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ARK.

STATE of Arkansas, Office of Child Support Enforcement *v.* Terrance D. ROSS

97-205 945 S.W.2d 374

Supreme Court of Arkansas
Opinion delivered June 9, 1997

Gordon, Caruth & Virden, by: *Bart Virden*, for appellant.

No response.

DAVID NEWBERN, Justice. In October 1992, the appellee, Terrance Ross, was ordered to pay $100 per month in child support for his two minor children. Thereafter, Mr. Ross became consistently delinquent in satisfying the obligation. Consequently, in proceedings occurring from 1994 through 1996, the Office of Child Support Enforcement ("OCSE"), the appellant, obtained

judgments on the accrued arrearages, and Mr. Ross was repeatedly held in contempt. Ultimately, Mr. Ross's driver's license was suspended, in accordance with Ark. Code Ann. § 9-14-239 (Supp. 1995), as the result of his child-support delinquency.

In the most recent hearing with respect to the child-support obligation, the Chancellor ordered the child-support obligation suspended pending reinstatement of Mr. Ross's driver's license. OCSE appeals from that order. We affirm because the arguments made in favor of reversal were not made to the Chancellor.

During the hearing, Mr. Ross testified that he had lost his job on account of the suspension of his driver's license. He indicated that he recently had found a different job but that he was only working 20 hours per week. At the conclusion of the hearing, the following colloquy occurred between the Chancellor and counsel for the OCSE:

[CHANCELLOR]:	. . . The court finds that Mr. Ross is not willfully delinquent in support. That as a result of the suspension of his driver's license his job was lost and the child support is hereby suspended until his driver's license is restored.
[COUNSEL]:	Your Honor, I believe the driver's license was suspended because of the child support if I'm not mistaken.
[CHANCELLOR]:	That's right.
[COUNSEL]:	Okay. Is—is he under some affirmative duty to—
[CHANCELLOR]:	Sir?
[COUNSEL]:	Will he be under some affirmative duty to get [the] license back?
[CHANCELLOR]:	Maybe the Child Support Division can get [it] back for him.
[COUNSEL]:	Okay. I believe he's working 20 hours a week, but we're still—
[CHANCELLOR]:	Well, that's not enough to sustain him—himself.
[COUNSEL]:	I'll get an order prepared to that effect, Your Honor.
[CHANCELLOR]:	All right. Thank you, sir. . . . .

According to Ark. Code Ann. § 9-14-239(b)(1)(A)(i) (Supp. 1995), OCSE must notify the Department of Finance and Administration ("DF&A") to suspend the driver's license of a noncustodial parent if OCSE determines (1) that the parent "is delinquent on a court-ordered child support payment or an adjudicated arrearage in an amount equal to six (6) months' obligation or more"; and (2) that the parent has failed to "execute[ ] an installment agreement or make[ ] other necessary and proper arrangements" for the payment of child support. The DF&A must "immediately suspend the license . . . of the noncustodial parent" upon receipt of such notification, § 9-14-239(d)(1), and the suspension must remain in effect until the OCSE notifies the DF&A to release the suspension. § 9-14-239(d)(2). *See Survey of Legislation, 1995 Arkansas General Assembly*, 18 U.A.L.R. L.J. 279, 349 (1996).

OCSE argues that the Chancellor's ruling suspending Mr. Ross's child-support obligation constitutes an erroneous decision "not to enforce the statute" imposing the license-suspension penalty. According to OCSE, the Chancellor's ruling should be reversed because it fails "to recognize and enforce [OCSE's] statutory authority to suspend [Mr. Ross's] driver's license" and because it "coerc[es] the state [not to] avail itself of its lawful right granted by A.C.A. 9-14-239 to suspend driving privileges of an individual who refuses to support [his] child in defiance of court orders."

We decline to address the merits of these arguments because, as the colloquy quoted above reveals, counsel for the OCSE did not raise them before the Chancellor. As we said in *Arkansas Office of Child Support Enforcement v. House,* 320 Ark. 423, 424, 897 S.W.2d 565, 566 (1995):

> [t]he rule is well-established that this court will not reverse on an issue not presented to the trial court. *Hubbard v. Shores Group, Inc.,* 313 Ark. 498, 855 S.W.2d 924 (1993). We have also said that we will not consider arguments raised for the first time on appeal or where a ruling from the trial court has not been obtained. *Mobley v. Harmon,* 313 Ark. 361, 854 S.W.2d 348 (1993).

Here, counsel for the OCSE made no argument in the trial court opposing the Chancellor's decision to excuse Mr. Ross from paying child support while he is without a driver's license. The Chancellor was not given the opportunity to consider these arguments. Thus, we affirm the Chancellor's decision. *See Betts v. Betts,* 326 Ark. 544, 546, 932 S.W.2d 336, 337 (1996)("A nonjurisdictional argument cannot be raised for the first time on appeal.").

Affirmed.

Patricia LOVE *v.* SMACKOVER SCHOOL DISTRICT and Terry Lee, Jeff Rogers, Juanita Corley, Jerry Hegwood, and Lynn Bradley, In Their Official Capacity as Members of the Smackover School District Board of Directors

97-20 946 S.W.2d 676

Supreme Court of Arkansas
Opinion delivered June 9, 1997

Mitchell, Blackstock & Barnes, by: *Marcia Barnes*, for appellant.

W. Paul Blume, for appellees.

DONALD L. CORBIN, Justice. This is an appeal by Appellant Patricia Love of the order by the Union County Circuit Court denying the award of attorney's fees in her case against Appellee Smackover School District involving the Teacher Fair Dismissal Act of 1983, Ark. Code Ann. §§ 6-17-1501 to -1510 (Repl. 1993). This is the second appeal of this case. In the first appeal, this court reversed the trial court's ruling that Appellant was not a "teacher" as contemplated by the Act and remanded the case to determine the amount of compensation to which she was entitled. *Love v. Smackover Sch. Dist.*, 322 Ark. 1, 907 S.W.2d 136 (1995). Jurisdiction of this appeal is therefore properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(10) (as amended by *per curiam* July 15, 1996).

Pursuant to this court's mandate, the Union County Circuit Court held a hearing on June 19, 1996, to determine Appellant's

damages pursuant to the mandate. The trial court ruled that Appellant was entitled to judgment against Appellee for $6,893.36 plus interest. The trial court also granted Appellant reinstatement as a half-time teacher for the 1996-97 school year. Appellant requested attorney's fees, but the trial court denied her request holding that such fees are not authorized under the Teacher Fair Dismissal Act, referring to the trial court's previous decisions in other Teacher Fair Dismissal act cases as well as the recent decision of *Piggee v. Jones*, 84 F.3d 303 (8th Cir. 1996). In *Piggee*, the United States Court of Appeals, Eighth Circuit, held that a violation of the Teacher Fair Dismissal Act was not a breach of contract claim for which attorney's fees may be awarded under Ark. Code Ann. § 16-22-308 (Repl. 1994).

The sole issue presented by this appeal is whether attorney's fees are available in an action brought under the Teacher Fair Dismissal Act as contemplated by section 16-22-308. We conclude that attorney's fees are available and we reverse the ruling of the trial court and remand this case to determine whether in this instance attorney's fees are warranted.

The American rule, which is the rule observed in Arkansas, is that attorney's fees are not chargeable as costs in litigation unless specifically permitted by statute. *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990); *Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986); *see Hall v. Thompson*, 283 Ark. 26, 669 S.W.2d 905 (1984); *Harper v. Wheatley Implement Co., Inc.*, 278 Ark. 27, 643 S.W.2d 537 (1982). Section 16-22-308 provides:

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

This court has previously determined that an action brought pursuant to the Teacher Fair Dismissal Act is a civil action within the meaning of section 16-22-308. *Sosebee v. County Line*

Sch. Dist., 320 Ark. 412, 897 S.W.2d 556 (1995). Likewise, a claim for "labor or services" is within the meaning of the statute and attorney's fees are allowed for such claim under section 16-22-308. *City of Fort Smith v. Driggers*, 305 Ark. 409, 808 S.W.2d 748 (1991). In reliance upon those two decisions, the court of appeals recently determined that the subject matter of the underlying litigation is solely dispositive of whether section 16-22-308 may be invoked. *Junction City Sch. Dist. v. Alphin*, 56 Ark. App. 61, 938 S.W.2d 239 (1997). In *Alphin*, the court of appeals reversed the trial court's disallowance of attorney's fees to a teacher who prevailed in an action brought pursuant to the Teacher Fair Dismissal Act, where the disallowance was based on the Act's omission of a procedure to award attorney's fees.

Similarly, in *Hall v. Kingsland Sch. Dist.*, 56 Ark. App. 110, 938 S.W.2d 571 (1997), the court of appeals determined that the trial court failed to exercise discretion to either award or deny attorney's fees and reversed and remanded to determine whether fees were warranted. In that case, the trial court had found that because the proceeding was brought pursuant to the Teacher Fair Dismissal Act, which makes no specific provision for attorney's fees, the motion for attorney's fees should be denied. The teachers argued on appeal that the trial court erred in finding that the Act's failure to mention attorney's fees prohibits consideration of an award of fees to the prevailing party. The court of appeals held that while the Act does not expressly provide for the award of attorney's fees, an award is nonetheless permissible under section 16-22-308.

In the first appeal of the present case, this court determined that Appellant had a written contract with the school board which entitled her to rights under the Teacher Fair Dismissal Act. *Love*, 322 Ark. 1, 907 S.W.2d 136. We now determine that actions brought pursuant to that Act are actions in contract for labor or services such that attorney's fees may be awarded by the trial court pursuant to section 16-22-308, the general statute authorizing attorney's fees. We further conclude that the Eighth Circuit's decision in *Piggee*, decided before this court had definitively spoken on this issue, was an erroneous interpretation of this State's law.

Although the award of attorney's fees is discretionary, *see, e.g.*, *Chrisco*, 304 Ark. 227, 800 S.W.2d 717, here, the trial court did not exercise its discretion when it declined to award Appellant attorney's fees. Because we conclude that attorney's fees are recoverable in a Teacher Fair Dismissal Act action, we reverse and remand this case to the trial court to determine if an award of attorney's fees is warranted.

Clarence WILLIAMS *v.* STATE of Arkansas

CR 97-33 946 S.W.2d 678

Supreme Court of Arkansas
Opinion delivered June 9, 1997

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W. Ray Nickle, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Following a jury trial, appellant Clarence Williams was found guilty of first-degree murder, kidnapping (2 counts), and attempted first-degree murder. He was sentenced to 20 years for first-degree murder, 40 years for kidnapping, and 12 years for attempted first-degree murder, with the sentences for kidnapping and attempted first-degree murder to run consecutively. The total term of imprisonment meted out was 52 years. He appeals on several grounds, none of which has merit. We affirm.

The State's case at trial was essentially comprised of the testimony of a co-defendant, William Hunt; a victim, Bradley Davis; and the statement taken from Williams by William Kucik of the FBI. William Hunt, age 20, testified that on April 8, 1995, he was riding with Antonio Britt and Scotty Hodges in a white Pontiac Bonneville that belonged to a friend of Britt's. The three men drove to Forrest City and then to Osceola where they picked up Clarence Williams. The four men ranged in ages from late teens to late twenties. They were driving and drinking when they were approached by two men (later identified as Bradley Davis and

Jonathan Hancock, who were approximately 19 at the time) in a white truck in Blytheville. Williams was driving the Pontiac. One of the men asked Williams if he had any crack cocaine for sale. Hodges yelled that he had some and directed the two men to pull over into a parking lot. After they did so, Hodges pulled a gun on the two men and demanded their money. Britt then jumped out of the Pontiac and said that he wanted the truck. Williams unlocked the trunk of the Pontiac, and the two men were forced into the trunk.

Williams drove off in the Pontiac with Hunt and Hodges, and Britt followed in the pickup truck. At some point, Britt pulled over, and Hodges left Williams and joined Britt in the truck. Hunt remembered turning up the music at Williams's request, but he could not remember if the title of the tape was "Lock 'em in the F***in' Trunk." He also could not remember if that song was played over and over. Williams led the way in the Pontiac down to the Mississippi River. Hunt testified that once they reached the river, Williams unlocked the trunk and grabbed one of the men from the Pontiac's trunk. Britt grabbed the other captive. Britt told the men to take off their clothes. At that point, Hunt testified that Williams said: "You've got to kill them, they've seen our face, you gotta waste 'em." Hunt testified that he urged that they not kill them. Hodges then hit one of the victims in the head with his gun, and it discharged, shooting the victim in the leg. Hodges then shot him a second time. Hunt testified that following the first shooting, he and Williams fled the scene on foot.

Hunt told the jury that only Hodges and Britt had guns and that both victims were sitting down and naked when the shooting began. Hunt said that he heard four more shots after he began running. Hunt ran back to Williams's house, which was about five miles away, and a friend of Williams drove him to his home the next afternoon. He learned that the police were looking for him, and he turned himself in.

William J. Kucik works for the FBI in Chicago. He was informed by a Jonesboro FBI agent that a warrant had been obtained against Williams for unlawful flight to avoid prosecution. He received an anonymous tip on Williams's location, and Wil-

liams was found in an abandoned apartment building. Williams initially told the officers that his name was Willie Morris, and he had Illinois identification to that effect. Williams eventually admitted that the name was false, and he gave a statement to Kucik while being processed. He told Kucik that he had come to Chicago three days after the incident in Mississippi County. He described to Kucik how three men came to his home the evening of April 8, 1995. The four men then rode in Britt's car, bought alcohol, and returned to Williams's home to drink. They next drove to Blytheville, and Britt showed Williams the liquor store that he had contemplated robbing. Williams told Britt that he did not want anything to do with the robbery. They next went to a friend's house and then to a local nightclub in Blytheville. They left the nightclub in search of drugs but were unsuccessful.

In his continued testimony, Kucik testified that Williams told him a white truck flashed its lights at them. The four men pulled up next to the truck at a stop sign. The passenger of the truck rolled down his window and asked where he could purchase $40 worth of crack cocaine. Britt told the man to pull over in a church parking lot. He got out of the car and took the money from the individuals. One of the group not named by Williams said the abducted men had more money, and this unnamed man and Britt forced the two men into the trunk of the car at gunpoint.

Williams told Kucik that he drove the white car and started speeding toward Osceola, hoping that the police would catch them. He said that he twice pulled over in order to let the victims out of the car but was told that nobody was leaving until they got to the river. Once at the river, Britt and the other man searched the victims. The other man was loudly playing a tape of a rap song called "I gotta Bop 'em," and announced that he was not going to leave any witnesses. That man shot one of the victims in the head at point-blank range. The other victim tried to catch the victim who was shot, and the man fired two or three more shots in the vicinity of the victims. Britt then pulled his gun and shot, but his gun jammed. The other assailant took the gun from Britt, unjammed it, and shot at the victims four more times. Williams said he left the scene and drove the car halfway to the levee.

Together with Hunt, he walked home through the woods because he was afraid that he too would be shot. Williams told Kucik that Hunt slept at his house that night and caught a ride home the next day. Williams later learned that Hunt had told his mother what happened, and she made him turn himself in to the police. Williams then fled to Chicago.

The surviving victim, Bradley Davis, also took the stand for the State. Davis, who was 21 at the time of the trial, was living in Gosnell with Jonathan Hancock on April 8, 1995. He testified that he and Hancock and two other friends were driving around in one of the friend's white truck, drinking beer, and "using a little drugs." They returned to their house and smoked crack cocaine. Later, Davis and Hancock went to Blytheville in search of more crack cocaine at about 1:00 a.m. In Blytheville, Davis saw four men at an intersection. He testified that though he had had quite a bit to drink, he remembered being taken from the truck at gunpoint and put in the trunk of the car. He handed one of the gunmen his empty wallet and checkbook. Before getting in the trunk, Davis saw two men with pistols and the driver of the white car, who got out to open the trunk. He said a fourth person was in the back seat of the Pontiac on the driver's side.

Davis testified that they started driving, and periodically the men in the Pontiac would ask Davis and Hancock if they were ready to die. The kidnappers also played a rap music tape and sang with the music. The rap music described what was happening to Davis and Hancock in that the song depicted a scenario of kidnapping people, putting them in a trunk, and murdering them while stealing their car. Davis testified that the car stopped twice and that the radio was turned up so that they could not hear the conversations. The conversations sounded serious, he said, and he occasionally heard laughter. He testified that after the second stop, the assailants played the same rap song repeatedly.

Prior to the trunk's being opened at the river, Davis remembered hearing a conversation that one of the guns was jammed and that one assailant needed bullets. When they were taken from the car, he and Hancock said their goodbyes and were told to undress. Davis told the kidnappers that they could have

the truck and that he and Hancock would go on about their business. He stated that he and Hancock were told to lie down on their backs naked. Davis was then shot in the arm and rolled over. He saw Hancock get shot in the face, and he waited to be mortally wounded. Once the shooting ended, Davis could hear the attackers "getting a kick out of it." He next heard the truck drive off.

Davis added that one of the four men did say before the shooting that they should let Davis and Hancock go, and once he was shot, Davis heard someone running off. He stated he also thought he heard another vehicle leave, but once he realized that he was not dead and got up, the white car was still there. He eventually ran toward a light on the riverbank. He woke the people in a riverboat and had them call 911. Davis was not able to identify Williams as the driver of the Pontiac.

Following the 911 call to the Blytheville Police Department, Davis was found by the deputies wrapped in a blood-stained sheet. He had been shot in the head or neck, arm, and leg. Dr. Peretti, Associate Medical Examiner, testified that Hancock died of three gunshot wounds, including two head wounds, and a blunt force head injury. He testified that one of the shots to the head was a contact wound.

The State rested its case, and Williams's counsel moved for a directed verdict on several grounds, including insufficient proof to make him an accomplice. The trial court denied the motions. In Williams's case in chief, he attacked inconsistencies between Davis's testimony and his various statements to law enforcement. Williams did not testify. Defense counsel announced to the court that he intended to introduce a second statement by Williams that was given to Mississippi County Sheriff's Deputy Ed Guthrie. The court ruled that the statement was not admissible. Williams was convicted and sentenced.

I. Sufficiency of the Evidence

We first address the sufficiency of the evidence because Williams's double jeopardy rights require a review of a challenge to the sufficiency of the evidence before a review of trial

errors. *Bradford v. State*, 325 Ark. 278, 927 S.W.2d 329 (1996), *cert. denied*, 117 S. Ct. 583 (1996); *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996). A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992). Evidence, whether direct or circumstantial, is sufficient to support a conviction if the evidence is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Peeler v. State*, *supra*; *Dixon v. State*, *supra*. Only evidence supporting the verdict will be considered. *Moore v. State*, 315 Ark. 131, 864 S.W.2d 863 (1993).

Williams argues that the trial court erred in allowing the case to go to the jury because the State's entire case hinged on accomplice liability, and there was no proof that he assisted or actively participated in the kidnappings and shootings. He argues that his mere presence, acquiescence, silence, or knowledge that a crime was being committed is not sufficient to make him an accomplice. Williams admits that Hunt testified that he opened the trunk and told Britt and Hodges to kill Davis and Hancock, but he contends that there was no other evidence of this. He further argues that there was no proof that he participated in the aggravated robbery which was used as the predicate felony under the felony-murder rule.

This court has often cited the elements required to support accomplice liability:

> 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 ordinarily 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).

Choate v. State, 325 Ark. 251, 255, 925 S.W.2d 409, 412 (1996), *quoting King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996).

We conclude that there is sufficient proof that Williams assisted in the commission of the crimes for which he was convicted. There is testimony that he drove the car, assisted in confining the victims, and encouraged the shootings. Specifically, Hunt testified that Williams as the driver opened the trunk for Hodges and Britt to confine the victims. It is also undisputed that Williams transported the victims to the river and led the truck to the location where the shootings took place. Hunt further testified that once they arrived at the river, Williams encouraged Hodges and Britt to "waste 'em" because the victims had seen their faces. Davis testified that he was tormented by his assailants asking if he was ready to die while the song, "Put 'em in the F***in' Trunk" was playing on the tape player. According to Davis and Hunt, only Williams and Hunt would have been in the car when the song was played. Hunt testified that he did not remember the song. Under these circumstances, the jury could well have inferred that Williams made the statements and played the song repeatedly.

We further conclude that Davis's testimony and Williams's statement offered sufficient corroborative proof that Williams drove the car with the victims in the trunk, played the rap music, taunted the captives, and drove them to the river in full knowledge that Britt and Hodges had guns and that an armed robbery had already been perpetrated.[1]

We affirm the trial court on this point.

II. Second Statement

The prosecution introduced only the statement given by Williams to FBI Agent Kucik at trial. Williams attempted to

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[1] Williams made the corroboration argument to the trial court in somewhat veiled terms, but the State does not object to this argument on appeal, and we conclude that defense counsel adequately preserved the point.

introduce the second, more expansive and more exculpatory statement that he gave to Mississippi County Deputy Sheriff Ed Guthrie in his case-in-chief. The trial court denied introduction of the second statement. Williams argues that under Ark. R. Evid. 806 and Ark. R. Evid. 803(24), he should have been allowed to introduce the second statement to shore up his credibility, which was placed in issue by the introduction of the first statement.

Rule 806 reads:

> If a hearsay statement, or a statement defined in Rule 801 [d](2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Ark. R. Evid. 806.

