Officer Everetts testified:

> [A]fter I explained that he was under arrest, he stuck his hands out to be cuffed. I asked him about his family, you know, if we needed to secure the trailer or whatever. He said that before we arrived he had done had his family leave the residence, he didn't want them there when we arrived. After we started walking out, Mr. Esmeyer made the statement I seen the picture on TV, I knew you all would be here pretty soon. [Statement # 3.]

Later, Officer McDougal testified that while they were at the Sheriff's Department, Esmeyer began asking questions about the booking procedures. Officer McDougal testified:

> McDOUGAL: He asked me if I knew any good attorneys, or if I could recommend one, and I told him that I wasn't supposed to do that.
>
> PROSECUTOR: And what did he say to you after that?
>
> McDOUGAL: Well, he made a statement at that time that I shouldn't have done it but I don't feel sorry about it. [Statement # 4.]

McDougal further testified that Esmeyer told him after his arrest and when they were driving to the Sheriff's Department that he shot Passmore in self-defense.

The trial court ruled that Esmeyer voluntarily waived his rights for purposes of Statements #1 and #2. The court then ruled that the statements made after Esmeyer invoked his right to counsel that he "knew [they] would be coming" (Statement #3) and that he "shouldn't have done it" (Statement #4) were voluntarily made because they were not made in response to police interrogation.

■■ A defendant's waiver of his Fifth, Sixth, and Fourteenth Amendment rights must be voluntarily, knowingly, and intelligently made. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In order to admit into evidence an incriminating statement made pursuant to a waiver, the State must prove by a preponderance of the evidence that the waiver was made in proper fashion. *Colorado* v. *Connelly*, 479 U.S. 157 (1986). A valid waiver is said to be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986). A statement made while in

police custody is presumed to be involuntary. *Moore* v. *State*, 303 Ark. 1, 791 S.W.2d 698 (1990). In addition, the accused must have a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it in order for his waiver to be voluntary. *Moran* v. *Burbine*, *supra*.

In determining admissibility, this court reviews the totality of the circumstances and reverses only when the trial court's finding of voluntariness is clearly against the preponderance of the evidence. *Weaver* v. *State*, 305 Ark. 180, 806 S.W.2d 615 (1991); *Jackson* v. *State*, 284 Ark. 478, 683 S.W.2d 606 (1985). Conflicts in the testimony are for the trial court to determine and will not be reversed unless clearly erroneous. *Higgins* v. *State*, 317 Ark. 555, 879 S.W.2d 424 (1994). Here, Esmeyer was read his rights, and he signed the waiver-of-rights form. Officers McDougal and Everetts testified that it appeared that Esmeyer understood his rights, and that point is apparent because he later invoked his right to counsel. Considering these facts, the trial court's finding of a voluntary waiver was correct.

With regard to Statements #3 and #4 after Esmeyer invoked his right to counsel, the framework for analyzing their admissibility was set forth in *Edwards* v. *Arizona*, 451 U.S. 477, 484 (1981):

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself *initiates* further communication, exchanges, or conversations with the police. (Emphasis ours.)

Thus, a statement will be admissible only if the accused initiated further contact, and in doing so knowingly and intelligently waived the right he had invoked. *Franks* v. *State*, 306 Ark. 75, 811 S.W.2d 301 (1991); *Taylor* v. *State*, 303 Ark. 586, 799 S.W.2d 519 (1990). The pertinent inquiry is whether the defendant initiated the interrogating process with the police, after invoking his right to counsel.

See Willett v. *State*, 322 Ark. 613, 911 S.W.2d 937 (1995); *Findley* v. *State*, 300 Ark. 265, 778 S.W.2d 624 (1989).

It is clear that Esmeyer spontaneously made both Statements #3 and #4 to the police officers, and we observe no basis for reversing the trial court's ruling to allow Statements #3 and #4 into evidence under the totality-of-the-circumstances test. The record supports a conclusion that the police officers did not question Esmeyer for the purpose of soliciting these additional statements. *See Scherrer* v. *State*, 294 Ark. 287, 742 S.W.2d 884 (1988). Moreover, the fact that the trial court suppressed other statements about the gun and the gun itself as violative of *Miranda* does not render Statements #3 and #4 inadmissible. We conclude that Esmeyer's Statements #3 and #4 were voluntarily made.