The principal reason for holding that Rule 806 does not apply to the facts of this case is apparent from the rule itself. Only if the defendant's credibility is attacked may his credibility be supported by other evidence. This is consistent with the general rule that the credibility of a witness cannot be bolstered until that witness has been impeached. *See McCormick on Evidence*, § 47 (4th ed. 1992). *See also George v. State*, 270 Ark. 335, 604 S.W.2d 940 (1980). Williams has not specifically shown where the State attacked the credibility of his first statement given to agent Kucik. It is true that Hunt's testimony varies somewhat from Williams's first statement, including reference to a comment made by Williams that "you gotta waste 'em." But this inconsistency is not an attack on the credibility of Williams's statement. We fail to see how the trial court abused its discretion in disallowing the second statement in this case.

Williams also contends that the trial court erred in refusing to allow the later statement under the residual hearsay

exception contained in Ark. R. Evid. 803(24). That rule provides that a statement should not be excluded as hearsay, even where the declarant is unavailable, when the statements are trustworthy and reliable. *See Ward v. State*, 298 Ark. 448, 770 S.W.2d 109 (1989). We question the reliability and trustworthiness of Williams's second statement, as did the trial court. Williams knew that a co-defendant, William Hunt, had implicated him. He had every reason to give deputy sheriff Guthrie a self-serving statement to minimize his participation in the crimes. There was no error by the trial court in this regard.

III. Use Immunity

Williams next argues that his due process and equal protection rights were violated by the trial court's refusal to grant immunity to Antonio Britt, who presumably would have testified in his favor. This court has said that the granting of immunity is not a constitutional right but merely one authorized by statute. *Fears v. State*, 262 Ark. 355, 556 S.W.2d 659 (1977). It is within the prosecutor's discretion to grant immunity when it is in the public's interest. *Id.* The reason for granting immunity is to aid in the prosecution of criminals by inducing witnesses to testify. *Id.*

Williams fails to cite any criminal case law or statute in support of his argument that his constitutional rights were infringed, and this failure to adduce apposite authority or otherwise to make a convincing argument is sufficient reason to affirm the trial court's ruling on this point. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996); *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977). It is also unclear from the abstract whether Williams obtained a definitive ruling from the trial court on this matter. We view Williams's contention on use immunity to be without merit.

IV. Biased Juror

Williams complains that the trial court committed error by refusing to grant a mistrial due to the participation of Ulysses Stewart on the jury. Juror Stewart had hugged Williams's mother in the hallway of the courthouse after the jury was selected. Wil-

liams's argument to the trial court was that Stewart knew that his integrity was now subject to question and that he would likely lean in favor of the State's case. Williams requested a mistrial on that basis, and it was denied. On appeal, he makes the same argument that the episode placed juror Stewart under unnecessary scrutiny.

A mistrial is a drastic remedy that should be granted only where the error is so prejudicial that justice cannot be served by continuing the trial or where the fundamental fairness of the trial itself has been manifestly affected. *Peeler v. State, supra.* The trial court is afforded broad discretion in making its ruling, and a mistrial will not be declared when the prejudice can be removed by an admonition to the jury. *Id.* This court has held that a trial court did not abuse its discretion when questioning a juror and the juror responded that he could maintain his objectivity. *Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995).

As in *Clayton*, juror Stewart said that his relationship with Williams's mother "wouldn't have anything to do with how this case goes, or how come I serve." Moreover, counsel for Williams conceded that the court was "eloquent" in how he handled the questioning of juror Stewart. There is also the point that Williams did not ask for curative relief by striking Stewart and empaneling one of the alternate jurors but instead insisted on a mistrial declaration. There was no abuse of discretion by the trial court in denying the request.

V. Proffered Instruction

For his final point, Williams argues that the trial court should have accepted his proffered instruction which would have added language to the AMCI instruction that mere presence is not enough to establish accomplice liability. Williams concedes that the proffered language is not included in AMCI 2d 401 but observes that it is contained in the notes to the model instruction and is a correct statement of the law. The State counters that the model instruction was given and that this was all that was needed to state the law accurately.

The State is correct. It is not error to refuse to give a nonuniform instruction when a uniform instruction accurately reflects the law. *Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994); *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985). This court has recently rejected the precise argument now raised by Williams. *See Webb v. State*, 326 Ark. 878, 935 S.W.2d 250 (1996). There was no error in refusing to give the amended instruction.

Affirmed.

Marcus HOOD *v.* STATE of Arkansas

CR 96-103 947 S.W.2d 328

Supreme Court of Arkansas
Opinion delivered June 9, 1997

Michael D. Ray, for appellant.

Winston Bryant, Att'y Gen., by: *Todd L. Newton*, Asst. Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. After a jury trial, the appellant was convicted of aggravated robbery, and sentenced to fifty years' imprisonment. The appellant raises four points for reversal. We affirm.

On January 4, 1994, Hamburg police officer Danny Ray Smith received a call concerning an alleged armed robbery that took place at a service station. Officer Smith found that one of the gas station's proprietors, Shorty Williamson, had been shot. Another man at the scene, Leroy Harris, provided Officer Smith with a description of a vehicle at the scene, "a small new model, new looking model green car with heavy dark-tinted windows."

Leroy Harris had gone to the Williamson service station to get some gas. While walking inside to pay, he saw a person walking out of the station whom he later identified as Cedric Dunn. While inside, Harris saw Williamson bent over. Harris then went back outside and noticed a small, green car with tinted windows parked at the back of the station. The car subsequently left and headed south. Harris did not see who was in the car, nor did he see Dunn actually enter the car.

At trial, Hood's friend, David Haynes, recalled that shortly before January 4, 1994, Hood went along with him to a field to shoot a chrome .357 Smith & Wesson, with a black, rubber-grip handle. After Haynes finished firing the gun, he said that he left it in Hood's car, which he described as a small "light green-looking Honda." Haynes did not see Hood again, but found out the next day that Hood was in jail. On cross examination, Haynes explained that he put the gun under the car seat while Hood was outside of the car, and that he did not know if Hood saw him put the gun under the seat. Haynes likewise never told Hood the gun was under the seat.

Cedric Dunn pled guilty to aggravated robbery and theft of property in relation to the Shorty Williamson shooting, and was sentenced to twenty years. Hood was married to Dunn's aunt,

and the two had known each other for eight or nine months prior to the robbery. Dunn testified that Hood came to him and "said we was going to go and rob Mr. Williamson." He said that he rode with Hood, who was driving his aunt's car, to Shorty Williamson's gas station. Dunn testified that Hood parked the car and followed Dunn into the gas station, but then Hood "seen somebody and left." According to Dunn, he pointed a gun at Williamson, who in turn struck at the gun, causing it to discharge. Williamson fell to the floor, and Dunn took some money from Williamson's pocket and ran. Dunn further testified that the gun was a "chrome, black handle .357," with a rubber handle, that he obtained from Hood. Hood had told Dunn that he was holding the gun for a friend. After the shooting, Dunn said that he went back to Hood's car and Hood drove him back to his home in Wilmot. While they were leaving, Dunn saw Leroy Harris pulling into the gas station. Dunn added that he gave Hood the money and the gun, and that Hood said he would hide the gun and they would split up the money later.

Joe Tullos was a captain with the Ashley County Sheriff's Reserve Department. On January 4, 1994, he received a radio dispatch about a "teal-green small import" that was involved in an armed robbery in Hamburg. That morning, Tullos encountered a vehicle matching the description about a mile and a half east of Wilmot. He observed the vehicle turn into the Wilmot city dump off of Highway 52. He waited for about three minutes, and then saw the vehicle pull out of the dump and continue down the highway. After following the vehicle for three miles, he pulled the vehicle over. He then arrested Hood, the only occupant of the vehicle. After Wilmot chief of police Glen Lawson arrived on the scene and advised Hood of his *Miranda* rights, Hood made the following statement: "Man, I never got out of the car over there."

Officers William Setterman and David Oliver aided in the investigation of the robbery. During an interrogation, Hood volunteered to take them to the sight where he disposed of the gun. Hood took Setterman, along with Hamburg chief of police David Sims, to the dumpsters east of Wilmot, off of a gravel road. In a grassy area Sims recovered a chrome .357 revolver. The revolver contained one spent shell casing with five live rounds.

Hood was charged with theft of property and aggravated robbery. The trial court granted Hood's directed verdict motion with respect to the theft of property charge. However, the jury ultimately convicted Hood for aggravated robbery, and sentenced him to fifty years' imprisonment.

1. Sufficiency of the evidence.

Hood challenges the sufficiency of the evidence to support his conviction for aggravated robbery. The State does not address the merits of his argument, but responds that the issue is not preserved for appellate review because Hood failed to abstract the trial court's ruling on the renewal of his directed verdict motion. We agree. At the close of the State's case, Hood's abstract shows that he made a specific directed-verdict motion on the aggravated robbery charge alleging that there was insufficient evidence of corroboration. The abstract also reflects that the trial court found that there was sufficient evidence of corroboration to give the case to the jury. Following the close of all evidence, Hood made a general renewal of "all earlier motions," and the abstract demonstrates that closing arguments were then made.

While Hood's abstract contains his general renewal of the earlier, specific directed-verdict motion, *see Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995) (renewed directed-verdict motion "I would renew all previous motions I have made" at close of evidence sufficient for appellate review), it fatally omits the trial court's ruling on this motion. This court has often emphasized that the record on appeal is limited to that which is properly abstracted. *See, e.g. Moncrief v. State*, 325 Ark. 173, 925 S.W.2d 776 (1996). Without the trial court's ruling, we have no basis for a decision, and are precluded from a review of this point. *See Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996); *Donald v. State*, 310 Ark. 197, 833 S.W.2d 770 (1992).

2. Sufficiency of the transcript.

Hood argues that the record in the case is inadequate for purposes of appellate review. Hood originally filed a motion to supplement the transcript, arguing that the record omitted a February

7, 1995, suppression hearing and a bench conference at trial regarding Hood's objection to the State's question to Setterman, "[W]here you or did you recover anything of evidentiary value in the investigation of Shorty Williamson's Service Station in Hamburg?" *See Hood v. State*, 324 Ark. 457, 920 S.W.2d 853 (1996) (per curiam). We granted the motion to supplement and remanded to reconstruct and settle the record. *Id.* We noted the resolvable nature of the omissions involved, and observed that even if a transcript of the proceedings could not be made, the record could nonetheless be settled pursuant to Ark. R. App. P.—Civ. 6. *Id.*

On June 6, 1996, the trial court held a hearing to reconstruct the record. Apparently, the court reporter who made the original record of the case, Val Dixon-Sims, failed to produce certain tapes, thus making it impossible to transcribe certain portions of pretrial hearings and a bench conference. When the initial transcript was received from Dixon-Sims, it contained none of the pretrial hearings. On remand, court reporter Margaret Norton was able to use existing tapes to prepare a partial transcript of a majority of the pretrial hearings, but there were no tapes at all of a particular suppression hearing, and the audio quality of the bench conference was inadequate.

Defense counsel explained at the June 6, 1996, hearing that the bench conference concerned the trial court's previous failure to rule on his motion to suppress. Because the trial court had not yet issued a formal ruling on the motion, defense counsel was concerned as to whether Setterman would be able to testify to the circumstances surrounding the recovery of the gun, given that it was the fruit of an allegedly coerced statement. Defense counsel further opined that "the Court must have overruled my objection. . . because the witness then went ahead and began testifying to where they went and what they got and what they did. That appears to me to be what happened at that bench conference." The prosecutor likewise stipulated to this version of events at the bench conference.

On June 24, 1996, a supplemental record was filed with this court containing a transcription of multiple pretrial hearings along

with the June 6, 1996, reconstruction hearing. On October 21, 1996, the State filed a motion to remand with this court arguing that while the record had been settled with respect to the June 20, 1995, bench conference, it had not been settled with respect to the suppression hearing testimony of Officers Oliver and Tommy Breedlove. We granted the motion, and the trial court held another reconstruction hearing on December 4, 1996. At this hearing, defense counsel explained that tape-recorded interviews were taken from Hood on January 4, 5, and 6, 1994. According to defense counsel's recollection, the tapes of the interviews showed that Hood was ill at the time of the statements, as indicated by Hood's constant coughing on the tapes. Defense counsel also recalled that the police used profanity, derogatory statements, and manipulation to obtain the statements.

The remainder of the December 4, 1996, hearing focused on the reconstruction of Breedlove's and Oliver's testimony regarding their interview with Hood on January 4, 1994. This testimony was apparently given originally at the February 7, 1995, suppression hearing. Both the prosecutor and defense counsel attempted to recollect the questions and answers asked of Breedlove. Breedlove was also called as a witness and asked questions regarding his recollection of his testimony at the suppression hearing. The prosecutor then read a transcript of Hood's January 4, 1994, interview prepared by defense counsel for the suppression hearing. Both the parties informed the trial court that this was an accurate recitation of the testimony adduced at the suppression hearing.

According to defense counsel, the only matter left unresolved was Officer Oliver's statement that he was attempting to intimidate Hood during the interview. The prosecutor responded that Oliver did admit that he was trying to intimidate Hood, as well as that he had made misrepresentations to Hood regarding statements Dunn had made. Defense counsel then replied "that's an accurate recitation of what happened at the suppression hearing, Your honor, in its entirety, I think." The trial court suggested that Officer Oliver be called as the next witness at the reconstruction hearing, to which defense counsel responded that it would be unnecessary to call Oliver, given the prosecution's stipulation to

the "intimidation" testimony. Subsequently, the trial court again inquired whether Oliver's testimony was necessary, and defense counsel responded:

> Your honor, I think the prosecutor and I agreed to what occurred, what was said, what we've read into the record. So I, it surprised me, I didn't think we would be, but I don't believe we'll have to put him on the stand and question him because I believe we stipulated to what he said. The arguments that were made to the Court I think have been recreated. So I don't see any need to put him on the stand and question him, Your Honor.

On direct review, Hood now claims that the record is insufficient for our review. He first contends that the exact dates of the three suppression hearings are unknown. This is not the case. The first supplemental transcript shows that a suppression hearing was held on February 3, 1995, where Officers Sims and Setterman testified. The first supplemental transcript also shows that a suppression hearing was held on May 15, 1995, where Charlotte Tadlock testified to Hood's health and physical condition when he was being interrogated in January. Hood also testified at this May 15, 1995, hearing. Both parties agree that there was another suppression hearing where Oliver and Breedlove testified, and that it occurred between the February 3 and May 15 hearings. While the parties never technically settled when this hearing occurred, the weight of the evidence suggests it was held on February 7, 1995.

Hood also complains that the reconstruction hearings lack substance. Again, this argument is without merit. The two supplemental transcripts total almost one-hundred fifty pages and transcribe at least in part all of the missing pretrial hearings, except for the second suppression hearing where Breedlove and Oliver testified. Moreover, the parties agreed that the December 4, 1996, reconstruction hearing adequately established the testimony from the missing suppression hearing. Thus, the record is sufficient to allow this court to review the voluntariness of Hood's statement. Hood also argues that the record is insufficient because it lacks a transcript of the bench conference on Hood's objection to Setterman's testimony. However, at the June 6, 1996, reconstruction hearing, the parties agreed that the subject of the bench

conference was the lack of a ruling on the motion to suppress, which motion was ultimately denied.

Finally, we must take note of two recent cases involving problems with the same court reporter, Val Dixon-Sims. In both *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997), and *Jacobs v. State*, 327 Ark. 498, 939 S.W.2d 824 (1997), we reversed the appellants' convictions and remanded for new trials because the trial transcripts were inadequate for appellate review. However, *McGehee* and *Jacobs* both involved life sentences, thereby implicating Ark. Sup. Ct. R. 4-3(h). Without an adequate record, the requirements of Rule 4-3(h) were not satisfied. *See McGehee, supra*; *Jacobs, supra.*

The present appeal is not a Rule 4-3(h) case. We are therefore limited to considering only what is argued by the appellant on appeal. The trial transcript, when combined with the supplemental transcripts generated from the reconstruction hearings, provides us with an adequate record to fully consider the merits of Hood's appeal.

3. Voluntariness of statement.

Hood gave three separate interviews to the police on three separate days. None of these statements was actually admitted into evidence at trial. However, Hood argues that the gun, which was recovered on the morning of January 5, was the fruit of a coerced statement on January 4. Thus, Hood maintains that the gun and its ammunition should have been suppressed at trial.

A custodial confession is presumed involuntary and the burden is on the State to show that the confession was voluntarily made. *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), *cert. denied*, 117 S. Ct. 246 (1996). 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. *Kennedy v. State*, 325 Ark. 3, 923 S.W.2d 274 (1996). 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, the repeated and

prolonged nature of questioning, or the use of physical punishment. *Kennedy, supra*; *Oliver v. State*, 322 Ark. 8, 907 S.W.2d 706 (1995). Other relevant factors in considering the totality of the circumstances include the statements made by the interrogating officer and the vulnerability of the defendant. *Kennedy, supra*; *Oliver, supra.*

According to the officers' testimony, the January 4 interview with Hood began at approximately 3:40 and ended one hour later. Hood was read his *Miranda* rights, and Hood executed a form acknowledging his rights and waiving them. According to Officer Breedlove, Hood was coughing and appeared to have a cold during the interview. Breedlove admitted that Officers Oliver and Setterman used profanity during the course of the interview. At another point in the interrogation, Officer Breedlove asked Hood "if he knew what a moron was." At one time, an interrogating officer asked Hood, "Do I have moron written on my forehead?"

Later in the interview, Hood states that he knew a man who said he was going to get money from the bus station about a week prior to the robbery. In response, Oliver asks "Marcus, you're still stammering around. I don't believe that you let a seventeen-year old push you into this. I don't care what you say, you know about it." Oliver later says, "The truth is going to come out. We'll discuss it again. The gun where it came from, don't make us go back over this again, you will be up a creek. Tell me the truth. It won't hurt you, or will not hurt you."

Hood then admits that he gave Dunn the gun, and says that he "bought the gun from Clearly." The following sequence occurs next[1]:

> OFFICER: I don't think there is any use in taking a statement from you. Where is the gun?
>
> HOOD: He has the gun.
>
> OFFICER: Where is the gun and where is the money?

---

[1] The January 4, 1994, interrogation was reconstructed by the prosecutor and defense counsel from an abbreviated transcript prepared by defense counsel from the tape-recorded interrogation. The prosecutor read from this transcript in a narrative form, and both parties made additions and clarifications as it was read. For the sake of clarity, we have reproduced the interrogation in question and answer form.

HOOD: You all can take me back, I tried to tell you.

OFFICER: You have to live with this, I don't. Let me explain this to you where you can understand. I'm going to test your hand. What if he [Dunn] says you shot the man? I have to get prints off the gun to prove he lied to me, otherwise there is no proof you didn't do the shooting yourself. What if [Dunn] told me this? We know he shot the man. He said he did the shooting. Without the gun we can't prove it. It's for your benefit.

At this point Hood admits that the gun is in a ditch on Highway 52 where Tullos turned around:

OFFICER: Where is the billfold? I need it to show that he pulled it out. What is it going to look like if he said you pulled it out of his pocket? I believe the other guy is going to squirrel out of it and leave Marcus hanging.

OFFICER OLIVER: Your wife is in okay shape at the hospital. A parole hold has been put on you. They'll be here in the morning to get you. I need a gun and billfold if you don't want to take the rap for shooting the man.
[Hood provides directions to the gun].

OFFICER: Are you ready to talk to us? I want to know about the gun, the money and the wallet.

HOOD: I could tell you something later on if you let me talk to him [Dunn]. I will tape record him [Dunn].

OFFICER: Why are we delaying this, Marcus?

HOOD: He showed me about eleven $100.00 bills plus a stack of twenties.

OFFICER: Your wife went in the hospital yesterday. Your health insurance is not too good. Hospitals want money, don't they? You didn't have any money to pay them. How the hell is [Dunn] supposed to see you from back here where you say you were parked at? Why did you let him leave with the money? Why didn't you take some?

HOOD: Because I didn't want money on me when travelling. He was to give it to me later. [Dunn] meant to pay Leroy off so he wouldn't tell on me.

OFFICER BREEDLOVE: The question is how long are you going to go back to the pen and how much is your bond going to be. If I have a chance to make a recommendation on what you said today to the judge it will be $100,000 bond. That's what I would recommend.

OFFICER OLIVER: I'm going to arrest your wife also.

HOOD: She didn't have anything to do with it.

OFFICER BREEDLOVE: I want a written statement from you saying what happened, everything.

HOOD: I can't spell. You can't read it.

OFFICER: I will pick it up after a while. How far did you get in school?

HOOD: Seventh or eighth grade.

This concluded the interview. At the suppression hearing, Officer Oliver admitted that he was trying to intimidate Hood.

With regard to the statements made by the police to Hood, it is significant that there were no threats of physical violence against him or promises of leniency. In two United States Supreme Court cases cited by Hood, *Arizona v. Fulimante*, 499 U.S. 279 (1991), and *Payne v. Arkansas*, 356 U.S. 560 (1958), credible threats of physical violence were levied against the accused to obtain confessions. As to the officer's assertions regarding Dunn's alleged statements, we have held that misrepresentations of fact, while relevant, do not necessarily render an otherwise voluntary confession inadmissible. *See Kennedy v. State*, 325 Ark. 3, 923 S.W.2d 274 (1996); *Tucker v. State*, 261 Ark. 505, 549 S.W.2d 285 (1977). In *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987), we "[found] no fault with an interrogator trying to persuade an accused to tell the truth, even though there may be misrepresentations of fact made by the interrogator, so long as the means employed are not calculated to procure an untrue statement and the confession is otherwise voluntarily made." Moreover, persistent questioning based upon the interrogator's assumption of the accused's guilt will not render a statement involuntary, particularly when the accused's story is presumed to be untrue on the basis of statements given by other persons present at the time of the crime. *Noble v. State*, 319 Ark. 407, 892 S.W.2d 477 (1995). As to the officers' appeal to Hood to consider the health of his wife and the threat of her arrest, we have observed that the police may, without violating an accused's rights, attempt to play on his sympathies or explain to him that honesty is the best policy, provided that the accused's decision to make a custodial statement is voluntary in the sense that it is the product of the accused's exercise of his free will. *Id.*; *see also Misskelley, supra* (police may use

some psychological tactics in eliciting a custodial statement from an accused). Although the interrogating officers' statements were obviously intended to influence Hood, we are unable to say that they were improper or contrary to basic notions of fairness, or that they procured an untrue statement.