IV. Doyle Violation

For his final point, Esmeyer argues that the trial court erred in permitting the introduction of his waiver-of-rights form and by otherwise allowing the prosecuting attorney to comment on his silence during the police interrogation. We agree with the trial court that no violation occurred under *Doyle* v. *Ohio*, 426 U.S. 610 (1976).

In *Doyle* v. *Ohio, supra*, the defendants were cross-examined by the prosecutors about their post-*Miranda* silence and asked why they told an exculpatory story for the first time at trial. The Supreme Court held that this was reversible error:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle v. *Ohio*, 426 U.S. at 618. *See also Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Here, the waiver-of-rights form was provided to the jury and mentioned on various occasions throughout the trial. Furthermore, during Esmeyer's cross-examination, the following colloquy occurred:

> PROSECUTOR: Okay. And you didn't stay — you're here now claiming self-defense, she had a gun, and here you didn't stay, you didn't stay and say, hey, folks, Mr. Police Officer, here, that lady pulled a gun on me because that gun would be right there in the car, its right there folks. You didn't stay and give that information, did you?
>
> ESMEYER: No sir.
>
> . . . .
>
> PROSECUTOR: Well, I want to get to that. But Mike McDougal, and you know that your cousin was questioned by J. R. Howard back on June 5th, don't you, and gave a complete statement, and he didn't say anything about that it was self defense then, but in regard to that, I said, I shouldn't have done it but I don't feel sorry about it. Did you say that?
>
> ESMEYER: No, that's not exactly what I said.

This colloquy, Esmeyer contends, evidences a prosecutorial comment on his right to silence.

The crux of Esmeyer's argument appears to be that he waived his *Miranda* rights, and that fact was made known to the jury by the waiver-of-rights form, but then he refused to make a narrative statement. That could suggest to the jury, according to Esmeyer's theory, that he had something to hide which would violate his Fifth Amendment right against self-incrimination. We give this argument little credence for one primary reason. Esmeyer did make certain statements after being warned of his rights — Statements #1, #2, #3, and #4 — and these statements were allowed into evidence. Thus, he did talk to police after being advised of his rights, and we fail to see under these circumstances how any impingement of his right to silence occurred. Moreover, we have held that the waiver-of-rights form is relevant as corroborative evidence of the inculpatory statements made by an accused. *See Misskelley* v. *State*, 323 Ark. 449, 915 S.W.2d 702 (1996).

Furthermore, unlike the facts in *Doyle* v. *Ohio, supra,* Esmeyer had maintained a justification defense before trial and imparted that to Officer McDougal. According to Officer McDougal, Esmeyer told him shortly after his arrest that he shot Passmore and Williams in self-defense. Hence, Esmeyer had not been silent about his theory of the case prior to trial. Finally, the evidence of

guilt in this case was overwhelming. We observe no basis for a *Doyle* violation.

Affirmed.

Damion Jemon BROWN *v.* STATE of Arkansas

CR 96-73 929 S.W.2d 146

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Chris Tarver, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen. and Senior App. Advocate, for appellee.

ANDREE LAYTON ROAF, Justice. Appellant Damion Jemon Brown was charged with capital felony murder for the killing of Jess Brown during an attempted robbery. He was convicted of the lesser included offense of first-degree felony murder and sentenced to life imprisonment. For his sole point on appeal, he contends that the trial court erred in refusing to instruct the jury on the lesser included offense of second-degree murder. We find no merit to the argument and affirm the conviction.

On February 22, 1994, Jess Brown was shot while he was working at Rocky's One Stop convenience store in Little Rock. Subsequently, two men were seen running from the convenience store. Jess Brown died as a result of a single gunshot wound to the

chest and abdomen.