With regard to Hood's vulnerability, he was twenty-two years old at the time of the interrogation. Additionally, he executed a rights-waiver form at the time of the interview. On January 4, 1994, he was only interrogated for approximately one hour, and was not handcuffed or bound. Also, Hood "was no stranger to the criminal justice system," a relevant factor discussed in *Misskelley v. State, supra.* Officer Breedlove testified that Hood never requested any food or bathroom privileges. Charlotte Tadlock, an emergency medical technician, examined Hood after he complained about feeling ill. She said he had a slight fever of only one-hundred degrees, which was "nothing major" in her opinion. While Hood said that he had a 104-degree temperature, this is simply a credibility determination best resolved by the trial court. Tadlock said that she gave him two aspirins, and observed that Hood appeared to be alert. Given the totality of the circumstances, we find that the trial court was correct in concluding that the January 4 statement was voluntary.

4. Failure to administer lesser-included instructions.

For this point, Hood argues that the trial court erroneously failed to instruct the jury with regard to the lesser-included offense of simple robbery. Hood's abstract shows that he moved for an instruction on simple robbery pursuant to "AMCI 301," which he proffered as Defendant's Exhibit Two, in addition to the "AMCI 301" transitional instruction proffered as Defendant's Exhibit Three. Hood's abstract also shows that he proffered "AMCI 2103" as Defendant's Exhibit Four, along with requested additions to "State's AMCI 8101" and "State's AMCI 8301", proffered as Defendant's Exhibit Five, as well as an objection to "State's 9202."

Hood has failed to abstract the instructions that were administered to the jury. More importantly, he has failed to

abstract his proffered instructions. Even the record lacks the substance of the various "defendant's exhibits" that Hood proffered. A proffered instruction must be included in the record and abstract to enable the appellate court to consider it. *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996). We thus decline to consider the merits of Hood's argument.

Affirmed.

NEWBERN, J., concurring.

BROWN, J., concurring.

DAVID NEWBERN, Justice, concurring. The majority opinion is correct. The ruling on Mr. Hood's directed-verdict motion renewal does not appear in his abstract of the record. As we limit our review of the record to that which is contained in the abstract, there was, so far as we allow ourselves to be concerned, no ruling on the motion. In view of the fact that the abstract shows that the trial continued after the motion was made, we may well be in contempt of common sense as Justice Brown allows in his concurring opinion. If so, it is not the first time.

The system of presenting the record to this Court through abstracting, and limiting our review to that which has been abstracted, has served this Court for a number of years. The abstracting method has indeed been a major contributor to our practice of keeping current despite a crushing load of cases. Anyone familiar with that system, however, must be aware that it has not been free of criticism and that resulting technical rulings have deprived this Court and our Court of Appeals of opportunities to rule on the merits of cases. We have always justified the system by repeating that there are seven justices on the Court and only one record of trial. *See, e.g., Cosgrove v. City of West Memphis*, 327 Ark. 324, 938 S.W.2d 827 (1997); *Duque v. Oshman's Sporting Goods*, 327 Ark. 224, 937 S.W.2d 179 (1997). Thus, each of us must have an abstract of the record because it is too much trouble or too time consuming for us to share the record.

On the other side of the "only one record" coin, however, we often say we may "go to the record" to affirm. *See, e.g., Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995); *Haynes v. State*,

314 Ark. 354, 862 S.W.2d 275 (1993). We obviously mean that, even though the abstract does not contain an essential item, if we can find it in the record we may recognize its existence if the result is to affirm. There also have been instances, exemplified by Justice Brown's concurring opinion in this case, in which time has been found by a justice to go to the record to see what happened at the trial. Apparently the justice who possessed the record while the case was on appeal in this Court had no objection to sharing it with Justice Brown. So long as all appellate judges and justices maintain offices near each other and near the Clerk's Office — in our case all in the same building — records of trial are available to any who care to see them.

The time has come again to consider being less technical. In our *per curiam* order of July 15, 1996, entitled, "In re: Supreme Court Rule 1-2, and Other Matters Related to the Jurisdiction of the Supreme Court and the Court of Appeals," we noted the expansion of the Court of Appeals and discussed the role each court should play in the context of revising the manner of dividing jurisdiction. We provided for the cover sheet as the first step in identification of cases which should come to the Supreme Court where they will be decided by seven justices sitting *en banc* as opposed to, usually, the panels of three judges in the Court of Appeals. With the expansion of the Court of Appeals that Court will soon be relieved of the burden of the large backlog of cases it has endured the last few years. Contemplated revisions of our rules will put an end to the Supreme Court's having to decide as many as ten or twelve cases per week so as not to develop a backlog.

By a *per curiam* order of October 17, 1988, entitled "*In Re: Revision of Rules of the Supreme Court,*" we began an experiment in which parties to cases on appeal in this State were allowed to forego presenting abstracts and to present instead an expanded "statement of the case" to be supplemented as necessary with an appendix containing photocopies of crucial pages from the record of trial. The system we devised was much the same as those used in other states and by the federal courts. Our announced purpose was to alleviate our concern "about whether our system requiring

abstracting of the record is worth the effort lawyers must devote to it, and thus the money litigants must invest in it, in each case."

Our appendix system was flawed in some ways. For example, it did not require record-page references in the statement of the case, and it had no provision for presenting a joint appendix. The main reason we called a halt to it, however, was not that such problems were insoluable; rather, it was that lawyers could not seem to get used to the idea that the statement of the case was the primary replacement for the abstract and that the appendix was to be used only as a resource tool to resolve any potential or extant dispute about facts or what had happened at the trial. Lawyers who had been made justifiably paranoid by our decisions refusing to decide the merits of cases due to incomplete abstracts seemed to have the feeling they needed to present far more than was necessary in an appendix. Appellate judges complained of needing wheel barrows to carry briefs with their appendices. There seemed to be no realization on the part of attorneys who were not accustomed to that system through federal court practice that there was no draconian provision for affirmance in the event of an incomplete appendix.

We ended the appendix experiment by our *per curiam* order of June 10, 1991, entitled *In Re: Revision of the Rules*, which we concluded with the following language:

> If we find a way to bring our case load and that of the Court of Appeals within reason, we may return to the appendix system, with some revisions, because we continue to wish to implement the goals stated in our original order. We would like our system to be as inexpensive and simple as possible. Under other circumstances we will be able to exercise the patience required to permit lawyers and litigants to become accustomed to the change and to fine tune it with revisions.

In a profession devoted to achieving justice and fairness through precedent, stability and reliance upon the past are very important; unwillingness to change is a resulting trait. Given (1) the fact that this Court and our Court of Appeals may at last be in a position to exercise the patience necessary to facilitate a major change in the manner of presenting cases to us, (2) a better effort on our part to produce a less flawed appendix-system rule, and (3)

a stronger effort to educate lawyers and litigants concerning the proper use of such a system, we should be able to decide our cases more often on their merits than on the failures of lawyers or litigants to tell us what is in a record of trial which is usually just down the hall and certainly present in our conference room as we hold our decisional conference.

If we and our Court of Appeals can find the fortitude to implement a system that will permit us to reach the merits of cases which hitherto have been caught in the abstract trap, the administration of justice in Arkansas will be better served.

ROBERT L. BROWN, Justice, concurring. I concur in this decision but write separately because I would reach the merits of Hood's argument and affirm based on sufficient evidence.

In *Walker v. State*, 318 Ark. 107, 883 S.W.2d 831 (1994), we established the bright line rule that a defendant in making a motion for directed verdict must state the specific grounds supporting the motion. The *Walker* decision was followed by *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995). In *Durham*, we held that when a criminal defendant makes a specific motion for directed verdict at the close of the State's case and proceeds to present evidence on his own behalf, a general renewal of all motions at the close of the evidence suffices to preserve a sufficiency argument. *See also* Ark. R. Crim. P. 33.1. In the instant case, Hood complied with the requirements of *Durham v. State, supra,* and apprised the trial court fully of the argument he now makes on appeal. The trial court then continued the trial, according to the abstract, which is ample indication that the renewal motion was denied. (Indeed, the record includes the trial court's ruling denying the motion.)

The majority declines to reach Hood's sufficiency argument for the sole reason that his abstract does not reflect a ruling on the renewal motion. Under our rules, an abstract is "flagrantly deficient" only when it fails to include "such material parts of the . . . record as are necessary to an understanding of the questions presented to the Court for decision." *See* Ark. S. Ct. R. 4-2(a)(6) & 4-2(b)(2). Here, the abstract clearly reflects a renewal of the directed-verdict motion followed immediately by the trial court's

continuation of the trial. Common sense should take hold at this juncture and direct this court to the obvious conclusion that the motion was denied.

In a comparable case just last year, three justices of this court concluded that when the abstract showed that a lawyer renewed a motion for directed verdict and the trial judge immediately commenced to instruct the jury, it was clear that the trial judge had, by his actions, denied the lawyer's renewed motion. *See Danzie v. State*, 326 Ark. 34, 45, 930 S.W.2d 310, 316 (1996) (Dudley, J., concurring). The same holds true in this case.

The abstract sufficiently shows that the renewal motion was denied. I would reach the merits.

Shirley A. CHLANDA and Thomas D. Ledbetter *v.* Lewis KILLEBREW

96-1382 945 S.W.2d 940

Supreme Court of Arkansas
Opinion delivered June 9, 1997

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Peter B. Heister* and *Ledbetter & Associates, Ltd.*, by: *Thomas D. Ledbetter*, for appellants.

Davis & Goldie, by: *James Goldie*, for appellee.

RAY THORNTON, Justice. This is an appeal from the trial court's order awarding attorneys' fees pursuant to Ark. Code Ann. § 16-22-309 (Repl. 1994) and Ark. R. Civ. P. 11. Appellant Shirley Chlanda and her attorney, appellant Thomas D. Ledbetter, were ordered to pay the amounts of $ 5,000.00 and $ 7,663.93 respectively as partial payment of Lewis Killebrew's attorney's fees expended by Mr. Killebrew in defending an action for conversion. Both appellants argue on appeal that the trial court erred in finding that they filed a lawsuit that was not well grounded in fact and could not be supported by a good-faith argument for the extension, modification, or reversal of existing law. Their argument is well taken, and we reverse and remand.

The facts of the underlying case are set out in full in *Chlanda v. Killebrew*, 326 Ark. 791, 934 S.W.2d 227 (1996). Those facts necessary to understand the instant case are as follows. Mr. Killebrew was appointed coadministrator of the estate of Milford Fuller, who was Mrs. Chlanda's brother-in-law. After Mr. Fuller's death, Mrs. Chlanda claimed that Mr. Killebrew was holding some jewelry, which had been given to her by her sister, Evelyn Fuller, who had predeceased Mr. Fuller by less than two months. Mr. Killebrew maintained that he did not have the jewelry. The

trial court granted summary judgment, and we reversed, holding that there were disputed factual issues to be resolved. It was during the pendency of this appeal that Mr. Killebrew petitioned the trial court for sanctions.

To obtain an attorney's fee pursuant to Ark. Code Ann. § 16-22-309(a)(1), the prevailing party must show that there was "a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney . . . ." *Id.* To obtain an attorney's fee pursuant to Ark. R. Civ. P. 11, it must be shown that an attorney or party signed a pleading not grounded in fact, not warranted by existing law, or good-faith argument for a change in the law, or filed for an improper purpose. Ark. R. Civ. P. 11; *Cowan v. Schmidle*, 312 Ark. 256, 848 S.W.2d 421 (1993).

We determined in *Chlanda I* that disputed factual issues remained unanswered. *Chlanda v. Killebrew*, 326 Ark. at 794, 934 S.W.2d at 228. Therefore, it cannot be said that appellants were pursuing a claim that was not grounded in fact. Such violations under the statute and the rule are established only when it is patently clear that a claim has no chance of success. *See Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995).

It is apparent from the record that the trial court based its assessment of damages against Mr. Ledbetter in part on the numerous discovery violations that he committed; however, we do not reach the issue of whether sanctions for discovery violations would be appropriate. We note that the federal rule specifically states that Rule 11 "does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to provisions of Rules 26 through 37." Fed. R. Civ. P. 11(d).

In summary, because an essential element for sanctions under Rule 11 or Ark. Code Ann. § 16-22-309 is a determination that appellants were pursuing a claim that was not reasonably based in fact or law, and because that issue was resolved by our decision in *Chlanda I*, the award of attorney's fees must be reversed and remanded.

Reversed and remanded.

GLAZE, J., concurs.

TOM GLAZE, J., concurring. I concur but do not join the majority's analysis concerning the discovery violations or application of Fed. R. Civ. P. 11(d).

[redacted]

Kathy PORTER *v.* Larry PORTER

97-228 945 S.W.2d 376

Supreme Court of Arkansas
Opinion delivered June 9, 1997
[Petition for rehearing denied July 14, 1997.*]

[redacted]

* NEWBERN, J., not participating.

Daggett, Van Dover & Donovan & Perry, PLLC, by: *Doddridge M. Daggett*, for appellant.

Green & Henry, by: *David G. Henry*, and *Carl J. Madsen*, for appellee.

RAY THORNTON, Justice. Kathy and Larry Porter, appellant and appellee, respectively, were married in the early 1970s and moved into a home owned by appellee's father, J.W. Porter, where they resided during the entire course of their marriage. During the marriage, appellee's father incorporated Porter's Seed Cleaning, Inc. All of the 100 outstanding shares in the corporation were initially issued to appellee's father. He retained fifty-one shares and gave twenty-five shares to appellee and twenty-four shares to his wife, appellee's mother.

Appellee filed a complaint for divorce against appellant on February 28, 1995. Appellant counterclaimed for divorce, and on January 2, 1996, the chancellor granted the divorce on appellant's counterclaim. Appellant claims error in three points of the property division.

First, appellant contends that the increase in value of appellee's twenty-five shares of stock in Porter's Seed Cleaning, Inc., is marital property in which she has an interest. Second, appellant complains that the trial court should have awarded her the dollar value of one-half of her husband's interest in a closely held corporation, Jay-Lynn Farming, Inc., rather than awarding her one-half of his stock ownership. For her third point, appellant claims that she should have been awarded a marital interest in the increased value of the farm house in which she resided based on the worth

of the home when she first moved into it subtracted from the worth of the home at the time of the divorce.

We cannot determine from the abstract whether the chancellor was presented with evidence of the value of the 25 shares of gift stock in Porter's Seed Cleaning, Inc., at the time of the divorce, and no evidence was abstracted to reflect that this was not a gift. We also cannot determine from the abstract whether evidence was presented to the trial court to establish the value of the closely held corporation, Jay-Lynn Farming, Inc., nor do we find that this issue was properly preserved for appeal. Finally no evidence was abstracted which would challenge the determination that the farm house belonged at all times to appellee's father, and that all improvements to this property were paid for by the father.

It is well established that the abstract is the record for purposes of appeal. *Allen v. Routon*, 57 Ark. App. 137, 943 S.W.2d 605 (1997). We have recently held that Rule 4-2(a)(6) of the Arkansas Supreme Court Rules is violated when there are no references to pages in the abstract and only transcript citations were supplied to the court. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994). A transcript will not be examined to reverse a lower court. *Oliver v. Washington County Arkansas*, 328 Ark. 61, 940 S.W.2d 884 (1997). The burden is clearly placed on the appealing party to provide both a record and an abstract sufficient for appellate review. *Cosgrove v. City of West Memphis*, 327 Ark. 324, 938 S.W.2d 827 (1997); *Lee v. Villines*, 328 Ark. 189, 942 S.W.2d 844 (1997). Issues unsupported by convincing argument or authority will not be considered by this court. *Schmidt v. Person, Evans & Chadwick*, 326 Ark. 499, 931 S.W.2d 774 (1996). This court will not entertain an argument when it cannot be determined from the abstract what arguments were made to the lower court. *Cosgrove*, 327 Ark. at 328, 938 S.W.2d at 830. When previously confronted with an extensive record and numerous volumes, and where the abstract was nine pages and left out relevant information and was hard to understand, this court has refused review. *Jewell v. Miller Co. Elec. Comm.*, 327 Ark. 153, 936 S.W.2d 754 (1997).

Rule 4-2(a)(6) of the Arkansas Supreme Court clearly requires that the abstract should contain "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." The purpose of an abstract is to give us an understanding of the issues on appeal. *McAdams v. Automotive Rentals, Inc.*, 325 Ark. 332, 924 S.W.2d 464 (1996). We may affirm for noncompliance with the Rule when there is a flagrantly deficient abstract.

In the matter before us for review, appellant fails to cite to her abstract at any point in her argument. The record in this case is 906 pages and is bound in seven volumes. The abstract is not quite five pages long and does not provide any testimony, authority, or documentation or even show that appellant disagreed with the chancellor's findings.

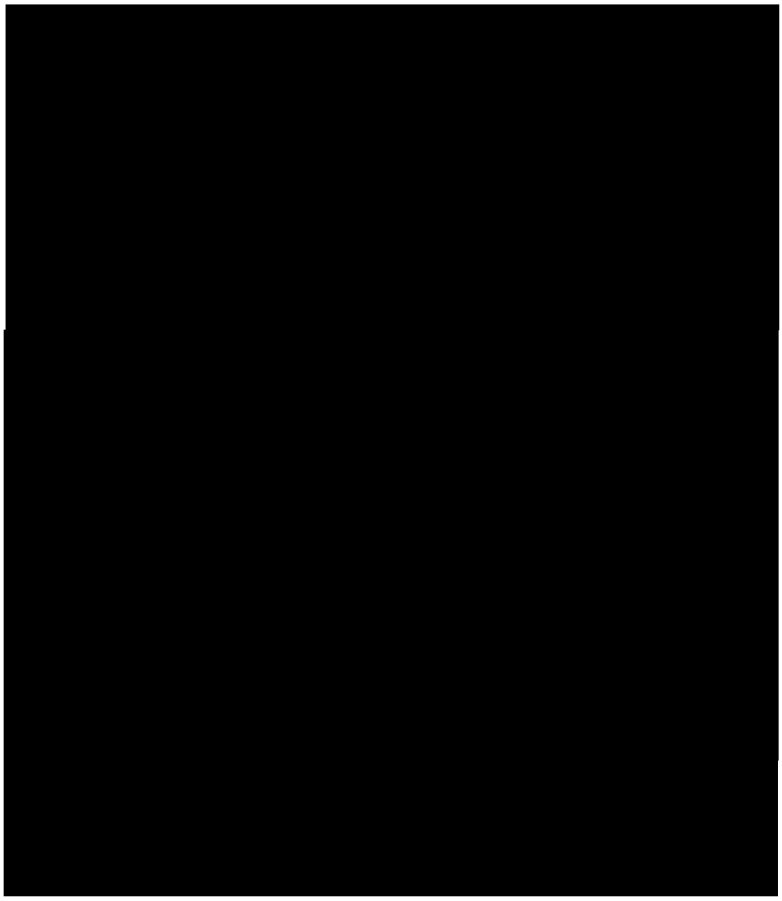
In summary, the record as abstracted is insufficient to demonstrate error, and we find that appellant is procedurally barred on all three issues. Affirmed.

NEWBERN, J., not participating.

Thomas B. STUEART *v.* ARKANSAS STATE POLICE COMMISSION

96-1129 945 S.W.2d 377

Supreme Court of Arkansas
Opinion delivered June 9, 1997
[Petition for rehearing denied September 11, 1997.*]



* GLAZE, J., would grant.

Benny M. Tucker, for appellant.

Winston Bryant, Att'y Gen., by: *Rick D. Hogan*, Deputy Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant Officer Thomas B. Stueart was terminated from the Arkansas State Police after he tested positive for marijuana use during a random drug screening pursuant to the Department's Drug Free Workplace Policy. He appealed his termination to the Arkansas State Police Commission, which upheld it. The Pulaski County Circuit Court affirmed on appeal. Stueart argued to the Commission, as he does to this court, that certain required procedures set forth in the Drug Free Workplace Policy were omitted and that this prejudiced substantial rights. This point is well taken, and establishes reversible error. We hold that because the Commission ignored its own rules in affirming Stueart's termination, its decision was based upon unlawful procedure. Ark. Code Ann. § 25-15-212(h)(3) (Repl. 1996). Accordingly, we reverse.

Pursuant to the Drug Free Workplace Act of 1988, the Arkansas State Police adopted a Drug Free Workplace Policy by General Order No. 104. The stated purpose of the order was to establish "the policies and procedures of the Arkansas State Police governing alcohol or drug testing of employees" and to prohibit "alcohol or drug abuse or drug misuse by employees, either on or off duty."