At trial, the State introduced a taped statement made by Damion Brown in which he stated that he and Greg Hogue were standing outside of Rocky's One Stop. The plan was for Brown to stand in the doorway to watch for people while Hogue robbed the store. According to the statement, Damion Brown entered the store first, the store owner pulled a gun, and Damion Brown dropped to the floor. Damion Brown stated that Greg Hogue fired the shot that killed Jess Brown.

Marcus Hall, an employee of Rocky's One Stop, testified that he went to the store on the evening of the shooting to purchase batteries. Hall testified that when he arrived at the store, he observed two men behaving suspiciously at a washeteria next door and warned Jess Brown about them. He stated that Jess Brown had several guns positioned around the convenience store, including one hidden beneath some paper on the counter beside the cash register. Hall further testified that Jess Brown was standing behind the cash register, and Hall was bent over behind Brown searching for batteries when he heard a gunshot and saw that Brown had been shot. The defense presented the testimony of Mark Poindexter, a co-defendant in the case who had testified in a prior proceeding, for the purpose of showing that the robbery was not Damion Brown's idea. Poindexter's entire testimony was read to the jury. Poindexter testified that he, Damion Brown, Greg Hogue, and two others drove in Poindexter's car to a park down the street from Rocky's One Stop in order to commit a robbery. He stated that Damion Brown and Greg Hogue left the car, covered their faces with ski masks or bandannas and, armed with guns, walked to the store. He further testified that he heard a gunshot, and Hogue and Brown ran back to the car.

After the conclusion of all the evidence, the jury was instructed on capital felony murder, the lesser included offense of first-degree felony murder, aggravated robbery, accomplice liability, and the affirmative defense to capital felony murder that Brown did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in its commission. The jury found Brown guilty of first-degree felony murder and aggravated robbery. The aggravated robbery verdict was merged in the first-degree murder conviction, and Brown was sentenced by the jury to life imprisonment.

On appeal, Brown asserts that the trial court erred in refusing to instruct the jury on the lesser included offense of second-degree murder. Brown was charged by information with capital murder and aggravated robbery. The capital murder count alleged that Brown, acting alone or with one or more persons, committed or attempted to commit aggravated robbery and, in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice caused the death of Jess Brown under circumstances manifesting extreme indifference to the value of human life. Prior to submission of the case to the jury, Brown requested that the jury be instructed on the offense of second-degree murder on the basis that it was a lesser included offense of capital felony murder. Brown proffered an instruction on second-degree murder, and the trial court refused to give the instruction. On appeal, Brown contends that a rational basis existed for the jury to conclude that he, through the transferred intent of Hogue, knowingly caused the death of another person under circumstances manifesting extreme indifference to the value of human life.

This court has held that where a rational basis for a verdict of acquittal on the greater offense and conviction on the lesser offense exists, the trial court should give the lesser included offense instruction, and it is reversible error not to do so. *State* v. *Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995). Error occurs when the trial court refuses to give the lesser included instruction where there is the slightest evidence to warrant it. *Id.* Consequently, we must determine whether second-degree murder is a lesser included offense of capital felony murder and, if so, whether there was sufficient evidence to warrant the instruction on second-degree murder.

Before an offense will be considered a lesser included offense of a greater one, three basic requirements must be met: (1) the lesser offense must be established by proof of the same or less than all the elements of the greater offense; (2) the lesser offense must be of the same generic class as the greater offense; and (3) the differences between the two offenses must be based upon the degree of risk or injury to person or property or upon grades of intent or degrees of culpability. *Tackett* v. *State*, 298 Ark. 20, 766 S.W.2d 410 (1989). Arkansas Code Annotated § 5-10-101 (Supp. 1995), *Capital murder*, provides in part:

(a) A person commits capital murder if:

> (1) Acting alone or with one (1) or more other persons, he commits or attempts to commit rape, kidnapping, vehicular piracy, robbery, burglary, a felony violation of the Uniform Controlled Substances Act, §§ 5-64-101 - 5-64-608, involving an actual delivery of a controlled substance, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice *causes the death of any person* under circumstances manifesting extreme indifference to the value of human life . . .

(Emphasis added.) Arkansas Code Annotated § 5-10-103 (Repl. 1993), *Murder in the second degree*, provides in part:

> (a) A person commits murder in the second degree if:
>
> (1) He *knowingly causes the death of another person* under circumstances manifesting extreme indifference to the value of human life . . .