The policy sets out specific steps to be taken in the chain of custody to ensure the reliability of the testing and to prevent tampering. A Drug Custody and Control form is used to properly document each step of the testing process. This required documentation is to show who received the samples, who opened them, and who tested them. The employee is required to sign the form at the time he is tested to confirm that he is the donor of the

sample, that he has not altered it in any way, that the bottle was sealed in his presence with a tamper-proof seal, and that the information provided on the form and on the label affixed to the specimen is correct.

At the end of the testing, the laboratory is required to submit any positive results to the authorized Medical Review Officer for confirmation of results. The Medical Review Officer is defined in the policy as "[a] licensed physician or designated person who reviews all positive drug test results to determine whether or not such results were due to the tested employee's proper use of a prescribed medication." The policy states, "A positive test result shall only be reported when both the initial and confirmatory tests have been completed *and* the positive result is not adequately explained to the satisfaction of the Medical Review Officer by consultation with the employee or the employee's physician." [Emphasis in original.]

At the hearing, both sides agreed that the chain of custody was flawed because the forms were not filled out correctly by the persons in the chain. However, there was testimony at the hearing that established who received the specimen at each point, who opened it, that it remained sealed until received by the testing facility, and who tested it. The specimen was taken from Stueart at his home in Ashdown. The officer in charge of collecting the specimen took it to his home and put it in the refrigerator overnight. He then delivered it to another officer, who delivered it to yet another officer at a designated point on the highway, and that officer took it to Baptist Medical Center in Arkadelphia. The specimen was taken by courier the next day to Baptist Medical Center in Little Rock, the testing facility, where it was tested.

While Stueart did not sign the donor certification on the form, he testified that he gave a specimen to the officer as established by the testimony at the administrative hearing. However, the fatal flaw was that the final steps in the procedure were omitted entirely. These requirements are, *as stated in the policy*:

> (1) that any positive results be submitted to the authorized Medical Review Officer for confirmation of results; and (2) that a positive test shall only be reported when both the initial and

> confirmatory tests have been completed *and* the positive result is not adequately explained to the satisfaction of the Medical Review Officer by consultation with the employee or the employee's physician. [Emphasis in original.]

It was undisputed that these steps were omitted. Dr. Don Cashman, supervisor of the toxicology lab at Baptist Medical Center, testified on cross-examination as follows:

> Q. What did you do when you saw that the results of this test were positive?
> A. We sent those results to the Arkansas State Police.
> . . .
> Q. You have reviewed the policy. Now have you come to an opinion that you did not follow the policy?
> A. It's correct, yeah. Our process did not follow their policy.
> . . .
> Q. The last page of the drug policy, number 5, it says, "Submit any positive results to the authorized Medical Review Officer for confirmation of results." Was that done?
> A. No.
> Q. And the bottom part, it says in 6a, "A positive test result shall only be reported when both initial and confirmatory results have been completed *and* the positive result is not adequately explained to the satisfaction of the Medical Review Officer by consultation with the employee or the employee's physician." Was that done?
> A. There [sic] results were not submitted to a medical review officer.
> Q. So 6a was not done, either; is that correct?
> A. That's correct.

By affirming Stueart's termination in the face of an admitted failure to follow the Department's stated policy, the Commission failed to follow its own rules. This failure distinguishes this appeal from a typical appeal from an exercise of judgment by an administrative agency in which our standard of review is limited to a determination of whether the agency's action is arbitrary and capricious, or whether its findings are unsupported by the record. *See, e.g., Arkansas Dep't of Human Servs. v. Kistler*, 320 Ark. 501, 898 S.W.2d 32 (1995). Rather, we are concerned with whether the Commission's decision is based upon unlawful procedure. *Regional Health Care Facilities, Inc. v. Rose Care*, 322 Ark. 767, 912

S.W.2d 409 (1995). We have held that a procedure is "unlawful" when an agency fails to follow that which it has prescribed. *Id.* As the District of Columbia Circuit Court of Appeals stated in *Panhandle Eastern Pipeline Co. V. F.E.R.C.*, 613 F.2d 1120 (D.C. Cir. 1979), which we quoted in part in *Rose Care*, "It has become axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide [the agency] a quick way to reach a desired result does not authorize it to ignore the regulation . . . . " *Id.* at 1135. The decision of an administrative agency may be reversed "if the substantial rights of the petitioner have been prejudiced because the administrative findings . . . are . . . made upon unlawful procedure." *Rose Care*, 322 Ark. at 771, 912 S.W.2d at 411 (quoting Ark. Code Ann. § 25-15-212(h)(3)).

The rights that were prejudiced in this case were indeed substantial. Although the United States Supreme Court has definitively approved drug testing, even when conducted without a reasonable suspicion that the subject is "using," the Court has said that the collection and testing procedure must satisfy reasonableness requirements in order to protect the employee's constitutional rights. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

For such a test to be "reasonable," it must be reasonably related to the objectives of the test "as actually conducted." *National Federation of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987). We find the following guidelines instructive in determining whether a methodology of drug testing meets the reasonableness requirement:

> In determining whether the searches "as actually conducted" were reasonable, the methodology of the searches must be examined in relation to the goals of the drug testing methods. If the testing is not conducted in ways in which there is absolute confidence in the reliability of the results, then the purposes of testing are not secured. Treating someone for drug abuse who is not a drug user is counter-productive, as is disciplining someone who is not a drug user. . . . It is critical that testing procedures be accurate and reliable.

KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL, § 5.01[3][d] at 5-18.39 (1995).

Stueart clearly had substantial rights that were placed at risk by the screening for drugs. Not only did he have a right to standards of reasonableness under the Fourth Amendment and under the Due Process Clause, but he also had a substantial interest in continued employment. Adherence to the procedure adopted by the agency to ensure absolute confidence in the reliability of the results was essential to protect these substantial interests. However, in affirming Stueart's dismissal, the Commission ignored its own requirement that the results be confirmed by a medical review officer. This failure to follow its own rules deprived Stueart of the rights that the procedure was designed to protect.

The testimony of Dr. Henry F. Simmons at the hearing illustrates the importance of the responsibilities of the Medical Review Officer. Dr. Simmons, who serves as a medical review officer for the Little Rock Police Department, testified as follows:

> [A]ssuming [the chain of custody is] intact, then I have to conduct, as a licensed physician . . . an interview with the individual, unless he or she expressly declines the opportunity, to look for a medical basis for the result.
>
> If I can find a medical basis, then I can make a negative report to the company. If I can't, I have to make a positive report.

It is readily apparent from this description of this medical review officer's duties, which are identical to those of the Medical Review Officer in the Arkansas State Police Program, that Stueart was deprived of the substantial rights protected by this procedure. He was deprived of the opportunity for an expert to determine whether there might be another explanation, besides marijuana use, for the positive result. Unlike the flaws in the chain of custody, this breach cannot be cured with affidavits and testimony.

Stueart properly raised this issue during the hearings before the Commission, and it ruled that the omission of the Medical Review Officer's report was irrelevant. His argument and the Commission's response are quoted in pertinent part as follows:

> MR. YEARGAN: What I'm saying, sir, is the State Police has used the policy to terminate an individual, but it did not follow the procedures set forth in the policy to terminate him.
> CHAIRMAN EILBOTT: I understand, but my question is, what is the relevance of a medical review officer where the substance is not a substance that is due to the tested employee's proper use of a prescribed medication?
> MR. YEARGAN: It wasn't followed through. No one ever checked with him. It wasn't done.

The Commission was clearly presented with Stueart's argument that the failure to follow procedure, the required final step of a medical review officer's evaluation, deprived him of substantial rights. The Commission determined — notwithstanding its own requirement for a final evaluation by a medical review officer — that the failure to follow its own rules was irrelevant.

We hold that the Commission's failure to follow its own rules prejudiced the same substantial rights that the rules were promulgated to protect, and that this failure requires that we reverse the decision of the Commission to terminate Stueart. We direct that Stueart be reinstated and restored to the benefits of his employment, with appropriate consideration given to set-offs from earnings and benefits that he may have received. We reverse and remand to the trial court with instructions to remand to the Commission for further action consistent with the holdings of this opinion.

GLAZE and BROWN, JJ., dissent.

TOM GLAZE, Justice, dissenting. I respectfully dissent. To the Arkansas State Police Commission's credit, it has adopted a Drug Free Workplace policy, and in being called on to enforce that Policy, the Commission upheld Officer Thomas B. Stueart's test, showing he was positive for marijuana use. While minor deviations occurred in following the State Police Department's drug-testing rules when testing Stueart, the Commission upheld Stueart's test because he failed to show how those deviations in any way tainted his test results.

If a criminal defendant had been arrested and tested for drugs, and procedural deviations occurred in the handling of the

defendant's specimen, our case law would require the defendant to show the evidence had not been tampered with before the test results would be excluded at trial. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997) (The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with, but it is not necessary for the State to eliminate every possibility of tampering). Here, the majority opinion declines to follow that accepted case law. Instead, the majority adopts a rule whereby Officer Stueart can have his test excluded from the Commission's consideration even though he has failed to show his test had been tampered with or that he had been prejudiced by the manner in which the test had been processed. I submit that Officer Stueart's rights were fairly protected, and the Commission's right to terminate him was supported by substantial evidence — which, from the record, is the *only* issue addressed and decided by the Commission and circuit court.

Even the majority opinion expresses agreement that the evidence reflects that Officer Stueart's voluntarily given specimen was properly taken from Stueart and sealed, and that the specimen remained sealed until it was tested at the Baptist Medical Center in Little Rock. And while the majority seems to agree that no tampering appears to have occurred with Stueart's specimen, it complains only that (1) Stueart failed to sign the urine-donor form, and (2) no medical review officer was asked to confirm Stueart's positive test results or to consult with him to determine if there might be another explanation for the results.

Two observations need to be made. One, Stueart's failure to sign the donor form was insignificant, and he made no assertion that anything occurred to the specimen as a result of his having failed to sign the form. In fact, the record reflects Stueart's urine specimen had been taken and sealed in his presence, and the sample remained sealed until tested. Two, although no medical review officer was assigned to review Stueart's drug test to determine another explanation for the positive results, Stueart had every opportunity to present an expert at his hearing to offer explanations that might have accounted for such results. Instead, Stueart merely relied on the testimony of Dr. Henry Floyd Simmons, who gave no alternative explanation except to say, categor-

ically, "I can tell you with utter confidence that as soon as I realized that the employee applicant had not signed the chain of custody, it (the test) would have been over." Simmons stated that, in federal (not state) testing procedures, federal law required him to end his review in such circumstances. Under the State Police Department's policy, a medical review officer's function is to review all positive test results to determine whether such results were due to the employee's proper use of a prescribed medication. Significantly, Dr. Simmons and Dr. Cashman testified that there is only one FDA drug that would actually make one positive for marijuana and that was Marinol — which Stueart was not taking. Dr. Simmons's opinion concerning the law or legal validity of the chain of custody matter in this state case is irrelevant. State law places the Commission in the role to weigh the evidence to determine if discrepancies in the chain of custody in this case tainted Stueart's test.

At this stage, I would point out that there was more than substantial evidence to support the Commission's findings and termination decision, and that evidence, bearing on Stueart's test results, was largely made by Dr. Dan Cashman, supervisor of the toxicology lab at Baptist Medical Center.

Again, the evidence reveals that the specimen was taken and sealed in Stueart's presence and remained sealed until received for testing. Cashman testified that when he received the subject specimen, the external chain of custody information contained Stueart's name which was entered into the computer. The specimen was assigned lab number 62149 which followed the specimen throughout the testing procedure. This numbered, urine specimen received a value number of .2872, meaning it tested positive for THC. The specimen was then retested and THC was confirmed. Cashman further explained that he had satisfied himself that the chain of custody was proper and that he had a clean specimen.

Finally, the majority opinion cites *Regional Health Care Facilities, Inc. v. Rose Care, Inc.*, 322 Ark. 767, 912 S.W.2d 409 (1995), for the rule than an administrative agency may be reversed if the substantial rights of the petitioner have been *prejudiced* because the

administrative findings are made upon unlawful procedure. That rule is good law, but, as discussed above, Stueart simply offered no evidence concerning how he was prejudiced by the minor deviations found in the State Police Department's chain of custody in handling Stueart's specimen. While I agree the Department failed to comply with its own drug-testing procedure and Stueart's right was violated in this respect, Stueart was not shown to have been prejudiced. Obviously, his job termination is not the prejudice in issue. If that were true, a defendant charged with a drug offense could always have his test results suppressed when minor discrepancies occurred in the State's chain of custody merely because he had been arrested, tried, and convicted.

In conclusion, the record here reflects Stueart's urine sample had been taken and sealed in his presence, and the sample remained sealed until tested. Furthermore, substantial evidence reflects that the specimen tested was Stueart's and the test showed positive for marijuana. The majority opinion fails to mention any prejudice which affected Stueart as a result of the procedural deviations that occurred in this matter. The only prejudice I can conceive is that Stueart was prevented from giving his explanation as to why his tests returned positive, but Stueart was given an extensive hearing where he could have offered such an explanation and did not.[1]

Because I believe substantial evidence exists that supports the Commission's decision, I would affirm.

BROWN, J., joins this dissent.

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[1] When asked if he had had contact with marijuana, Stueart did testify that he had attended some boat races where there was a smell of marijuana, but he could not determine where the smell came from. Both Doctors Simmons and Cashman opined that passive smoke was an unlikely explanation.

Aaron Michael HODGE *v.* STATE of Arkansas

CR 97-406 945 S.W.2d 384

Supreme Court of Arkansas
Opinion delivered June 9, 1997

David Copelin, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

PER CURIAM. Appellant Aaron Michael Hodge moves the court for leave not to abstract an audiotape and videotape exhibit. Rule 4-2(a)(6) of the Supreme Court Rules provides that exhibits need not be abstracted where it is impractical to do so and where this court waives the requirement on motion.

With respect to abstracting the audiotape, Hodge maintains its quality is poor. Despite the questionable quality,

what can be abstracted of the audiotape should be abstracted, assuming the tape was played to the jury and the statement is a point on appeal. Only if the statement is completely incomprehensible should abstracting be deferred.

With respect to the videotape, a description of what is on the videotape and how it is irrelevant, unconstitutional, and prejudicial must be included in the abstract. We recently have stated that the failure to abstract the prejudicial parts of a videotape precludes our consideration of the videotape on appeal. *Evans v. State*, 326 Ark. 279, 931 S.W.2d 136 (1996); *Donihoo v. State*, 325 Ark. 483, 931 S.W.2d 69 (1996).

Denied.

Will Alfred JAMES *v.* STATE of Arkansas

CR 97-311 945 S.W.2d 941

Supreme Court of Arkansas
Opinion delivered June 9, 1997

James P. Massie, for appellant.

No response.

PER CURIAM. Will Alfred James, by his attorney, has filed a second motion for rule on the clerk. His attorney, James P. Massie, requests that the clerk accept the late record, and he admits in his motion that the record was tendered late due to a mistake on his part. Mr. Massie also requests that this court appoint another counsel in order to relieve him from representation.

We find that an error causing delay in submission of the brief on appeal, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion to allow acceptance of the belated brief. *See In re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). Because Mr. Massie admits mistake in this second motion, appellant's motion for rule on the clerk to accept the belated record is therefore granted.

Appellant also requests that the court appoint another attorney to represent appellant due to the fact that Mr. James lacks the financial resources to continue this appeal. Once the

notice of appeal has been filed, Rule 16 of the Rules of Appellate Procedure — Criminal requires that trial counsel continue to represent a convicted defendant throughout appeal unless the supreme court relieves counsel and appoints new counsel. *See also* Ark. Sup. Ct. R. 4-3(j)(1). Counsel may not abandon an appeal merely because the client lacks the money for the appeal. *Jackson v. State,* 325 Ark. 27, 923 S.W.2d 280 (1996). Regardless of the defendant's financial circumstances, when an attorney knows of his desire to appeal, the attorney is obligated to do the following before he may be relieved: (1) file a notice of appeal; (2) file a partial record, consisting of at least the judgement and notice of appeal in the appellate court, along with a motion to be relieved containing a statement of the reasons for the request to withdraw; (3) mail a copy of the motion to be relieved to the defendant. *Id.* at 29, 923 S.W.2d at 281.

This court presently has no knowledge regarding appellant's contractual relationship with Mr. Massie or his financial ability to pay Mr. Massie for services rendered. Until Mr. Massie presents a motion that includes appropriate documentation such as an affidavit of indigency, if applicable, together with a statement of reasons supporting his withdrawal, this court will neither relieve counsel from representation nor appoint new counsel. For the foregoing reasons, we deny the portion of this motion requesting that we appoint another attorney.

The present motion for rule on the clerk is granted in part and denied in part. A copy of this opinion shall be forwarded to the Committee on Professional Conduct.

Clarence MIXON *v.* STATE of Arkansas

CR 97-452 945 S.W.2d 383

Supreme Court of Arkansas
Opinion delivered June 9, 1997

John Stroud III, for appellant.

No response.

PER CURIAM. The appellant, Clarence Mixon, has previously filed a motion for rule on the clerk. *See Mixon v. State*, 328 Ark. 534, 944 S.W.2d 829 (1997). We denied the motion because Mixon's attorney, John Stroud III, had not admitted fault for filing the notice of appeal prior to the entry of the judgment and commitment order. Mr. Stroud has since submitted an affidavit accepting responsibility for failing to perfect Mixon's appeal.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to treat the motion as one for belated appeal and 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.

Jack JONES, Jr. *v.* STATE of Arkansas

CR 96-541 947 S.W.2d 339

Supreme Court of Arkansas
Opinion delivered June 16, 1997

[redacted]

Craig Lambert and *Arkansas Public Defender Commission, Capital, Conflicts, and Appeals Office*, by: *Elizabeth Johnson* and *DiDi Sallings*, for appellant.

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

W.H. "Dub" Arnold, Chief Justice. The appellant, Jack Jones Jr., was convicted of the capital murder and rape of Mary Phillips, and the attempted capital murder of Lacy Phillips. He was sentenced to death by lethal injection, life imprisonment, and thirty years' imprisonment, respectively, for the crimes. We affirm the convictions and sentences.

On the afternoon of June 6, 1995, seventeen-year-old Darla Phillips dropped her eleven-year-old sister Lacy off at Automated Tax and Accounting Service in Bald Knob, where their mother, thirty-four-year old Mary Phillips, worked as a bookkeeper. Mary was planning to take her daughter to a 3:00 p.m. dentist appointment. Darla and her fifteen-year-old brother Jessie were expecting their mother and little sister to return to their home in Bradford around 4:30 p.m. or 5:00 p.m. They never arrived.

A black-haired male entered the business before Lacy and her mother could leave for the dentist's office. According to Lacy's testimony at trial, the man had a teardrop tattoo on his face and more tattoos on his arm. The man had come into the business earlier that day to borrow some books. When he returned, he complained that he had been given the wrong book. He then told Lacy and her mother that he was "sorry," but that he was "going to have to rob (them)." He ordered Mary to lay down on her stomach, and then made Lacy lay down on top of her mother. After retrieving the cash out of the register, he took them into a small break room. The man took Lacy into a bathroom off of the break room, tied her to a chair, then left. When he returned, Lacy, now crying, asked the man not to hurt her mother, to which he replied, "I'm not. I'm going to hurt you." He began to choke Lacy until she passed out. After Lacy lost consciousness, Jones struck her at least eight times in the head with the barrel of a BB gun, causing severe lacerations and multiple skull fractures. When Lacy woke up, she saw blood and began to vomit. She went back to sleep and awakened later when police, seeing her bloodied body and thinking she was dead, were taking photographs of her.

Police found Mary's body nude from the waist down. A cord from a nearby *Mr. Coffee* pot was wrapped around her neck and

wire was tied around her hands, which were positioned behind her back. Bruises on her arms and back indicated that she had struggled with her attacker prior to her death. According to autopsy results, Mary died from strangulation and blunt-force head injuries. Rectal swabs indicated that she had been anally raped before she was killed.

Based on Lacy's description of the assailant, Arkansas State Police Investigator Jerry Brogdon went to Jones's residence and asked him if he would accompany him to the White County Sheriff's Office. At destination, Jones was read his *Miranda* rights and signed a waiver-of-rights form. He admitted that he had committed the crimes because he wanted to get revenge against the police. He reasoned that his wife had been raped, and that the police had done nothing about it.

Admission of photograph

Jones first claims that the admission of a State's Exhibit 49, a photograph of Lacy's skull taken prior to surgery, should not have been admitted into evidence at his trial. According to him, the photograph was cumulative of the other photographs introduced and was unduly prejudicial.

We recently discussed the guideposts in determining whether a trial court abuses its discretion in admitting photographs in *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 631 (1997):

> We have often stated that the admission and relevancy of photographs is a matter within the sound discretion of the trial court. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980). Although highly deferential to the trial court's discretion in these matters, this court has rejected a *carte blanche* approach to admission of photographs. *Berry v. State*, 290 Ark 223, 227, 718 S.W.2d 447, 450 (1986). We have cautioned against "promoting a general rule of admissibility that essentially allows automatic acceptance of all photographs of the victim and crime scene the prosecution can offer." *Id.* at 228, 781 S.W.2d at 450. This court rejects the admission of inflammatory pictures where claims of relevance are tenuous and prejudice is great, and expects the trial court to carefully weigh the probative value of photographs against their prejudicial nature. *Id.* at 228-29, 781 S.W.2d at 450.