(Emphasis added.) Second-degree murder, as defined, requires proof that a person "knowingly" cause the death of another person. In contrast, it is settled law that felony murder simply requires that a death be caused in the course of committing a felony. *See Johnson* v. *State*, 252 Ark. 1113, 482 S.W.2d 600 (1973) (first-degree murder conviction upheld where homeowner's daughter accidently shot by father during burglary attempt by appellant). Accordingly, because second-degree murder requires proof of an element not required for proof of felony murder, second-degree murder is not a lesser included offense of felony murder. *See Tackett* v. *State*, *supra*.

In addition, we have stated:

> Where the indictment for a greater offense does not contain allegations of all the ingredients of the lesser offense, a conviction of the lesser cannot be sustained, *even though the evidence may supply the missing element.*

(Emphasis added.) *Henderson* v. *State*, 286 Ark. 4, 688 S.W.2d 734 (1985) (quoting *Caton & Headley* v. *State*, 252 Ark. 420, 479 S.W.2d 537 (1972)). In the instant case, the information simply charged that Damion Brown or an accomplice caused the death of Jess Brown during the course of a felony. The information did not allege that Brown possessed any culpable mental state in causing the death; an allegation as to a culpable mental state is a necessary

element to the charge of second-degree murder. Therefore, a conviction of the lesser offense could not be sustained, even if, as Brown contends, there was evidence of a knowing mental state. *See Henderson, supra.*

Brown also asserts on appeal that two previous decisions of this court require reversal of his conviction. In *Davis* v. *State*, 317 Ark. 592, 879 S.W.2d 439 (1994), this court held that a single stab wound to the chest penetrating the heart constituted sufficient circumstantial evidence to show that the appellant knowingly caused the death of another. Davis was charged with first-degree murder, and, at his trial, the jury was also instructed on the lesser included offenses of second-degree murder and manslaughter. However, Davis was convicted for the murder of a man with whom he had been living, and he had been seen arguing with the victim within an hour of the estimated time of death. It is clear that *Davis* did not involve a charge of felony murder.

Brown's reliance upon the case of *Hill* v. *State*, 303 Ark. 462, 798 S.W.2d 65 (1990) is also misplaced. Hill, like Brown, was charged with capital felony murder committed in the course of a robbery, and, like Brown, he was convicted of first-degree murder. The trial court refused Hill's proffered jury instruction on the lesser included offense of first-degree felony murder and instead erroneously instructed the jury on first-degree murder after premeditation and deliberation. On appeal, Hill challenged the trial court's failure to give the proper instruction on first-degree murder. We set aside Hill's conviction of first-degree murder and reduced his conviction to that of second-degree murder, for which an instruction had been given without objection. Although in *Hill* we said, without discussion, that "within the capital murder charge is the lesser included offense of second-degree murder," it is clear that second-degree murder is a lesser included offense of capital murder only if the accused's mental state is an element of the offense. To the extent that the discussion in *Hill* regarding second-degree murder as a lesser included offense of capital murder may be in conflict with the clearly articulated principles regarding lesser included offenses set forth in *Tacket* v. *State, supra*, and *Henderson* v. *State, supra*, we take this opportunity to clarify *Hill*. Accordingly, we hold that second-degree murder is not a lesser included offense of capital felony murder as set forth in Ark. Code Ann. § 5-10-101(a)(1).

Ark. Sup. Ct. R. 4-3(h)

The record has been examined in accordance with Arkansas Supreme Court Rule 4-3(h), and there were no rulings adverse to Brown which constituted prejudicial error.

Affirmed.

Jimmy Don WOOTEN *v.* STATE of Arkansas

CR 95-975 931 S.W.2d 408

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Gibbons Law Firm, P.A., by: *David L. Gibbons*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Deputy Att'y Gen., Sr. Appellate Advocate for appellee.

ANDREE LAYTON ROAF, Justice. Appellant Jimmy Don Wooten was convicted of capital murder, criminal attempt to commit capital murder, and aggravated assault. Wooten was sentenced to death by lethal injection on the capital murder charge, thirty years' imprisonment on the attempt-to-commit-capital-murder charge, and six years' imprisonment on the aggravated-assault charge. On appeal, he contends that the trial court erred in (1) overruling his

Batson objection during jury selection, (2) in allowing victim-impact evidence during the penalty phase of his trial, and (3) in failing to suppress identification testimony. We find no error and affirm.

On August 5, 1994, David LaSalle, Henry Teb Porter, and Molly Porter were hiking on a forest trail near the Long Pool recreation area in Pope County when they encountered appellant Jimmy Don Wooten. Wooten was riding a six-wheel all-terrain vehicle. At trial, Henry Porter testified that the group had three encounters with Wooten before he attacked them and shot David LaSalle. LaSalle died as a result of a single gunshot wound to the head. Porter also testified that Wooten shot him in the shoulder, forearm, and face, and that he was able to remove the key from Wooten's all-terrain vehicle before Wooten chased him into the woods. Molly Porter, Henry Porter's daughter, testified that Wooten shot LaSalle and shot her father and chased after him.

On the day of the shooting, Wooten reported that an assailant who looked just like him had stolen his six-wheel vehicle while he was fishing near Long Pool and had shot at him using the .22-caliber pistol he had in the vehicle. Wooten claimed that he later found the vehicle with the gun abandoned by the side of the road near his truck. A .22-caliber bullet was recovered from David LaSalle's body. It was determined that Wooten's gun fired a spent .22-caliber cartridge found at the location where LaSalle and Porter were shot. In addition, swimming trunks found at Wooten's home matched Henry and Molly Porter's description of trunks worn by the assailant.

In a bifurcated proceeding, the jury found Wooten guilty of capital murder. During the penalty phase of his trial, the jury found one aggravating circumstance and concluded that it justified beyond a reasonable doubt a sentence of death.

1. Jury Selection

Wooten first argues that the trial court erred in allowing the state to remove the sole African-American from the jury panel by a peremptory strike when she was otherwise qualified and unbiased and not challenged for cause. In *Prowell* v. *State*, 324 Ark. 335, 921 S.W.2d 585 (1996), we recently set forth the standard to be applied in reviewing an objection based upon *Batson* v. *Kentucky*, 476 U.S. 79 (1986). We wrote:

The procedures to be followed when a *Batson* objection is raised are well established:

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

Mitchell v. *State*, 323 Ark. 116, 913 S.W.2d 264 (1996); *Heard* v. *State*, 322 Ark. 553, 910 S.W.2d 663 (1995). Further, this Court has stated that a prima facie case may be established by: (1) showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, (2) demonstrating total or seriously disproportionate exclusion of blacks from the jury, or (3) showing a pattern of strikes, questions, or statements by a prosecuting attorney during voir dire. *Id.* The standard of review for reversal of a trial court's *Batson* ruling is whether the court's findings are clearly against the preponderance of the evidence. *Id.*

In the instant case, the State exercised a peremptory challenge to excuse Ms. Shirley Hatley. The prosecuting attorney stated that Ms. Hatley could not say that she would be able to sign the death-penalty form if the State proved its burden. Counsel for Wooten objected based upon *Batson* and stated for the record that Ms. Hatley was the sole African-American on the panel. Wooten's counsel asserted that Ms. Hatley in fact stated that she could consider the death penalty. In response, the prosecuting attorney asserted that Ms. Hatley was the only juror who stated that she did not know whether she could sign the death-penalty form. The prosecuting attorney also noted for the record that Wooten and the officers involved in the case were all white, but he conceded that Wooten was not precluded from raising a *Batson* objection. *See Powers* v. *Ohio*, 449 U.S. 400 (1991) (defendant's race is irrelevant to his standing to object to the discriminatory use of peremptory challenges).

In overruling Wooten's *Batson* objection, the trial court concluded that Ms. Hatley was very hesitant in her responses to the

state and that she never said that under the proper circumstances she could actually vote for the death penalty. The trial judge stated, "I don't think there is a proper *Batson* situation here and I'll allow them to use a peremptory challenge on Ms. Hatley."