> We require the trial court to first consider whether such evidence, although relevant, creates a danger of unfair prejudice, and then to determine whether the danger of unfair prejudice substantially outweighs its probative value. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403.
>
> Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand testimony. *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994). Other acceptable purposes are to show the condition of the victim's bodies, the probable type or location of the injuries, and the position in which the bodies were discovered. *Harvey v. State*, 292 Ark. 267, 729 S.W.2d 406 (1987). Of course, if a photograph serves no valid purpose and could only be used to inflame the jury's passions, it should be excluded. *Berry v. State*, 290 Ark 223, 718 S.W.2d 447 (1986). The same guidelines that apply to photographs also apply to videotapes. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

327 Ark. at 637-8. An essential element of the attempted murder charge was the degree of intent. To secure a conviction for attempted capital murder, the State had to prove that Jones, "with [a] premeditated and deliberated purpose," attempted to cause Lacy's death. Ark. Code Ann. § 5-10-101(a)(4). We have often held that the nature and extent of a victim's wounds is relevant to a showing of intent. *Camargo v. State*, *supra*; *citing Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943, *cert. denied* 117 S.Ct. 436 (1996); and *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995).

In the present case, prior to trial, the State initially sought to admit ninety-nine photographs. The trial court denied admission of these photographs on the basis that they were cumulative of others that it was admitting into evidence. The trial court, did, however, admit a second set of photographs, thirty-nine in number, that were offered by the State. The photo at issue is among these thirty-nine photographs and was the only one that Jones objected to at trial. It depicts Lacy's skull with the scalp peeled back and was taken prior to her surgery.

The trial court conducted a preliminary hearing on the admission of the photograph at issue. Dr. Harold Smith, the neurosurgeon who performed Lacy's surgery, testified that the photograph was a fair and accurate depiction of Lacy's skull prior to the surgical procedure. According to Dr. Smith, the photograph would assist him in his testimony and was the only one that demonstrated the multiple and depressed fragments of bone that were driven down into Lacy's brain. It was Dr. Smith's opinion that, without this photograph, his testimony would be more difficult for a lay person to understand. After hearing this testimony, the trial court ruled that the photo was admissible on the basis that it depicted Lacy's life-threatening and serious injuries and would help Dr. Smith explain the nature and extent of Lacy's injuries to the jury.

We agree with the trial court's assessment that the photograph aided the jury in understanding Dr. Smith's testimony regarding the nature and extent of Lacy's head injuries. The trial court very carefully considered the photograph at issue and made a well-reasoned determination to allow its admission. In sum, we cannot say that the trial court abused its discretion in admitting the photograph.

Inconsistent verdict forms

Jones also claims that he is entitled to a new sentencing trial due to the jury's inconsistent findings regarding certain mitigating circumstances. The jury in his case unanimously found, on Form One, that the following five aggravating circumstances existed: (1) Jones had previously committed another felony involving the use or threat of violence; (2) in the commission of capital murder, he knowingly created a great risk of death to a person other than the victim; (3) the capital murder was committed for the purpose of avoiding or preventing an arrest; (4) the capital murder was committed for pecuniary gain; and (5) the capital murder was committed in an especially cruel or depraved manner. On subsection (a) of Form Two, the jury unanimously found that the following three mitigating circumstances probably existed: (1) Jones cooperated with the police by voluntarily accompanying them to the police department; (2) he cooperated with the police by giving

them a full confession and accepting full responsibility for these offenses; and (3) he had a turbulent and troubled childhood.

On Form Three — Conclusions, the jury found that one or more aggravating circumstances did exist beyond a reasonable doubt at the time of the murder; that the aggravating circumstances outweighed beyond a reasonable doubt any mitigating circumstances found by any juror to exist; and that the aggravating circumstances justified beyond a reasonable doubt a sentence of death. Upon Jones's request, the trial court modified Form Three to read that, if the jury made these three findings, it *may* sentence Jones to death. On Form Four, the verdict form, the jury indicated that, after careful deliberation, it was sentencing Jones to death. The signature of each juror appears on this form. Jones does not take issue with the jury's findings on Form One, subsection (a) of Form Two, Form Three, or Form Four.

What Jones does challenge is the confusing manner in which the jury completed subsections (b) and (c) of Form Two. In subsection (b), the jury indicated that one or more of the jurors believed that the following mitigating circumstances probably existed, but that they did not unanimously agree that such mitigating circumstances probably existed: (1) Jones suffered from the mental disease or defect of attention-deficit hyperactivity disorder; (2) despite his efforts, Jones was repeatedly misdiagnosed and treated with inappropriate medications; (3) Jones's parents were often inconsistent in disciplining their children; (4) Chris Jones loves and is dependent on his father, Jack Jones; and (5) Chris Jones would be harmed psychologically if his father were sentenced to death.

Subsection (c) of Form Two instructed the jury to check the applicable factors where they believed that there was some evidence presented to support the mitigating circumstances offered, but where they unanimously agreed, after considering the evidence, that it was insufficient to establish that the mitigating circumstances probably existed. Despite the fact that subsection (c) instructed the jury not to check any factors in this section that it had checked in any other section, the jury checked the following factors that it had also checked in subsection (b): (1) Jones suffered

from the mental disease or defect of attention-deficit hyperactivity disorder; (2) despite his efforts, Jones was repeatedly misdiagnosed and treated with inappropriate medications; (3) Jones's parents were often inconsistent in disciplining their children.

In support of his argument that the jury's inconsistent findings require reversal, Jones relies on our decisions in *Camargo v. State, supra*; and *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995). We think that the facts in those cases are distinguishable from those presently before us. In *Camargo*, Form Three on "Conclusions" was the form in dispute:

> (a) ( ) One or more aggravating circumstances did exist beyond a reasonable doubt, at the time of the commission of the capital murder.
> (b) (X) The aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances found by the jury to exist.
> (c) ( ) The aggravating circumstances justify beyond a reasonable doubt a sentence of death.

The *Camargo* jury only marked (b) on Form Three. On appeal, we concluded that, because the jury failed to mark (a) and (c), a reversal of the death sentence was mandated due to a failure to comply with Ark. Code Ann. § 5-4-603(a)(b) and (c) (Repl. 1993), which requires that the jury unanimously return these three written findings in order for a death sentence to be imposed. *Id.* at 645. Unlike the *Camargo* jury, Jones's jury made these three necessary statutory findings on Form Three.

In *Willett*, the jury completed subsections (a) and (c) of Form Two in a conflicting manner. In subsection (a), the jurors unanimously found that the following mitigating circumstances probably existed at the time of the murder: (1) that Willett had no prior history of criminal conduct, (2) that he had been a model prisoner, and (3) that he had cooperated with police by voluntarily giving a statement about the crimes at issue. However, in subsection (c), the jurors found that there was evidence of the same three circumstances, but unanimously agreed that they were not mitigating circumstances. In reversing Willett's death sentence, we held that, "On this record, it is impossible to discern whether the jury found any mitigating circumstances. Therefore, we reverse

the judgments of sentence to death and remand for resentencing." *Id.* at 628. Conversely, in this case, it is not impossible to determine whether the jury found any mitigating circumstances. They clearly found three: (1) Jones cooperated with the police by voluntarily accompanying them to the police department; (2) Jones cooperated with the police by giving them a full confession and accepting full responsibility for these offenses; and (3) Jones had a turbulent and troubled childhood.

In deciding this issue, the State asks us to clarify our previous interpretations of the United States Supreme Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986). We agree that we must do so. In *Willett* and *Camargo*, we interpreted *Skipper* too broadly to mandate reversal in all cases involving errors relating to mitigating circumstances. *Willett*, 322 Ark. at 628; *Camargo*, 327 Ark. at 645.

In *Skipper*, the Supreme Court held that it was error to prohibit Skipper from introducing the testimony of two jailers and a visitor who would have testified that he had made a good adjustment in jail between his arrest and his trial. The Court held that the exclusion of this evidence denied Skipper his right to place before his sentencer all relevant evidence in mitigation of punishment, and that the exclusion of relevant mitigating evidence at Skipper's trial "impeded the sentencing jury's ability to carry out its task of considering all relevant facts of the character and record of the individual offender." *Id.* at 8. In *Willett*, our parenthetical explanation of *Skipper* went beyond the actual holding of the case. While we agree that the rule in *Skipper* provides that the exclusion of relevant mitigating evidence from the jury's consideration can never be harmless, we do not read *Skipper* to preclude the application of a harmless-error analysis to errors relating to the jury's consideration of that evidence. In the present case, Jones does not complain that he was unable to present relevant mitigating evidence to the jury. In fact, the record reflects that Jones presented his mitigating evidence through the testimony of nine witnesses who testified on his behalf during the penalty phase of his trial.

[redacted] We must also clarify our previous interpretations of Ark. Code Ann. § 5-4-603(d)(Repl. 1993), which reads as follows:

> (d) On appellate review of a death sentence, *if the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason and if the jury found no mitigating circumstances,* the Arkansas Supreme Court shall conduct a harmless error review of the defendant's death sentence. The Arkansas Supreme Court shall conduct this harmless error review by:
> (1) Determining that the remaining aggravating circumstance or circumstances exist beyond a reasonable doubt; and
> (2) Determining that the remaining aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt.
> (e) If the Arkansas Supreme Court concludes that the erroneous finding of any aggravating circumstances by the jury would not have changed the jury's decision to impose the death penalty on the defendant, then a simple majority of the court may vote to affirm the defendant's death sentence.

(Emphasis added.) We have previously interpreted this provision to allow us to conduct a harmless-error analysis only if the jury found no mitigating circumstances. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994); *Kemp v. State, supra.* However, a plain reading of this provision reveals that it applies when the jury makes an error in finding that an aggravating circumstance exists. There was no such error in this case. The statute simply prescribes a set of parameters where this court must engage in a harmless-error analysis. It does not preclude us from conducting harmless-error analysis in other situations.

We agree with the State that this issue is controlled by our decision in *Wainwright v. State*, 302 Ark. 371, 790 S.W.2d 420, *cert. denied* 499 U.S. 913 (1990). In that case, Wainwright asserted that the trial court erred in denying his motion for judgment notwithstanding the verdict, which was based on his argument that the jury made inconsistent findings regarding a mitigating circumstance. On one form, the jury unanimously found that Wainwright did not resist when arrested; on another form it found this same mitigating factor did not exist. We recognized that, although

the jury may have been inconsistent on this factor, it was clear in unanimously finding that three aggravating circumstances existed at the time appellant committed the murder. We affirmed the trial court's ruling that the error was harmless since the jury had specifically found that the aggravating circumstances outweighed beyond a reasonable doubt all mitigating circumstances, and that each juror, when individually polled, stated that he or she had voted for the death penalty. *Id.* at 387. The Eighth Circuit Court of Appeals held that the jury's inconsistent findings did not rise to an Eighth or Fourteenth Amendment violation where the jury specifically found that three aggravators outweighed beyond a reasonable doubt all mitigating circumstances. *Wainwright v. Lockhart*, 80 F.3d 1226 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 395 (1996).

In this case, the jury made inconsistent findings with regard to the following factors: (1) Jones suffered from the mental disease or defect of attention-deficit hyperactivity disorder; (2) despite his efforts, Jones was repeatedly misdiagnosed and treated with inappropriate medications; and (3) Jones's parents were often inconsistent in disciplining their children. It is unclear whether some or none of the jurors determined that these factors constituted mitigating circumstances. However, even if we were to resolve the confusion in Jones's favor and assume that some of the jurors did conclude that these factors constituted mitigating circumstances, it is clear that the jury unanimously concluded that five aggravating circumstances existed, and that these aggravators outweighed beyond a reasonable doubt *any mitigating circumstances found by any juror to exist.* To be sure, nothing in the forms indicated to the jury that a mitigating circumstance must have been found unanimously before it could be considered in the weighing process. *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341, *cert. denied* 497 U.S. 244 (1990). The jury further found that the aggravating circumstances justified beyond a reasonable doubt a sentence of death. Moreover, the jury was instructed that, if it made these three statutory findings, it *may* sentence Jones to death. Each juror signed a verdict form sentencing Jones to death, and each juror indicated orally that he or she had voted for the death penalty.

Because the jury specifically found that five aggravators outweighed beyond a reasonable doubt any mitigating circum-

stances found by any juror to exist, we conclude that any inconsistencies by the jury in the completing of subsections (b) and (c) of Form Two were harmless error. *See Wainright v. State, supra.*

Other errors

The transcript of the record in this case has been reviewed in accordance with Arkansas Supreme Court Rule 4-3(h), which requires, in cases in which there is a sentence of life imprisonment or death, that we review all prejudicial errors in accordance with Ark. Code Ann. § 16-91-113(a)(1987). No errors have been found.

Affirmed.

Jason PYLES *v.* STATE of Arkansas

CR 96-1314 947 S.W.2d 754

Supreme Court of Arkansas
Opinion delivered June 16, 1997
[Petition for rehearing denied July 14, 1997.]

Young & Finley, by: *Dale W. Finley* and *Richard H. Young*, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. The appellant, Jason Pyles, was convicted of the first-degree murder of Rick Humphries. Pyles appeals that conviction based upon seven argu-

ments of error. Specifically, Pyles contends that the trial court erred by the excluding testimony of a proffered defense witness, testimony relating to a polygraph, and testimony of a note written to the victim. Also, Pyles contends error in the admission of evidence relating to the use of Luminol testing. Pyles claims that the trial court abused its discretion in scheduling the trial well into the night, which resulted in prejudice by requiring the entire defense to be submitted hurriedly. Lastly, Pyles contends that the trial court erred in denying his motion to suppress the confession because it was not voluntary. We agree that Pyles's confession was not voluntary and, therefore, reverse and remand for a new trial.

On May 18, 1994, Pyles called the police to report finding Rick Humphries dead. The police suspected Pyles in the murder. On May 19, 1994, officers arrested Pyles at his girlfriend's parents house on two warrants for unrelated misdemeanors, criminal mischief and harassment.

When the officers arrived at the house, Pyles was asleep in a bedroom and not fully clothed. After awakening him, they left the bedroom and awaited for him to come out into the living room. When he did come out of the bedroom, he was instructed of his *Miranda* rights and given a pat down. There are disputed accounts about whether the officers found a small 35-millimeter film canister during the pat down or when Pyles emptied his pockets in order to leave personal items with a young man at the house. Despite this, the police, upon seeing the canister asked Pyles what was in it and he was evasive. The officers opened the canister and found three small packets of what was identified later as methamphetamine.

Pyles was taken into custody on the misdemeanor warrants and at that time signed an acknowledgment that he had been advised of his *Miranda* rights and also signed a waiver of those rights. Pyles subsequently confessed to the murder of Humphries.

Appellant was charged with the murder of Rick Humphries on May 23, 1994. At that time he was also charged with possession of a controlled substance with intent to deliver. He was found guilty on the possession charge on May 17, 1995. On April

17 1996, Pyles was found guilty of murder in the first degree in the Sebastian County Circuit Court.

I. Confession Obtained by False Promises

Appellant contends that his confession should be suppressed because the officers made false promises that induced him to confess. He claims that the eliciting of the confession violated his Fifth and Fourteenth Amendments rights because it was not a voluntary statement.

Pyles contends that Officer Donald Steven Howard promised him that he would "help him in every way in the world." Pyle's version of the interrogation is that the officers repeatedly told him that if the murder was done in self-defense, a court would be more lenient.

Following a long interrogation of several hours by other officers, Officer Howard began to interrogate Pyles. Officer Howard testified that he knew Pyles prior to the arrest through baseball and that he visited with Pyles about that. He testified that he told Pyles that it was important for him to tell the truth and that "they knew he did it." He also testified that he told Pyles that he did not believe that Pyles was a cold-blooded killer and that he told Pyles that he would "do everything in the world [he] could for him." Pyles claims that he confessed after Officer Howard made this statement. The State concedes that a questionable promise may have been made to the appellant.

In *Davis v. State*, 257 Ark. 388, 517 S.W.2d 515 (1974), this Court examined a confession challenged as involuntary by the appellant. We held that we would examine such challenges on a case-by-case basis and make and determine whether a confession was voluntary based upon the totality of the circumstances. Additionally, we held:

> If a police official makes a false promise which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been voluntarily, knowingly and intelligently made. In determining whether there has been a misleading promise of reward we look at the totality of the circumstances. The totality is subdivided into two main compo-

> nents, first, the statement of the officer and second, the vulnerability of the defendant. Because these two factors create such a multitude of variable facts, it has been impossible for us to draw bright lines of substantive distinction.

Id. at 267.

In determining the totality of the circumstances, the statements of the officer are first examined. If statements are clearly promises it is not necessary to look farther. *Id.*

In *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), we determined that a confession is not voluntary if the officer makes statements which are calculated to deceive. We have found no fault with an interrogator trying to persuade an accused to tell the truth or to answer questions, even though there may be misrepresentations of fact made by the interrogator, so long as the means employed are not calculated to procure an untrue statement and the confession is otherwise voluntarily made. *Id.* A misrepresentation will not invalidate a confession by the defendant as long as it does not constitute an improper influence. *Rouw v. State*, 265 Ark. 797, 581 S.W.2d 313 (1979).

In *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987), the appellant challenged the voluntariness of his confession. He voluntarily went to the station for questioning in a rape case involving his nephew. Upon his arrival, he was informed of his *Miranda* rights, and during questioning for approximately one hour, he maintained his innocence. A sergeant then related to Free information which he had learned at a seminar on sexual abuse; he told Free that adult males who have preference for young males are extremely difficult to treat, and the first step is to admit the existence of the problem. He also stated that a court could order counseling and that penitentiaries might have counseling available. It was shortly after this discussion that Free confessed to having had oral sex with the victim on five separate occasions. This court upheld the validity of that confession and noted that the sergeant was trying to persuade Free to tell the truth and that there was no evidence that his statement was meant to mislead Free.

Often it is difficult to determine whether an officer's statement is a promise of reward or leniency, a statement meant to

deceive, or merely an admonishment to tell the truth. In *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979), we allowed a statement by an interrogating officer that, "things would go easier if you told the truth." However, in *Tatum v. State*, 266 Ark. 506, 585, S.W.2d 957 (1979), we determined that the statement "I'll help you any way that I can" was a false promise. On several occasions, we have held statements to be false promises: when the officer claimed he "would do all that he can," *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1980), and when the officer said, "I'll help all that I can." *Shelton v. State*, 251 Ark. 890, 475 S.W.2d 538 (1972)

The second factor pointed out in *Davis v. State, supra*, is the vulnerability of the defendant; in instances where it is difficult to ascertain the meaning of a statement, the vulnerability of a particular defendant becomes important.

In the case before us, the record reflects that Pyles became emotional when he was interrogated by Officer Howard. Both Pyles and Officer Howard testified that Pyles held the officer's hands and wept. Pyles testified that he was emotional and tired from a long interrogation. The statement that Officer Howard made closely resembles those which we held unacceptable in *Tatum, Hamm,* and *Shelton, supra.* Therefore, we must conclude that the officer's action constituted a false promise that resulted in an involuntary confession. We, therefore, reverse on this point. We address only those remaining points that are likely to arise upon retrial.

II. Exclusion of Testimony of Elizabeth Foster

One of Pyles's defenses was that someone else, namely David Landry, could have committed the murder. Testimony of Elizabeth Foster, a former girlfriend of Landry's, was proffered. In a suppression hearing before the trial judge, she testified that Landry had a knife similar to the one that was used in the murder, but she could not identify the murder weapon as Landry's knife. She testified that Landry was a violent person, that he had a drinking problem, and that he had previously threatened her. Also, she testified that he once told her that he would cut someone's throat

if he ever murdered someone. However, she testified that she had never heard Landry make any threats against the victim.

The trial court excluded this testimony, and Pyles challenges that ruling based upon the contention that it is relevant evidence which should have been allowed. In *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993), we addressed the issue of admitting evidence intended to incriminate others of a crime charged against a defendant. We cited language from a North Carolina case and a California case as the rule which was being adopted. Specifically, we examined *Killian v. State*, 184 Ark. 239, 42 SW.2d 12 (1931), and *West v. State*, 255 Ark. 668, 501 S.W.2d 771 (1973), where the defendants attempted to introduce testimony that other parties had been responsible for the offense for which they were being tried. In each case, we upheld the trial court's refusal to allow the testimony because there was no evidence showing the other party was guilty.

In quoting two other jurisdictions, we noted:

> The Supreme Court of North Carolina stated: A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. State v. Wilson, 367 S.E.2d 589 (N.C. 1988).
>
> The Supreme Court of California has recognized that a defendant has the right to present evidence of third party culpability but stated: [T]he rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. People v. Kaurish, 802 P.2d 278 (Cal. 1990).

Following our holding in *Zinger*, it is evident that any inference that could be gained by allowing Foster's testimony does not directly prove a link between Landry and the murder. The testimony is speculative and remote. Therefore, we conclude that the

trial court did not abuse its discretion in the exclusion of this testimony.

III. Validity of Search

Pyles next contends that evidence related to the film container should have been suppressed because there was an invalid search. Pyles contends that this search was violative of Ark. R. Crim. P. 12.1(a) because there is no reasonable way that an officer could think that he could be endangered by the contents of a film canister. Also, he contends that Rule 12.1(d) was also violated because "the officers did not remember what offenses were charged in the misdemeanor warrants."

Although decisions by the court of appeals are not controlling upon this court, Pyles challenged this very search in an appeal of his drug possession conviction. *Pyles v. State*, 55 Ark. App. 201, 935 S.W.2d 570 (1996). The court of appeals held that the search was valid under Rule 12.1.

In *Pyles*, the court of appeals relied on *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935 (1982), stating,

> "our Supreme Court held that a search incident to arrest requires no additional justification, finding that a search of containers, whether open or closed, may be conducted pursuant to a lawful arrest. Our Supreme Court has also said that Rule 12.1(d) allows officers to search for evidence of any crime, not just the crime for which an accused is being arrested.

The court of appeals properly applied our holding in *Baxter*. Accordingly, the trial court properly denied appellant's motion to suppress.

IV. Scheduling of Trial

Pyles also contends that the trial court erred by requiring that the defense present his case at night without giving the jury a dinner break. Appellant contends that the trial was rushed from its initiation with the hurried selection of jurors, with the first day of trial continuing until 7:15 pm, and the second day beginning at 9:00 am with the State resting at 3:00 pm. The appellant began its

case at 3:15 pm. At 6:39 pm, appellant requested the court to adjourn until the next day; this was denied and the court stated that there would be no adjournment until the defendant rested its case. There was no break the rest of the day except an eight-minute break from 6:27 until 6:35 pm. Appellant contends that he was treated differently than the State. He contends that there was error in the trial court's continuing the trial well into the evening.

The trial court denied a request by defense attorney to adjourn for the night. The trial court admonished both attorneys saying that they both had "drug the case on and on and gone over stuff that didn't having any bearing on the case." The Court went on to say that there had been "more irrelevant testimony in this case than I have ever seen." Clearly by reprimanding both counsels, the court was not treating one side differently from the other. In fact, after the defense rested, the Court ruled that the State would have to introduce its case in rebuttal before adjourning for the night.

In *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980), we held that "it is the duty of the trial judge to see not only that the trial proceeds in accordance with law but that it proceeds efficiently and effectively and in keeping with the ends of justice. He should be free to shut off long-winded and irrelevant testimony or questioning and to confine counsel to the actual issues in the case." Also, in *Clines, Holmes, Richley, & Ondorff v. State*, 280 Ark. 77, 656 S.W.2d 684 (1984), we found no abuse of discretion for a trial court to order a five-day recess as the trial was nearing a close. The Court found that absent proof of "great prejudice" there was no evidence of an abuse of discretion.

It is not necessary for us to rule on this point as the issue will be moot when the case is retried. However, we will note that while a trial court has great discretion in scheduling a trial in a manner to allow all necessary evidence to be presented, we do not find it desirable for a trial court to hurry a trial along. Trial courts should allow both sides ample time to fairly present their sides and allow the jury sufficient time to digest and consider all of the evidence within reasonable time restraints.

All other points raised on appeal are found to be without merit and moot following our decision to remand this case for a new trial.

Reversed and remanded.

Stephen G. SCOLLARD *v.* Garrett S. SCOLLARD

96-953 947 S.W.2d 345

Supreme Court of Arkansas
Opinion delivered June 16, 1997

Edward L. Wright, for appellant.

Gill Law Firm, by: *Joe D. Calhoun*, for appellee.

DAVID NEWBERN, Justice. In 1991, Garrett Scollard, the appellant, was negotiating property rights in the course of being divorced from Mary Scollard. He was also fearful that a judgment of a Florida court in favor of his former wife, Jeanette Scollard, would be registered in Arkansas. Admittedly in order to frustrate the collection of any such judgment, Garrett Scollard, on August 31, 1991, conveyed a tract of land to his son, Stephen Scollard, the appellee, allegedly with the understanding that Stephen would reconvey it to Garrett at a later time. In November 1991, Garrett asked Stephen to deed the property to Mary Scollard, Garrett's estranged wife. Stephen refused to transfer the property and later sold it.

On January 25, 1995, Garrett sued Stephen in a circuit court action alleging constructive fraud. The Trial Court rendered a judgment for Garrett. Stephen has appealed contending that the action was barred by the statute of limitations and the evidence was insufficient to show constructive fraud. We need not address the sufficiency issue as we reverse and dismiss the case because the statute of limitations clearly barred Garrett's claim. We also decline, due to lack of citation to authority or convincing argument, to address an argument that Stephen waived his statute-of-limitations defense by not asserting it in a timely manner after stating it in his answer to the complaint.

It is undisputed that Garrett and Mary Scollard separated in October 1991, and in November of that year Garrett told Stephen to convey the property to Mary Scollard. Stephen refused. In February 1992, Garrett asked Stephen to return the land to him. Stephen refused.

On February 14, 1992, Garrett sued Stephen in a chancery court action to establish a constructive trust with respect to the land in his favor. On June 9, 1992, Garrett took a voluntary nonsuit in that action.

Stephen's sale of the land occurred in two transactions, one in 1993 and the other in 1994. Garrett brought his circuit court action on January 25, 1995. The complaint alleged that Stephen's

refusal to return the property amounted to constructive fraud and breach of contract. It prayed for damages based on the amount Stephen received for the property. Stephen's answer asserted the property had been the subject of a gift. He moved to dismiss on the ground that the action was barred by the three-year statute of limitations. *See* Ark. Code Ann. § 16-56-105.

Garrett, in response to the motion, did not dispute the fact that his action was controlled by the three-year period of limitations. He argued that his cause did not accrue until February 1992, because that was when Stephen refused to return the property to him. Alternatively, he submitted that the statute of limitations was tolled for 116 days because that was the amount of time that his 1992 action was pending in Chancery Court.

The Trial Court dismissed the action on November 30, 1995. The Trial Court granted Garrett's motion to vacate in an order filed on January 11, 1996. The Trial Court found specifically that Garrett's cause of action accrued on the last day of November 1991 but was not barred because the pendency of the chancery court action tolled the statute of limitations for 116 days. The Trial Court stated in the order that "the commencement of an action tolls the running of the applicable statute of limitations. The present [breach of contract and constructive fraud] action is essentially the same cause of action as was [the constructive trust suit] filed in 1992."

1. Statute of limitations

Assuming constructive fraud occurred, it happened on August 31, 1991, when Stephen allegedly agreed to accept the property on condition that it be returned to Garrett but intended all the while not to return it. While any action Garrett may have had accrued on that date, the running of the statute of limitations would be suspended until the fraud was discovered or should have been discovered through the exercise of reasonable diligence. *Chalmers v. Toyota Motor Sales*, 326 Ark. 895, 935 S.W.2d 258 (1996); *Cherepski v. Walker*, 323 Ark. 43, 913 S.W.2d 761 (1996). Thus, the statute of limitations did not began to run until Garrett received notice that Stephen viewed the property as his own. Ste-

phen submits that the statute began to run in November 1991 because that was when he refused to transfer the property to Mary Scollard in response to Garrett's request. Garrett does not dispute that he made that request, but he contends that the statute did not begin to run until February 1992, when he told Stephen to return the property.

We hold that Stephen's refusal to dispose of the property as instructed provided notice of Stephen's claim to Garrett. It was at that time that Garrett discovered, or certainly should have discovered, that Stephen had no intention of recognizing Garrett's claim to the property. Thus, we agree with the Trial Court that the statute of limitations began to run no later than November 30, 1991. The action was barred after November 30, 1994, unless the running of the statute was tolled.

2. Tolling

Stephen contends that the Trial Court erred by finding that the prior chancery court action tolled the statute of limitations during the 116-day pendency of that action.

Once it has been shown that the statute of limitations period has expired, to avoid dismissal the party resisting the limitations defense has the burden of showing that some of the period is tolled. *Milam v. Bank of Cabot,* 327 Ark. 256, 937 S.W.2d 653 (1997); *Cherepski v. Walker, supra.*

Garrett argues that the statute of limitations was tolled by the filing of the earlier action in chancery court. The Trial Court found support for Garrett's position in two of our cases, *Erwin, Inc. v. Arkansas Louisiana Gas Co.,* 261 Ark. 537, 550 S.W.2d 174 (1977), and *Linder v. Howard,* 296 Ark. 414, 757 S.W.2d 549 (1988), and in his conclusion that the action filed in circuit court was "essentially" the same as the action filed in chancery court "with the exception of the remedy sought."

In the *Erwin, Inc.*, case, several parties sued Arkansas Louisiana Gas Company ("ARKLA") for damages allegedly incurred from a gas explosion. All of the plaintiffs claimed damages in excess of the sums that their insurer, Houston General Insurance

Company, had paid them. After the expiration of the limitations period, ARKLA reached an agreement for settlement with each plaintiff, less the amount paid to him or her by the insurance company. With respect to the remainder of each claim, ARKLA asserted that the insurance company was the real party in interest but not a formal party to the litigation, thus those amounts were barred by the statute of limitations. We disagreed on the theory that the insureds were the real parties in interest and the litigation could proceed against ARKLA in their names.

The facts of the *Erwin, Inc.,* case are thus quite different from those at hand. There was no action followed by a dismissal. The claim was continuous and the same from beginning to end. ARKLA had agreed to "split" the claims for settlement purposes, but that had no implication as far as the statute of limitations was concerned.

In the *Linder* case, the underlying action arose out of an automobile accident occurring on May 17, 1983. Linder was seventeen at the time of the accident and turned eighteen on October 15, 1983. Pursuant to the statutes in effect at the time, Linder had until October 15, 1986, to file an action in connection with her injuries from the automobile accident. Linder's complaint was filed in chancery court on October 14, 1986. Subsequently, after the limitations period had expired, Linder, acknowledging that the suit was in the wrong court, moved to transfer to circuit court.

The Chancellor transferred the case, but the Circuit Court granted the Howards' motion for summary judgment on the ground that the action was barred. We reversed, holding that Ark. Code Ann. § 16-57-104(a) (1987) permitted transfer without dismissal of the claim and it was the intent of the General Assembly that a mistake in filing should not require a refiling of the claim. The action, which was filed in a timely manner, was not barred by the statute of limitations upon transfer.

Another case cited by Garrett is *Peek v. Pulaski Federal Savings & Loan Assn.,* 286 Ark. 147, 690 S.W.2d 120 (1985), in which we held that there had been an improper dismissal of a claim pursuant to a local court rule after the statute of limitations had expired.

We said the statute of limitations was tolled during the pendency of the suit. There again, there was no lack on continuity.

We fail to see how those cases, or any of the cases cited by Garrett, support the notion that the statute of limitations was tolled in this case. In the *Erwin*, *Linder*, and *Peek* cases, as well as the other cited cases, the transfer, dismissal, or nonsuit occurred outside the time allowed by the relevant limitations statutes. All involved a continuation of the same action. The facts presented by this case are quite different.

Initially, we note that the circuit court action and the previous chancery court action are not the same. The chancery court action alleged the occurrence of fraudulent conduct and requested, by way of remedy, the imposition of a constructive trust, which is a restitutionary remedy designed to disgorge Stephen of his allegedly ill-gotten gain and not to recover damages for Garrett's alleged loss. The circuit court action sought to impose liability for the tort of constructive fraud and requested damages. The two complaints, though reciting similar facts, stated different causes of action requiring establishment of different elements.

[redacted] To establish fraud, a plaintiff must show: (1) a false representation of material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Wheeler Motor Co. v. Roth,* 315 Ark. 318, 867 S.W.2d 446 (1993). We have found constructive fraud to exist in cases of rescission of contracts or deeds, and breaches of fiduciary duties, but we have always required that a plaintiff show a material misrepresentation of fact. *South County Inc. v. First Western Loan Co.,* 315 Ark 722, 871 S.W.2d 325 (1994).

[redacted] On the other hand, a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *Brasel v. Brasel,* 313 Ark. 337, 339, 854 S.W.2d 346, 347 (1993). The duty to

convey the property may arise because it was acquired through fraud, duress, undue influence or mistake, breach of a fiduciary duty, or wrongful disposition of another's property. *Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996). Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property. *Id.*

Thus, a constructive trust may be imposed when the elements necessary for constructive fraud are not present. Most important, it is not necessary to show a material misrepresentation of fact to recover under the theory of constructive trust.

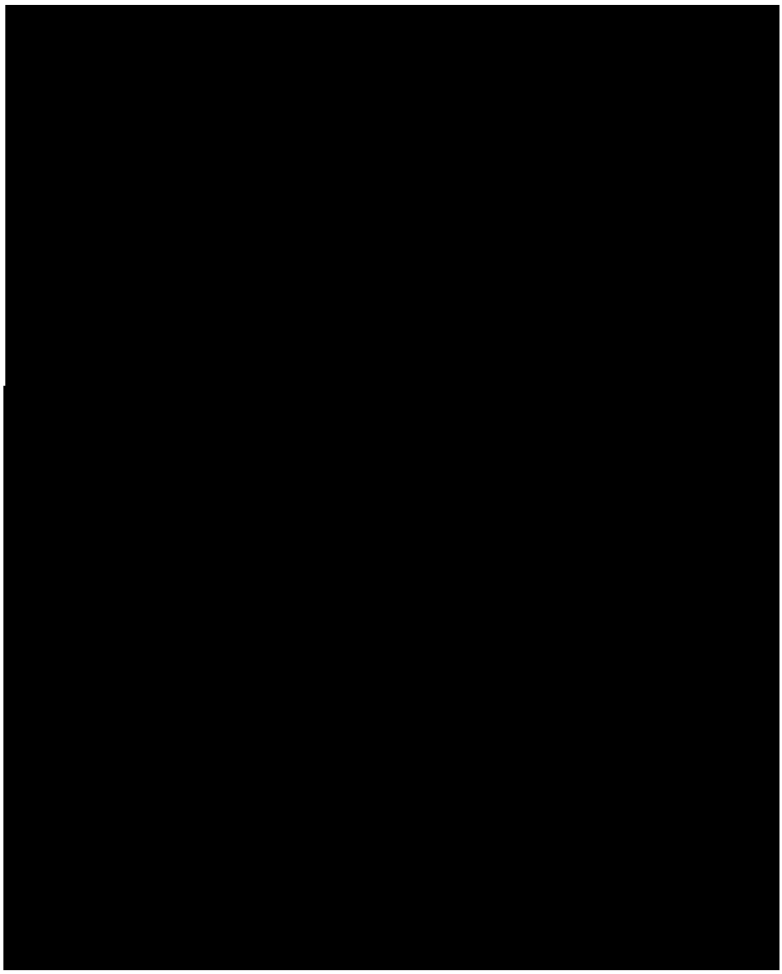
Even if we were to conclude that the actions were the same, we are not convinced that the tolling doctrine applies where, as here, the first action was nonsuited within the period of time allowed by the applicable statute of limitations. As Stephen points out, when the chancery court action was nonsuited on June 9, 1992, Garrett had until November 30, 1994, to file his constructive fraud action, a period of almost two and one-half years. Even after Stephen sold the last of the property on April 4, 1994, Garret had well over seven months to file an action in circuit court. Absent some authority or convincing argument that tolling should occur in the circumstances presented, we hold the limitations period ran prior to the filing of the action.

Reversed and dismissed.

Mrs. Gaines HOUSTON, Trustee, The Pemberton Trust Estate
v. William and Mary KNOEDL

96-1531 947 S.W.2d 745

Supreme Court of Arkansas
Opinion delivered June 16, 1997



John I. Purtle, P.A. and *William & Anderson*, by: *Leon Holmes*, for appellant.

The Henry Law Firm, P.A.,by: *David P. Henry*, for appellees.

TOM GLAZE, Justice. This case involves a dispute over the ownership of a parcel of land located in Lonoke County. In 1938, the property belonged to John Pemberton, who upon his death, devised it to his wife, Mary. In 1946, Mary Pemberton deeded 14.83 acres of the farm land to Ralph and Mildred Pemberton. Later, upon Ralph's and Mildred's deaths, the farm acreage became the property of their daughter, Mildred Pemberton Crow. In August of 1993, Mildred conveyed 1.6 acres of the 14.83 acreage to William and Mary Knoedl who planned to build their retirement home on it. It is this conveyance that is the focus of the present litigation.

When the Knoedls took possession of the 1.6 acre tract of land, John McRae, a beneficiary of a previously established Pemberton Trust, immediately informed Mr. Knoedl that the 1.6

acre tract belonged to the Trust. The Knoedls' and McRae's disagreement over the disputed property resulted in the Pemberton Trust filing an ejectment action against the Knoedls in the Pulaski County Circuit Court. That action was dismissed on August 26, 1994, because of improper venue. On November 2, 1994, the Trust filed another ejectment action against the Knoedls, but this time in the Lonoke County Circuit Court. The Trust, however, subsequently voluntarily dismissed their second suit without prejudice.

On December 20, 1995, the Knoedls filed suit in the Lonoke County Circuit Court against the trustees of the Pemberton Trust and John McRae (hereinafter the Trust), alleging slander of title, malicious prosecution, and abuse of process, and requesting compensatory and punitive damages. The Trust answered, denying the Knoedls' claims, and counterclaimed, again requesting damages and asking that the trial court declare the Trust the owner of the disputed property.

At a jury trial on July 11, 1996, the trial court directed a verdict in the Knoedls' favor on the Trust's counterclaim, and allowed the Knoedls' case to be submitted to the jury. The jury returned a general verdict in the Knoedls' favor, and awarded them $30,000 in compensatory and $75,000 in punitive damages. After the trial court denied the Trust's motions for judgment notwithstanding the verdict and new trial, the Trust filed this timely appeal.

The Trust presents six points for reversal, but its first three arguments are not preserved. In each of the three arguments, the Trust urges that the Knoedls' evidence was insufficient to prove the Knoedls' allegations of slander of title, malicious prosecution, and abuse of process; consequently, the Trust argues the trial court erred in giving instructions to the jury regarding those causes of action.

First, we note the Trust failed to make a timely objection to the giving of the instructions. In *MIC v. Barrett,* 313 Ark. 527, 855 S.W.2d 329 (1993), this court held that, in order to be timely, objections to jury instructions must be made either before or at the time the instructions are given. The *MIC* court held

that, even though the parties agreed their objections were originally made at an in-chambers hearing before the jury was charged, there was no record of the hearing. The court concluded as follows:

> Since we are not able to ascertain from the record or abstract the specific objections to the remaining instructions made prior to the jury retiring to consider its verdict, these objections will not be addressed.

Like in *MIC*, the Trust here waited to make its objections and record concerning jury instructions until after the trial court gave the instructions and after counsel rendered closing arguments. Our review of the abstract fails to reveal where any hearing took place where the Trust made specific objections to the instructions prior to the jury retiring to consider a verdict.

In addition, we mention, too, that the Trust failed to preserve its instruction arguments because it did not properly move for a directed verdict at the end of the Knoedls' case-in-chief and again at the close of all evidence. Such failure constitutes a waiver. *See* Ark. R. Civ. P. 50(a) and (e). The intent of this rule is to require a party testing the sufficiency of the evidence first to submit the question to the trial court, thereby permitting the court to make a ruling at the conclusion of *all* the evidence, but prior to the verdict, thus, preserving the specific question for appeal. *Willson Safety Products v. Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990). Preservation of a sufficiency-of-evidence issue for appeal also requires the party moving for directed verdict to state specific grounds upon which it seeks such relief. *Stroud Crop, Inc. v. Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994). Here, the Knoedls offered three separate causes of action against the Trust, and even though the trial court cautioned the Trust to be specific when making its directed-verdict motion, the Trust still failed to specify what evidence might have been omitted or elements not proved in each of the Knoedls' three counts.

In its fourth argument, the Trust contends the jury's award of $30,000 in compensatory and $75,000 in punitive damages is excessive and a product of passion and prejudice. This court has stated the standard of review in such matters is that,

when an award is alleged to be excessive, this court reviews the proof and all reasonable inferences most favorably to the appellees and determines whether the verdict is so great as to shock the conscience of this court or demonstrate passion or prejudice on the part of the trier of fact. *Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997). In *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996), this court found that an award of $18,000 in compensatory damages was not excessive where there was evidence of out-of-pocket expenses totalling $13,500. In affirming the award, the *Cox* court noted there was evidence of mental anguish, and the amount of damages growing out of mental anguish is ordinarily left to the determination of the jury.

Here, the Knoedls' evidence supported out-of-pocket expenses totalling $13,720. The Knoedls also presented evidence that, while they were forced to litigate this matter, they suffered stress, stomach problems, marital differences, and sought medical attention and the need of prescription drugs. They further pointed out to the jury, without objection, that the Trust representatives, including John McRae, knew full well that Mildred Crow had deeded the property to the Knoedls, the Trust had no interest in that disputed 1.6 acre tract, and dismissal of all three of their ejectment suits reflected as much. Again, without objection, the Knoedls submitted to the jury that the Trust's actions were malicious and were intended to interfere with the Knoedls' peaceful enjoyment of their property. Significantly, the Trust never attempted to disprove the damages presented by the Knoedls. Based upon these damages submitted by the Knoedls, we cannot say the amount awarded by the jury was excessive.

We need mention that the Trust now complains that the trial court gave no instructions on punitive damages. Nonetheless, the Knoedls properly requested and argued in closing arguments that punitive damages be awarded. The Trust never objected to that argument below, nor objected to the failure to give an instruction on the subject. While the Trust was permitted to argue the excessive award of damages issue, which was preserved by a new-trial motion below, it is barred from arguing a new ground for the first time on appeal for challenging the puni-

tive-damage award. *See Whitney v. Holland Retirement Center, Inc.*, 323 Ark. 16, 912 S.W.2d 427 (1996).