On appeal, Wooten contends that a prima facie case was established because the sole African-American was excused from the panel. *See Mitchell* v. *State*, 295 Ark. 341, 750 S.W.2d 936 (1988). Granted, we have stated that the prosecution's use of a peremptory challenge to remove the only black prospective juror may establish a prima facie case. *Cooper* v. *State*, 324 Ark. 135, 919 S.W.2d 205 (1996); *Mitchell* v. *State*, 295 Ark. 341, 750 S.W.2d 936 (1988). However, as in *Prowell* v. *State*, *supra*, here the prosecutor volunteered an explanation for the challenge, and the trial court made no specific ruling on whether a prima facie case was made. In *Prowell*, this court recognized that once a prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot. *See Hernandez* v. *New York*, 500 U.S. 352 (1991).

Wooten also asserts that the State failed to provide a racially neutral reason for the challenge, and he contends that a white venireperson examined at the same time as Ms. Hatley and two others who were questioned after Ms. Hatley was excused gave answers similar to Hatley's, but were not challenged. In support of his argument, Wooten cites *Ford* v. *Norris*, 67 F.3d 162 (8th. Cir. 1995), where the court stated that "a prosecutor's failure to apply a stated reason for striking black jurors to similarly situated white jurors may evince a pretext for excluding jurors solely on the basis of race."

However, Wooten did not present this argument to the trial court. In fact, Wooten did not mention other similarly situated jurors when the prosecuting attorney stated that Ms. Hatley was the only juror to that point who had said she did not know if she could sign the form or when the trial court noted that Ms. Hatley was very hesitant in her responses to the State. Because an appellant may not change his grounds for objection on appeal, this point is not preserved on appeal. *Gilland* v. *State*, 318 Ark. 72, 883 S.W.2d 474 (1994). We do not address arguments made for the first time on appeal. *Allen* v. *State*, 324 Ark. 1, 918 S.W.2d 699 (1996).

2. Victim-Impact Evidence

Wooten next argues that the trial court erred in allowing the state to use victim-impact evidence in the State's initial presentation during the penalty phase rather than as rebuttal to any mitigating evidence offered by Wooten.

During its initial presentation of evidence in the sentencing phase of the trial, the State introduced victim-impact testimony from David LaSalle's wife. Prior to the beginning of the sentencing phase, Wooten asserted that under *Payne* v. *Tennessee*, 501 U.S. 808 (1991), victim-impact evidence could only be admitted to counteract or rebut mitigating evidence offered by the defendant. Wooten contended that the State could not present the evidence during its initial presentation in the sentencing phase. The trial court concluded that the General Assembly had authorized the use of victim-impact testimony and that *Payne* did not clearly provide that victim-impact testimony was limited to rebut mitigating evidence. On appeal, Wooten again argues that victim-impact evidence may be offered only to rebut certain evidence in mitigation offered by the defendant.

The basic rule of statutory construction is to give effect to the intent of the legislature, and when a statute is clear, it is given its plain meaning. *Hercules Inc.* v. *Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995); *see also State* v. *McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994). The legislative intent is gathered from the plain meaning of the language used. *Id.* Arkansas Code Annotated § 5-4-602(4) (Repl. 1993), *Capital murder charge — Trial procedure*, provides in part:

> (4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in § 5-4-604, any mitigating circumstances, or any other matter relevant to punishment, including, but not limited to, victim impact evidence, provided that the defendant and the state are accorded an opportunity to rebut such evidence.

We initially note that the statute clearly provides that evidence may be presented as to any matter relevant to punishment, including, but not limited to, victim-impact evidence. The statute does require that the defendant and the State be accorded an opportunity to rebut such evidence; however, the statute does not provide that

such evidence be limited to rebuttal.

In further support of his argument, Wooten relies on Section 2 of Act 1089 of 1993. Act 1089 enacted § 5-4-602(4), and section 2 provided:

> It is the express intention of this act to permit the prosecution to introduce victim impact evidence as permitted by the United States Supreme Court in *Payne* v. *Tennessee*, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

Wooten argues in essence that the General Assembly intended to restrict the use of victim-impact evidence to those limits imposed by *Payne* and that *Payne* only permits victim-impact evidence to rebut evidence of mitigation offered by the defendant.