In its fifth argument, the Trust submits the trial court erred in allowing a 1978 survey prepared by Forest Marlar to be introduced into evidence. While the Trust raises several grounds on appeal to support its argument, we limit our inquiry to the ones offered and preserved at trial — that the Knoedls failed to establish an adequate foundation for the survey's introduction, and the Marlar survey had never been recorded. *Whitney*, 323 Ark. 16, 912 S.W.2d 427.

Marlar, a registered civil engineer, testified that he physically conducted a survey of the subject property in 1978 and determined its boundaries. He stated he had not recorded the survey because that was not the practice at the time. Having been qualified and shown previously to have established the boundaries of the property now claimed by the Trust, Marlor's testimony was relevant and probative in establishing the description of Mildred Crow's deed of the subject property to the Knoedls.

Continuing its fifth point, the Trust also suggests that the trial court erred in excluding deeds of surveyed property that the Trust argued surrounded the Knoedls' tract and showed that Marlar's surveyed, boundary lines did not match. The trial court excluded the proffered deeds because the Trust offered no one to establish the deeds' boundaries or descriptions or to show how such evidence disproved the legal description in the Knoedls' deed. The trial court believed the deeds of neighboring property would be confusing to the jury, since no witness was offered to plat or explain those deeds' relevance. We are unable to conclude the trial court abused its discretion in so ruling.

Finally, the Trust claimed the trial court erred (1) in excluding the testimony of Denzel Roland and (2) in directing a verdict on the Trust's ejectment claim. Roland worked for the Pulaski County Assessor's Office in mapping property ownership for taxation purposes. The Trust urged that Roland's testimony together with a computerized map Roland produced based on the deeds of adjoining property owners would show that Mildred Crow had previously conveyed the land the Knoedls now claim. The Trust

contends on appeal that, by excluding Roland's testimony, it was denied an opportunity to defend the integrity of its property, support its ejectment claim, and defend against the Knoedls' slander-of-title claim.

The trial court denied admission of Roland's testimony, noting that Marlar had previously testified as to the location of the Knoedls' property using their deed and existing boundary markers. The trial court also noted that Roland did not know where the boundary markers were located, and he did not know whether the deeds he used were accurate. The admission and exclusion of expert testimony is a matter which lies within the sound discretion of the trial court. *Firestone Tire & Rubber Co. v. Little*, 276 Ark. 511, 639 S.W.2d 726 (1982). Based on the foregoing, we cannot say the trial court abused its discretion in excluding Roland's testimony.

For the foregoing reasons, we affirm.

Doyle MASSONGILL *v.* COUNTY of SCOTT, Arkansas, Booster Hawkins, In His Capacity as Scott County Judge, the Scott County Quorum Court, and Jimmy Allen Storms, Billy Wayne Wagner, Tom Garrison, Randy Godfrey, Lloyd Hattabaugh, Joyce Holleman, Terry McMellon, Johnny Faye Owens, and Dwayne Wadkins, Individually and in Their Official Capacities As Members of the Scott County Quorum Court

96-992 947 S.W.2d 749

Supreme Court of Arkansas
Opinion delivered June 16, 1997

[Petition for rehearing denied September 11, 1997.]

Oscar Stilley, for appellant.

Duncan & Rainwater, P.A., by: *Neil Chamberlin*, for appellees.

TOM GLAZE, Justice. Appellant Doyle Massongill filed this illegal-taxation class-action suit against appellants Scott County Judge and the Scott County Quorum Court members (hereinafter the County), challenging the validity of two ordinances, 92-3 and 95-3, as amended by 96-3 (hereinafter 96-3). Ordinance 92-3 was enacted on January 13, 1992, and it provided for a solid-waste management program for the County and established a solid-waste collection and disposal fee for households and businesses located in the County. Ordinance 96-3 was enacted on January 3, 1996, and it provided Quorum Court members with health insurance benefits with the expressed purpose to compensate them for rendering judicial duties, such as performing marriages. Massongill filed a motion for summary judgment, and the County responded by filing its motion for partial summary judgment. The chancellor granted the County's motion, finding both ordinances valid, but concluded 92-3 had gone into effect too soon because its emergency clause was invalid. Massongill appealed.

Because the trial court's order appealed from was not final regarding Ordinance 92-3, this court granted the County's motion to dismiss Massongill's appeal. Afterwards, the parties appeared again before the chancellor, and upon stipulations entered into between the parties, the court entered a final order awarding a partial refund of fees illegally imposed by the County during the emergency period in which Ordinance 92-3 was unlawfully in effect. Massongill appeals now from the trial court's final order which upholds the validity of the text of both ordinances.

Massongill first questions Ordinance 92-3's validity contending it is an appropriation measure as defined under Ark. Code

Ann. § 14-14-907(a)(1987), and as such, went into effect immediately upon passage by the quorum court and approval of the county judge.[1] Massongill's argument continues that, because Ark. Code Ann. § 14-14-908(b) provides that an emergency ordinance cannot levy taxes, impose special property tax assessments, or impose a service rate, 92-3, as an appropriation measure which imposes a tax or service fee, must be declared illegal.

Massongill simply misreads § 14-14-907, which in pertinent part provides as follows:

> (a)(1) Generally. *An appropriation ordinance* or amendment to an appropriation ordinance is defined as a measure by which the county quorum court *designates a particular fund or sets apart a specific portion of county revenue in the treasury, to be applied to some general object or expenditure* or to some individual purchase or expense of the county.
>
> * * *
>
> (3) *Appropriation measures* enacted by a quorum court *shall include the following categories of financial management*:
>
> (A) *The levy of taxes* and special property tax assessments *as provided by law.*
>
> (B) The enactment of specific appropriations by which a specified sum has been set apart in the treasury and devoted to the payment of a particular demand. Specific appropriations may be enacted through the adoption of an annual budget, a statement of estimated receipts and expenditures, in a manner prescribed by law.
>
> * * *
>
> (c) All appropriation ordinances or an amendment to an appropriation ordinance shall be designated "appropriation ordinance." (Emphasis added.)

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[1] We note that both parties argue the other has failed to preserve specific points related to the appropriation-measure argument initially raised by Massongill below, but our review of the abstract reflects all matters now argued were sufficiently addressed at trial and may be considered and decided by us on appeal.

[redacted] As defined in provision (a)(1) above, an appropriation measure in no way enacts a tax or imposes a fee; rather, it merely *designates* a particular fund *or sets apart* a specific portion of *county revenue to some expenditure or purchase* by the County. As is further made clear by § 14-14-907(a)(3)(A), an appropriation measure sets apart its levy of taxes and county revenues *as provided by law.* Ordinance 92-3's objective was not to set aside (or appropriate) county revenues for solid-waste-collection purposes; rather, it was enacted to achieve the two following goals: (1) the County would have its own solid waste collection service, and (2) would charge each household in the county a five-dollar fee for that service. Appropriately, 92-3 was not labeled or designated an appropriation measure because it was not one. § 14-14-907(c) *supra.*

[redacted] Neither (as contended by Massongill) was the text of Ordinance 92-3, as a whole, invalid because its emergency clause was invalid. Although the County was prohibited under § 14-14-908(b) from imposing a tax or service fee by emergency ordinance, the County's error in adding an emergency clause to 92-3's enactment did not sound the ordinance's death knell. As the County points out, this court has consistently held that the failure of an emergency clause does not render the entire act (or in this case an ordinance) inoperative. *See Foster v. Graves*, 168 Ark. 1033, 275 S.W.2d 653 (1925). In *Beaumont v. Faubus*, 239 Ark. 801, 394 S.W.2d 478 (1965), this court stated that, in the situation of an invalid emergency clause, an act takes effect when it would have become effective without the clause. Here, Ark. Code Ann. § 14-14-905(e) provides a nonemergency ordinance becomes effective thirty calendar days after the ordinance's publication; therefore Ordinance 92-3 went into effect when that calendar period expired. As discussed earlier, in holding 92-3's emergency clause invalid, the chancellor properly refunded fees the county unlawfully charged residents during that illegal period.

Massongill further challenges 92-3's validity by arguing it created a monopoly in violation of Article 2, § 19, of the Arkansas

Constitution.[2] His argument is without merit. Massongill says that he can find no statute that gives the County the right to monopolize trash collection, and it is the County's duty to bring such authority to the court's attention. Of course, Massongill is wrong in attempting to place the burden on the County in this respect, because it is his burden, as appellant, to show error by citation of authority and convincing argument that the trial court erred.

Even so, Massongill's Article 2, § 19, argument still must fail. He does not attack the constitutionality of Ark. Code Ann. §§ 14-14-801(a) and (b) and -802(b)(1) and (2)(F)(ii), which respectively provide in pertinent part that quorum courts may levy taxes and appropriate public funds for expenses as prescribed by law, and they may by ordinance provide services to their citizens, including solid-waste collection and disposal services. *See also* § 8-6-212 (Supp. 1995). This statutory authority alone is sufficient to affirm the trial court's holding on this point, since Massongill does not suggest §§ 14-14-801 and -802 violate Article 2, § 19 of the Arkansas Constitution.

However, other reasons unravel Massongill's monopoly theory, as well. For example, in reading statutory provisions §§ 14-14-801 and -802 and Ordinance 92-3, we fail to find any language that grants the County a monopoly. Neither do we find any legal authority, and Massongill cites to none on point, that prevents a county from having the exclusive right to collect solid waste. The chancellor here held that Article 2, § 19, does not apply to a governing body, and in support of that holding, the County cites *No. Little Rock Transportation, Inc. v. The City of North Little Rock*, 207 Ark. 976, 184 S.W.2d 52 (1944), where this court declared an act unconstitutional because it granted an exclusive franchise or monopoly to a private cab company. Discussing this constitutional provision's history, this court, quoting from *Ex parte Levy*, 43 Ark. 42, said the following:

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[2] § 19. Perpetuities and monopolies. Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges or honors ever be granted or conferred in this State.

> The monopolies which in England became so odious as to excite general opposition, and infuse a detestation which has been transmitted to the free States of America, were in the nature of exclusive privileges of trade, granted to favorites or purchasers from the crown, for the *enrichment of individuals* at the cost of the public. They were supported by no consideration of public good. (Emphasis added.)

The County further relies on *Smith v. City of Springdale*, 291 Ark. 63, 722 S.W.2d 569 (1987).[3] There, the court, citing *Dreyfus v. Boone*, 88 Ark. 353, 114 S.W.2d 718 (1908), stated that monopolies are upheld when deemed necessary in executing a duty incumbent on city authorities or the legislature for the preservation of public health. *See also Geurin v. City of Little Rock*, 203 Ark. 103, 155 S.W.2d 719 (1941), and *cf. L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517 (8th Cir. 1985). In sum, based on the arguments presented, we conclude Massongill's monopoly theory must fail.

Lastly, Massongill submits 92-3 must be stricken because the County violated Arkansas's competitive bidding laws, particularly Ark. Code Ann. § 14-22-111 (1987). He states that the County rejected the low bid for solid-waste disposal submitted by a private company, and then improperly established its own service at a higher cost. In considering this argument, it is sufficient to say that § 14-22-111 did not require the County to accept the low bid; instead, it allows "contracts shall be awarded to the lowest responsible bidder" and permits that "any bid may be rejected." *See* § 14-22-111(a) and (b)(1). While perhaps unnecessary, the County justifies its actions at the bidding stage by explaining that eight bids had been taken and those bids averaged $157,802.31. The County explains its action was reasonable not only because the law authorized its rejection of all bids, but also because the county had subsequently provided trash-collection

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[3] The *Smith* decision involved an ordinance granting a waste collection and disposal franchise to a private company. Although the *Smith* court found a city is authorized to enter into exclusive contracts for sanitation services, it reversed because there had never been competitive bidding as required by law.

services at the competitive cost of $169,000.00.[4] Also as a consideration for rejecting the earlier bids, the County pointed out that the low bid was $47,000.00 less than the second lowest bid and, as such, appeared questionable and inadequate. In conclusion, because we hold the County did not violate the state's competitive bidding laws, nor the other statutory and constitutional provisions argued by Massongill hereinabove, we affirm the trial court's decision upholding 92-3's validity.

We next turn to Massongill's challenge of county ordinance 96-3, which we find has merit. He premises his argument on Ark. Code Ann. § 14-14-1205(c) (Supp. 1995), and urges that the County Quorum Court's payment of health insurance benefits on behalf of its members amounts to illegal compensation. Section 1205(c) provides as follows:

> (c) JUSTICE OF THE PEACE AS COUNTY EMPLOYEE OR DEPUTY. No justice of the peace shall receive compensation as a county employee or deputy, *nor shall any justice receive compensation or expenses from funds* appropriated by the quorum court *for any services performed within the county, other than as provided by this subchapter.* (Emphasis added.)

The chancellor held § 14-14-1205(c) is inapplicable because the health insurance benefits involved here cannot be denoted compensation as that term is employed in § 14-14-1205. Furthermore, he expressed that he could find no legislation concerning the authorization of "fringe benefits" or prohibition of same to court members, and as a consequence, he believed such insurance coverage could be awarded members under the County's broad authority under § 1 of Amendment 55 to the Arkansas Constitution. That constitutional provision provides that a quorum court is authorized by the Arkansas Constitution to "exercise local legislative authority not denied by the Constitution or by law." Because the chancellor found no law against quorum court members having their insurance benefits paid by the County, he determined the County's Ordinance 96-3 providing such benefits to be valid. Specifically, the chancellor held that such benefits may be

[4] This cost was only $12,000.00 more than the average $157,802.00 amount of the eight bids earlier submitted.

given due solely to their "status" as quorum court members. We must disagree with the chancellor's reading of § 14-14-1205.

We again emphasize provision (c) of § 14-14-1205, which very clearly *precludes* quorum court members from receiving *compensation or expenses* from funds appropriated by the quorum court for any services performed within the County, *other than as provided by this subchapter.* (Emphasis supplied.) This subchapter dealing with personnel procedures specifically restricts or limits compensation and expenses to be provided quorum court members to that which is provided in § 14-14-1205 and other statutes in subchapter 12. Clearly, health insurance coverage is a County expense under 96-3, and cannot be made otherwise merely by labeling such coverage a "fringe benefit." Accordingly, Ordinance 96-3 and ones like it run contrary to Arkansas's applicable constitutional and statutory laws that specify and restrict the compensation and expenses that quorum court members and other county officials are entitled to receive. Because we conclude Ordinance 96-3 is illegal as being contrary to § 14-14-1205(c) and to the meaning of § 1 of Amendment 55, we reverse and remand this cause with directions to enjoin the Scott County Quorum Court from paying health insurance benefits in their behalf and order such payments to be repaid. Because the chancellor upheld 96-3, the parties were precluded from addressing any refund payments, we remand with directions that they be allowed to do so in a manner consistent with this opinion. *Cf. Tedford v. Mears*, 258 Ark. 450, 526 S.W.2d 1 (1975).

We affirm the trial court's decision upholding the validity of Ordinance 92.3 and reverse its holding concerning Ordinance 96.3 as discussed immediately above.

Arvie WILES, Individually and as Administrator of the Estates of B.L. Wiles and Juanita Wiles, Deceased, and Allen Wiles, Individually and as Father and Next Friend of Kayla Joy Wiles, a Minor, and William Wiles *v.* Eddie Earl WEBB

96-864 946 S.W.2d 685

Supreme Court of Arkansas
Opinion delivered June 16, 1997
[Petition for rehearing denied September 11, 1997.]

Gary Eubanks and Associates, by: *James Gerard Schulze* and *William Gary Holt*, for appellants.

Wright, Lindsey & Jennings, by: *Troy A. Price*, for appellee.

ROBERT L. BROWN, Justice. This case involves litigation for wrongful death and personal injury arising out of a vehicular accident. Verdict was rendered in favor of the appellee, Eddie Earl Webb. The appellants raise three points for reversal: (1) the trial court erred in refusing to allow evidence of Webb's liability coverage; (2) the trial court erred in denying a motion to declare a mistrial following violation of two orders *in limine*; and (3) the trial court erred in giving the Sudden Emergency instruction to the jury. We agree with the appellants on the third point, and reverse and remand to the trial court for further proceedings. We further take this opportunity to hold that AMI 614 — the Sudden Emergency instruction — is inherently confusing, and for that reason we abolish its usage in all future cases.

Appellant Arvie Wiles is the administrator of the estates of his deceased parents, B.L. Wiles and Juanita Wiles, who suffered fatal injuries when the 1983 Chevrolet Caprice station wagon driven by B.L. Wiles was struck by a 1982 International logging truck

driven by appellee Eddie Earl Webb on State Highway 298 in Garland County. Appellant Allen Wiles is the son of B.L. and Juanita Wiles and the father of Kayla Joy Wiles, a minor who was a passenger in the station wagon and who suffered serious injury. Appellant William Wiles, the son of B.L. and Juanita Wiles, was also a passenger in the station wagon who suffered physical injury. The appellants will be collectively referred to in this opinion as the "Wileses."

The accident occurred on May 18, 1994. Following the accident, the Wileses filed their complaint against Webb and alleged that B.L. Wiles attempted to make a left-hand turn from Tabor Mountain Cutoff Road onto State Highway 298 in order to proceed in an easterly direction. They alleged that Webb, who was proceeding westbound on State Highway 298, crossed the center line and struck B.L. Wiles's station wagon broadside while it was in the eastbound lane of traffic. The Wileses further claimed that Webb's conduct was negligent for the following reasons: (1) Webb failed to keep a proper lookout; (2) he failed to keep his vehicle under proper control; (3) he drove at a speed greater than was reasonable and prudent under the circumstances; (4) he crossed the center line and otherwise violated the laws of the State of Arkansas; and (5) he otherwise failed to exercise ordinary care under the circumstances.

Webb answered and counterclaimed, asserting the negligence of B.L. Wiles and theories of apportionment and contribution. The counterclaim was later dismissed.

At trial, the Wileses relied exclusively on physical evidence to make their case. B.L. and Juanita Wiles, who died in the accident, were ages 74 and 64, respectively, at the time of the accident. Kayla Joy Wiles, age 2 at the time of the accident, had no memory of the event. William Wiles, who was 37 years old at the time of the collision, is mentally retarded and has had only a first-grade education. He also had no recollection of how the accident occurred.

A pivotal witness at the trial was Arkansas State Trooper B.R. Skipper, who testified by way of videotape deposition. He testified that the Wiles/Webb accident occurred at approximately

10:45 a.m. and that there were no adverse weather conditions; the pavement was dry; and there was nothing to obscure Webb's vision. He testified that the initial impact of the vehicles occurred between the center of the truck's front bumper and an area at or near the left front wheel of the station wagon. As a result of the impact, the station wagon was spun in a clockwise direction and travelled approximately 70 feet west, where it came to rest in a ditch south of the highway. The force of the collision caused Webb's logging truck to spin one-quarter turn counter-clockwise and travel approximately 25 feet west of the point of impact.

On cross-examination by Webb's counsel, Trooper Skipper testified that the intersection in question had a stop sign on Tabor Mountain Cutoff Road. He opined that Wiles's vehicle had entered the intersection to make a left-hand turn onto Highway 298, heading east. Looking at photographs of the accident site, Trooper Skipper referred to the presence of skid marks left by Webb's logging truck in the westbound lane that proceeded into the eastbound lane. He testified that the skid marks made by Webb's truck reflected signs of discontinuity or interruption, when the truck changed direction. He stated that the change of direction occurred at the point of initial impact between the two vehicles.

Trooper Skipper further testified that the accident involved was an "angular" collision, which was not quite 90 degrees. He reached this conclusion based on the points of impact on the two vehicles and the belief that B.L. Wiles was turning to his left to head east on State Highway 298. Trooper Skipper also added that Wiles's vehicle was approximately 18 feet in length. He stated that the speed limit at the place of the accident was 55 miles per hour and that the average reaction time for a driver was 1.5 seconds. He defined "reaction time" as "the time it takes for a person to see an object and then make an evasive move away from that object." He testified that, based on the physical evidence, he did not find any indication that Webb was driving at a speed in excess of 55 miles per hour. He also testified that Webb left 85 feet of skid marks and opined that, if Webb was travelling at a speed of 45 miles per hour, then his vehicle left skid marks for slightly less than 1.3 seconds before impact with Wiles's station wagon.

On re-direct examination, Trooper Skipper agreed that B.L. Wiles had a substantial portion of the station wagon in the eastbound lane at the time of the collision. On re-cross examination, he testified that with the length of the station wagon being 18 feet and the total width of the road being 20 feet, he opined that the station wagon partially blocked both lanes of traffic at the time of initial contact.

On re-direct examination, Trooper Skipper then testified that the condition of both vehicles upon collision, especially the damage to the station wagon, would damage the surface of the pavement. However, he admitted that the markings indicating damage to the highway's surface were found in the eastbound lane. On re-cross examination, Trooper Skipper testified that such markings might not necessarily appear in the westbound lane (Webb's lane) because on maximum impact, the striking of the station wagon by Webb's logging truck could cause a downward force that would cause the back end of the truck to rise.

The Wileses also introduced the testimony of three witnesses (Norman Wiles, Chester Wiles, and Arvie Wiles) that skid marks apparently created by Webb's logging truck began in the westbound lane and proceeded into the eastbound lane.