We do not agree with Wooten's reading of the statute or of *Payne*. Wooten's interpretation of *Payne* is too narrow; he concludes that the Supreme Court's reference to "counteracting" mandates that victim-impact evidence be limited to the rebuttal phase of sentencing. Granted, the Court in *Payne* stated that "the State has a legitimate interest in *counteracting* the mitigating evidence which the defendant is entitled to put in." (Emphasis supplied.) However, the Court in the same paragraph stated that "[w]e are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Payne*, 501 U.S. at 825. The Court went on to hold as follows:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

Payne, 501 U.S. at 827.

3. Identification Testimony

For his final argument, Wooten contends that the trial court erred in denying his motion to exclude evidence of his identification in a lineup because the lineup was unduly suggestive in viola-

tion of the Fifth and Fourteenth Amendments to the United States Constitution. Prior to trial, Wooten moved to suppress testimony regarding both his pretrial and in-court identification because the pretrial physical lineup procedures were unduly suggestive, and any subsequent in-court identification would be tainted by the pretrial procedures. On appeal, Wooten submits that the trial court erred in failing to suppress the evidence of the lineup and the identification testimony of Henry Porter and Molly Porter.

We will not reverse a trial court's ruling on the admissibility of an in-court identification unless the ruling is clearly erroneous under the totality of the circumstances. *Prowell* v. *State*, 324 Ark. 335, 921 S.W.2d 585 (1996). In determining whether an in-court identification is admissible, we look first at whether the pretrial identification procedure was unnecessarily suggestive or otherwise constitutionally suspect; it is the appellant's burden to show that the pretrial identification procedure was suspect. *Id.* A pretrial identification violates the Due Process Clause when there are suggestive elements in the identification procedure that make it all but inevitable that the victim will identify one person as the culprit. *Id.*

However, even when the process is impermissibly suggestive, the trial court may determine that under the totality of the circumstances the identification was sufficiently reliable for the matter to be submitted to the jury, and then it is for the jury to decide the weight the identification testimony should be given. *Id.* In determining reliability, the following factors are considered: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pretrial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pretrial identification procedure. *Id.*

Both Henry Porter and Molly Porter selected Wooten from a lineup conducted on the day of the incident and identified him as the assailant at trial. At the suppression hearing, Johnny Casto of the Pope County Sheriff's Department testified that Henry Porter initially described the assailant as being in his late twenties, five feet, seven inches tall, approximately 135 to 140 pounds, with sandy blond hair. Mr. Porter did not state that the assailant had either a mustache or beard. Pope County Sheriff Jay Winters testified that

Molly Porter described the assailant as being in his late twenties with light brown hair, 5′6″ tall, and approximately 140 to 150 pounds. She also did not mention a beard or mustache. Appellant Wooten contends that the lineup conducted was overly suggestive because, based upon the description provided by the two witnesses, it was inevitable that he would be picked.

Wooten submits that he was the shortest person in the lineup by three to four inches. He asserts that the person closest to his height had gray hair and a mustache, that two other persons depicted in the lineup had facial hair, and that two persons appeared to be in their late teens or early twenties. The trial court concluded that he did not see "much disparity at all" between the individuals placed in the lineup and "there's nothing to the Court that appears to be suggestive." We cannot say that the trial court's ruling was clearly erroneous; there is simply nothing in the lineup that would direct a witness toward Wooten as the assailant. *See King* v. *State*, 323 Ark. 558, 916 S.W.2d 725 (1996). Further, an accused is not entitled to have a lineup in which all the participants are identical. *Perry* v. *State*, 277 Ark. 357, 642 S.W.2d 865 (1982).

Moreover, even when the pretrial process is impermissibly suggestive, the trial court may determine that under the totality of the circumstances the identification was sufficiently reliable for the matter to be submitted to the jury. *See Prowell* v. *State, supra.* On appeal, Wooten submits that the in-court identification was not sufficiently reliable because there was no evidence presented as to the witnesses' degree of attention or their opportunity to view the assailant during the crime.

However, Wooten did not obtain a ruling on his motion to suppress the in-court identification; therefore, this point is not preserved on appeal. At the conclusion of the suppression hearing, the trial court stated that "with respect to your motion to suppress evidence of in-court identification, it's a little premature." Counsel for Wooten stated that, given the court's ruling on his motion to suppress the lineup identification, he agreed with the trial court. Wooten did not object at trial when Henry Porter and Molly Porter identified him as the assailant. We have repeatedly stated that failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review of the issue on appeal. *Laudan* v. *State*, 322 Ark. 58, 907 S.W.2d 131 (1995); *Bowen* v. *State*, 322 Ark. 483, 911 S.W.2d 555 (1995).

Ark. Sup. Ct. R. 4-3(h)

The record has been examined in accordance with Arkansas Supreme Court Rule 4-3(h), and there were no rulings adverse to Wooten which constituted prejudicial error.

Affirmed.

Lester Tyrone BROOKS *v.* STATE of Arkansas

CR 96-771 927 S.W.2d 801

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Appellant, pro se.

No response.

PER CURIAM. Appellant Lester Tyrone Brooks moves this court to declare him indigent for purposes of appeal. He attaches an affidavit to establish indigency which is duly executed. We note from the partial record filed that the appellant had retained counsel for trial who is different from counsel petitioning on appellant's behalf for indigency. Because of this fact, we remand this matter to the trial court for a determination of indigency and for appointment of counsel for appeal, if indigency is found.

James GUSS *v.* STATE of Arkansas

CR 96-905 928 S.W.2d 336

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Jeffrey H. Kearney, for appellant.

No response.

PER CURIAM. Appellant James Guss, by his attorney, Jeffrey H. Kearney, has filed a motion for a rule on the clerk. Appellant filed a timely notice of appeal from the denial of his petition for postconviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. His attorney admits by motion that the record of the postconviction proceedings was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). The motion is therefore granted.

A copy of this opinion will be forwarded to the Committee on Professional Conduct.

David Anthony WEBB *v.* STATE of Arkansas

CR 96-711 928 S.W.2d 793

Supreme Court of Arkansas
Opinion delivered September 16, 1996

Zimmery Crutcher, Jr., for appellant.

No response.

PER CURIAM. Appellant David Anthony Webb by his attorney Zimmery Crutcher, Jr., petitions the court for (1) a writ of certiorari to complete the record and to designate funds to pay for the trial transcript, and (2) for a rule on the clerk regarding the transcript to be prepared.

The facts alleged in the petition are these. On March 22, 1996, the appellant moved to dismiss his trial attorney, Mr. Crutcher, without notice to Mr. Crutcher.

On March 27, 1996, the appellant filed a notice of appeal and request to proceed *in forma pauperis*, also without notice to Mr. Crutcher.

On April 11, 1996, an affidavit was filed by the court reporter, stating that she had not received a copy of the notice of appeal and

that no arrangements had been made with her about the trial transcript.

On June 14, 1996, the trial court notified Mr. Crutcher that a partial record had been filed in the Supreme Court on May 30, 1996, and that the completed record was due June 23, 1996. Mr. Crutcher was given the option of filing the complete record or moving this court to relieve him as counsel.

On June 19, 1996, Mr. Crutcher moved to withdraw as counsel, and on July 8, 1996, that motion was denied by this court. Mr. Crutcher now points out in the indigency petition that his petition to withdraw was filed before the deadline for filing the record but denied by this court after the deadline had passed.

No affidavit of indigency executed by the appellant accompanied these petitions. Hence, this court is unable to determine the indigency status of the appellant. Without that determination, it is premature to grant the petition for writ of certiorari to complete the record. And, without a complete record, it is premature to consider a petition for rule on the clerk.

We emphasize again that Mr. Crutcher was retained counsel during the trial of this matter. We remand this matter to the trial court for a determination of indigency and, if indigency is found, for appointment of counsel for appeal.

[redacted]

[redacted]

[redacted]