Webb testified in his own defense. He stated that as he reached the peak of a grade in State Highway 298, he could see the station wagon approaching the stop sign on Tabor Mountain Cutoff Road. He testified that he released the accelerator and stayed in the westbound lane until the station wagon pulled out in front of him. He added that he was not certain whether the station wagon ever came to a complete stop at the stop sign, but he was certain that the station wagon pulled out in front of him. Once the station wagon pulled out into the westbound lane, Webb testified that he applied his brakes as soon as he could and veered to the left in an attempt to steer clear of the vehicle. He testified that his truck skidded and that he struck the station wagon in the middle of the highway. He explained that he did not have time to consider whether to veer left or right and stated that he was not certain what the driver of the station wagon was going to do once he pulled out into his lane. He testified that at

the time he came over the grade in the highway, he was travelling at 40 or 45 miles per hour. He testified that, following the accident, he received a phone call from appellant Arvie Wiles, who purportedly told him: "Don't be hard on yourself. There wasn't anything you could do and the family doesn't blame you."

On cross-examination, appellants' counsel asked Webb whether he knew if Arvie Wiles had any knowledge of the physical evidence at the scene when the statement was made, to which Webb responded that he did not. Webb testified that at the time he veered to the left, the station wagon had been proceeding across his lane at a constant speed.

The defense also presented evidence that B.L. Wiles was driving without required corrective eyeglasses. There was also the testimony of Ruth Meredith, a purported eyewitness, that Wiles's station wagon was stopped in Webb's lane. On cross-examination, her testimony was shown to be at odds with her deposition testimony on several critical points.

The jury answered interrogatories to the effect that Webb was not guilty of negligence and that the negligence of B.L. Wiles was the proximate cause of the accident. Judgment in favor of Webb was entered later. A motion for a new trial was made, raising the same three points raised in this appeal. It was denied.

The Wileses contend that the trial court erred in giving the Sudden Emergency instruction — AMI 614 — under the facts of this case. We agree. AMI 614 reads:

> A person who is suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation.

AMI Civ. 3rd 614. At trial, the Wileses objected to this instruction on the ground that there was evidence of negligence on the part of Webb.

Our most recent case discussing AMI 614 is *Frisby v. Agerton Logging, Inc.*, 323 Ark. 508, 915 S.W.2d 718 (1996). In

Frisby, this court found error in using AMI 614 to instruct the jury in connection with a collision between the appellant's Toyota automobile and the appellee's logging truck. Each party claimed that the other was negligent. The jury returned verdicts in favor of the appellee both on the appellant's claim for damages and on the appellee's claim for damages. This court determined that error occurred because the appellant had testified that the appellee's logging truck was driving in his lane at the time of the collision and that this constituted negligence on the part of the appellee. We then stated:

> In order to justify the use of the sudden-emergency instruction, the evidence must show that the driver was in a stressful situation which required a quick decision on the possible courses of conduct. That person must have been aware of the danger, perceived the emergency, and acted in accordance with the stress caused by the danger. *Diemer v. Dischler*, 313 Ark. 154, 158-59, 852 S.W.2d 793, 795-796 (1993). When there is *any* evidence of negligence on the part of the party seeking to invoke the instruction, AMI 614 is inapplicable. *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994). Stated another way, when an emergency arises wholly or partially from the negligence of the person who seeks to invoke the sudden-emergency doctrine, AMI 614 has no application and should not be delivered to the jury. *Id.*; *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995) (instruction proper where third-party driver encountered collision caused by others and did not in any way create the emergency himself).

Frisby v. Agerton Logging, Inc., 323 Ark. at 513, 915 S.W.2d at 721 (emphasis added).

Thus, the law on this point is clear: the trial court erred in giving the Sudden Emergency instruction *only if* Webb's conduct was in any wise responsible for creating the emergency situation. Webb contends that the emergency situation was created when the station wagon pulled out from the stop sign on Tabor Mountain Cutoff Road and that his veering to the left was an instant response to the stress of the emergency. The Wileses' case, on the other hand, was based on physical evidence, since the two survivors of the crash could not remember what happened, and both suffered from disabilities due to age and mental retardation. The

essence of the Wileses' case was that Webb was inadvertent in his driving, and upon recognizing B.L. Wiles's station wagon crossing the highway, Webb hit his brakes and either veered to the left into Wiles's lane or lost control of the logging truck. Had Webb had the truck under control, say the Wileses, he could have veered to the right where there was ample space at the Tabor Mountain Cutoff Road intersection to avoid the station wagon and, thus, the accident.

The physical evidence appears reasonably clear. Webb's truck crossed the center line, and the point of impact occurred in Wiles's eastbound lane. Testimony by Webb estimated the point of impact as being potentially as far over as five feet into the eastbound lane. The logging truck's skid marks were 85 feet.

The issue from the Wileses' perspective boils down to whether Webb was inadvertent or, in legal parlance, failed to keep a proper lookout and, as a result, lost control of his vehicle. The physical evidence suggests this might have happened, though Webb's own testimony belies this. This, however, was the issue for the jury to decide, and the issue necessarily embraces an analysis of comparative fault. Indeed, the jury was instructed on ordinary care:

> A failure to exercise ordinary care is negligence. When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances.

AMI Civ. 3rd 303.

In order for the Sudden Emergency instruction to be given, the trial court must first find: (1) that a sudden emergency was created, and (2) that the defendant had no part in its creation. Then by giving the instruction, the trial court informs the jury that due to an emergent circumstance, the defendant is not as responsible for what occurred as he might otherwise have been. In a comparative-fault case like the one at hand, we believe that the instruction is tantamount to instructing the jury that Webb's responsibility for what occurred is all but nullified by the trial court's finding that a sudden emergency was caused solely by the

negligence of Wiles. At worst, what occurs is that the trial court all but decides the ultimate issue by instructing the jury on sudden emergency. At best, the instruction confuses matters and skews the analysis in favor of the defendant. The result is that a defendant who did not in any way create the initial emergency circumstance but who is woefully negligent in other respects falls heir to a reduced standard of care.

We conclude that the physical evidence presents some evidence of negligence on Webb's part, and we hold that it was error to give the Sudden Emergency instruction in the present case. In doing so, we adopt the position of the concurring opinions in *Frisby v. Agerton Logging, Inc.*, 323 Ark. 508, 915 S.W.2d 718 (1996) (Glaze, J., concurring) and *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994) (Glaze, J., concurring). On the issue of confusion generated by AMI 614, *Prosser and Keeton on the Law of Torts* has this to say:

> Despite the basic logic and simplicity of the sudden emergency doctrine, it is all too frequently misapplied on the facts or misstated in jury instructions. As a result, the model jury instructions in at least Illinois, Florida, Kansas and Missouri recommend that no such instruction be given, and Mississippi abolished the doctrine altogether in 1980.

W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 197 (5th ed. 1984) (citations omitted). Moreover, we are now of the opinion that the Supreme Court of Hawaii was correct when it stated that the risk of prejudice in instructing the jury on the Sudden Emergency instruction far exceeds the possibility of error in not doing so. *See DiCenzo v. Izana*, 723 P.2d 171 (Hawaii 1986).

We are mindful of the fact that other jurisdictions are divided on this issue. Some jurisdictions have abolished the instruction or severely limited it. *See, e.g., DiCenzo v. Izana, supra*; *Bass v. Williams*, 839 S.W.2d 559 (Ky. App. 1992); *Knapp v. Stanford*, 392 So.2d 196 (Miss. 1980); *Cowell v. Thompson*, 713 S.W.2d 52 (Mo. App. 1986); *Simonson v. White*, 713 P.2d 983 (Mont. 1986); *Kozeny v. Miller*, 499 N.W.2d 75 (Neb. 1993); *Paiva v. Pfeiffer*, 551 A.2d 201 (N.J. Super. A.D. 1988). Others have decided to retain

it. *See, e.g., Young v. Clark*, 814 P.2d 364 (Colo. 1991); *Weiss v. Bal*, 501 N.W.2d 478 (Iowa 1993); *Ebach v. Ralston*, 510 N.W.2d 604 (N.D. 1994); *Lockhart v. List*, 665 A.2d 1176 (Pa. 1995); *Thomas v. Oldham*, 895 S.W.2d 352 (Tex. 1995).

Nevertheless, we are convinced that the better course is to abolish the Sudden Emergency instruction for all future use, and we overrule prior authority to the contrary. Because we do not believe that the issues relating to liability coverage and the orders *in limine* will reoccur in a new trial, we need not address them.

Reversed and remanded.

ARNOLD, C.J., NEWBERN and CORBIN, JJ., dissent.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. I concur to say the majority opinion is exactly correct in abolishing the AMI 614 Sudden Emergency instruction. The trial judge in the present case said it best as follows:

> The 614 problem is going to give the courts in this state a problem until someone of higher power makes up its mind that it is going to get rid of the instruction. Otherwise, the trial courts are in a dilemma.

That so-called "higher power" is this court, since it is this court that adopted AMI 614. Only recently our court recognized again the confusion AMI 614 had caused in *Frisby v. Agerton Logging, Inc.*, 323 Ark. 508, 915 S.W.2d 718 (1996), where we stated, "Hence, *the instruction (AMI 614) should not have been given. It added nothing to the comparative fault analysis and only injected confusion* into complex proceedings."

Such confusion over AMI 614 has flourished, rendering at least eight cases (including the present one) before this court in the '90s alone. *Frisby v. Agerton Logging, Inc.*, 323 Ark. 508, 915 s.W.2d 708 (1996); *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995); *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994); *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993); *Smith v. Stevens*, 313 Ark. 534, 855 S.W.2d 323 (1993); *Berry v. Chapple*, 309 Ark. 612, 832 S.W.2d 256 (1992);

Scoggins v. Southern Farmers' Ass'n, 304 Ark. 426, 803 S.W.2d 515 (1991). Courts and attorneys alike have been befuddled on its usage (or nonusage), and jurors can only be elated to be rid of such prattle being introduced into a serious negligence case. Other negligence and comparative-fault instructions left after 614's removal will be more than adequate to guide jurors through their deliberations.

DAVID NEWBERN, Justice, dissenting. As the majority opinion demonstrates, some state courts have, in the last decade, considered whether the sudden emergency doctrine remains useful and appropriate in the context of comparative negligence. Some have said it does, and some have said it does not.

The argument against the doctrine, and thus against AMI 614 which embodies it, is that it either conflicts with or is made unnecessary by the theory of comparative negligence.

There is no conflict. Both the standard negligence instruction, AMI 301, and AMI 614 focus on requiring conduct such as that which would be exercised by a reasonably prudent person under the same circumstances or situation. The question becomes, then, whether AMI 614 is mere surplusage. It is not, and the case now before us demonstrates the reason for that conclusion.

For the sudden emergency instruction to have had any effect in this case, the jury must first have decided that Mr. Webb was "suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence." A major flaw in the majority opinion is found in the remark that ". . .we believe that the instruction is tantamount to instructing the jury that Webb's responsibility for what occurred is all but nullified by the trial court's finding that a sudden emergency was caused solely by the negligence of Wiles." The first question presented by the instruction is whether Mr. Webb created the emergency to any degree. It has nothing to do with deciding negligence on the part of Mr. Wiles — a matter not at issue.

Assuming the jury decided that Mr. Webb was not at fault in creating the emergency situation, its next task was to decide

whether he used the same "care that a reasonably careful person would use in the same situation." The majority opinion states that the instruction "skews the analysis in favor of the defendant." That cannot be so, for virtually the same language as appears in AMI 301 governs the determination whether the defendant acted reasonably when confronted with the sudden emergency. Nor does the instruction excuse a defendant who has not created the emergency but who, in the words of the majority opinion, is "woefully negligent in other respects." To suggest that the instruction prompts condonation of such conduct underestimates jurors' intelligence.

The leading case among those decided by the jurisdictions which have considered and rejected the idea that the sudden emergency doctrine should be done away with is *Young v. Clark,* 814 P.2d 364 (Colo. 1991). Quoting an earlier Colorado case, the Colorado Supreme Court viewed the doctrine as an "evidentiary guideline by which a trier of fact may properly apply the prudent [person] rule in evaluating the evidence of negligence being considered." Responding to criticisms such as those leveled by the majority in the case now before us, the Colorado Court said:

> Such reasoning, in our view, is based on unfounded assumptions about how jurors perceive an instruction explaining the relatively simplistic sudden emergency doctrine. The pattern instruction used by Colorado courts . . . is a clear statement of the doctrine and obligates the finder of fact to do nothing more than apply the objective "reasonable person" standard to an actor in the specific context of an emergency situation. It thus does not operate to excuse fault but merely serves as an explanatory instruction, offered for purposes of clarification for the jury's benefit. [Footnote omitted.]

This is a case in which the defendant was shown to have driven into an oncoming lane of traffic, an action which would ordinarily be condemned as demonstrative of negligence at least. The sudden emergency instruction does no more than refine the factual issue.

If the jury in this case found that Mr. Webb was confronted by a sudden emergency, there is not one whit of evidence, physi-

cal or otherwise, that he did anything to cause that emergency, allegations of inattentive driving notwithstanding. The question became whether his reaction to it, as demonstrated by the skid marks and explained by his own testimony, was reasonable under the circumstances, *i.e.*, whether it was unreasonable for him in that split-second situation to have veered into the oncoming lane of traffic. The jury answered that question affirmatively in response to a specific interrogatory. The judgment should be affirmed.

I respectfully dissent.

ARNOLD, C.J., and CORBIN, J., join in this dissent.

Garry DOTY and Patricia Doty *v.* Ida J. BETTIS, et al.

97-109 947 S.W.2d 743

Supreme Court of Arkansas
Opinion delivered June 16, 1997
[Petition for rehearing denied September 11, 1997.]

[redacted]

Lyons, Emerson & Cone, by: *Jim Lyons*, for appellants.

Bill W. Bristow, for appellees.

ANNABELLE CLINTON IMBER, Justice. This appeal concerns the validity of a local-option election whereby the voters of Willis Township in Poinsett County were asked to decide whether Precinct 41 should become dry. The appellants, Garry and Patricia Doty, raise three arguments on appeal in support of their contention that the election results should be set aside. We affirm.

The underlying facts of this case are undisputed. In 1996, certain voters decided to circulate a petition that would place on the ballot an initiative to convert Precinct 41 of Willis Township in Poinsett County into a dry precinct. Accordingly, the proponents prepared and circulated a petition that read as follows:

PETITION

> We the undersigned being qualified electors in Precinct 41 of Willis Township in Poinsett County do hereby petition for an election to be held to determine whether or not licenses shall be granted for the manufacture or sale, or the bartering, loaning or the giving away of intoxicating liquor, beer or wine within the designated territory of Precinct 41 of Willis Township in Poinsett County, Arkansas.

After obtaining the necessary signatures, the promoters submitted their initiative petition to the county clerk of Poinsett County. Twelve of the submitted signature pages contained the above language while the remaining thirteen pages contained only

signatures. In contrast to the above language contained on some of the signature pages, the initiative petition submitted to the county clerk said:

"INITIATIVE PETITION"

> We, the undersigned legal voters of the State of Arkansas, Poinsett County, Precinct 41 of Willis Township, respectfully propose the following amendment of the law, to wit:
> TITLE: To prohibit the manufacture or sale of intoxicating liquors in Precinct 41 of Willis Township of Poinsett County:
>
> and by this, our petition, order that the same be submitted to the people of Precinct 41, Willis Township of Poinsett County to the end that the same may be adopted, enacted, or rejected by the vote of legal voters of said Precinct 41, Willis Township of Poinsett County at the regular general election to [be] held in said Willis Township on the 5th day of November, 1996, ...

The county clerk verified the signatures and certified the petition to the county court and the election commissioners. Likewise, the County Court of Poinsett County found that the signatures were sufficient and ordered the Election Commissioners of Poinsett County to place the following on the ballot:

> FOR THE MANUFACTURE OR SALE OF INTOXICATING LIQUORS
>
> AGAINST THE MANUFACTURE OR SALE OF INTOXICATING LIQUORS

Gary and Patricia Dotty appealed the county court's order to the Circuit Court of Poinsett County alleging that the promoters of the initiative violated several statutory requirements. The circuit court rejected the Dotys' arguments and ordered the matter to be placed on the November 5, 1996, ballot.

The Dotys filed a notice of appeal of this ruling on November 4, 1996, just one day prior to the scheduled election. We must presume that the initiative was in fact placed on the November 5, 1996, ballot, and that the election was held because courts are without authority to enjoin the holding of a regularly scheduled election, regularly called. *Brown v. McDaniel*, 244 Ark. 362, 427

S.W.2d 193 (1968). Neither party, however, has informed this court of the result of the election; hence, we do not know whether the initiative passed or failed.

On appeal, the Dotys allege that the results of the election must be set aside because the initiative petition contained the following three procedural defects: 1) all of the signature pages did not contain the full language of the petition as required by Ark. Code Ann. § 7-9-104(c); 2) the explanation of the initiative contained on some of the signature pages was materially different from the initiative language submitted to the county clerk; and 3) the election date was not mentioned in the petition as required by Ark. Code Ann. § 3-8-902(a).

The timing of this appeal is crucial to our review of the issues presented. It is well settled that *prior to an election* the provisions of the laws are mandatory, and thus, we will strike an initiative from the ballot if does not strictly adhere to the statutory requirements. *Reichenbach v. Serio*, 309 Ark. 274, 830 Ark. 847 (1992); *Henard v. St. Francis Election Comm.*, 301 Ark. 459, 784 S.W.2d 598 (1990); *Swanberg v. Tart*, 300 Ark. 304, 778 S.W.2d 931 (1989). In contrast, if the appeal reaches this court *after the election* has occurred, the only remedy we can provide is to set aside the election results, and thus the statutory requirements are merely directory. *Reichenbach, supra*; *Henard, supra*; *Swanberg, supra*. In other words, once the votes have been cast, we will not set aside the election unless the procedural errors rendered the result doubtful or prevented the electorate from casting free and intelligent votes. *Reichenbach, supra*; *Henard, supra*; *Swanberg, supra*. We have explained that the reason for this rule is that:

> It is of the utmost importance that the public should have confidence in the administration of the election laws, and to know that the will of the majority, when fairly expressed, will be respected.

Reichenbach, supra (citing *Wheat v. Smith*, 50 Ark. 266, 7 S.W. 161 (1887)).

The Dotys' appeal was not submitted to this court for consideration until June 9, 1997, which is over seven months after the election occurred. Thus, at this point, the only remedy we

can provide to the Dotys is to set aside the election results, which we have previously explained will be done only when it has been demonstrated that the outcome of the election would have been different but for the procedural irregularities. *Reichenbach, supra; Henard, supra.* Without knowing the results of the November 5, 1996, election it is impossible for us to make this determination. Furthermore, the Dotys have failed to demonstrate in their briefs how the outcome of the election would have been different if the three alleged procedural irregularities had not occurred. Accordingly, we must affirm without reaching the merits of the Dotys' arguments on appeal.

Affirmed.

Robin K. SCHLESIER *v.* STATE of Arkansas

CR 97-399 946 S.W.2d 184

Supreme Court of Arkansas
Opinion delivered June 16, 1997

Gruber Law Firm, by: *Wayne A. Gruber*, for appellant.

No response.

PER CURIAM. Robin K. Schlesier, by his attorney, has filed an amended motion for a rule on the clerk.

His attorney, Wayne A. Gruber, admits in his amended motion that the record was not timely filed 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.

Jimmie L. WILSON, Appellant/Petitioner *v.* James A. NEAL, Appellee; John Plegge, Respondent No. I; Wanda W. McIntosh, Respondent No. II

96-1524 947 S.W.2d 338

Supreme Court of Arkansas
Opinion delivered June 16, 1997

Wilson Law Firm, P.A., by: *E. Dion Wilson*, for appellant.

No response.

PER CURIAM. This petition for writ of mandamus is the outgrowth of our direction to the trial court to settle the record in this appeal. Petitioner Jimmie L. Wilson moves the court for the

writ to direct the trial court to include the record in a U.S. District Court cause, *Wilson v. Neal*, H-C-95-54, as part of the record in this appeal. Petitioner Wilson claims that without the federal record his record on appeal is inadequate. Petitioner Wilson further challenges the failure of the trial court to include in the record the proceedings before Hon. Lance Hanshaw, Special Circuit Judge; Hon. John Lineberger, Special Circuit Judge; and Hon. Olly Neal, former Circuit Judge.

Respondent Neal answers that he has no objection to supplementing the record in this matter with the Hon. Lance Hanshaw trial (*Neal v. Wilson*, No. SC-93-691), which is on file with the Arkansas Supreme Court. Respondent Neal also tenders the transcript of proceedings before the Hon. Olly Neal on May 17, 1995, as a potential supplement to the record in the appeal at hand. He further observes that there is no record of proceedings before Hon. John Lineberger. Respondent Neal adds that Petitioner Wilson made no request for an extension of time for the preparation of the transcripts for these three proceedings and, indeed, had stated in the notice of appeal for each proceeding that a transcript was being prepared.

[redacted] The petition for writ of mandamus is denied. This extraordinary writ does not lie for matters that involve the discretion of the trial court. *Saunders v. Neuse*, 320 Ark. 547, 898 S.W.2d 43 (1995). Here, it is clear that the trial court determined that the federal district court record was not relevant to its decision concerning settlement of the record because it was extraneous to the proceeding before it and to its decision. The trial court did note that supplementing the record with other proceedings was a matter to be decided by the appellate court. We agree.

Writ denied.

NEWBERN, GLAZE, and CORBIN, JJ., not participating.

Mike Dane OGLESBY *v.* STATE of Arkansas

96-1244 946 S.W.2d 693

Supreme Court of Arkansas
Opinion delivered June 23, 1997

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

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

W.H."DUB" ARNOLD, Chief Justice. Appellant, Mike Dane Ogelsby, appeals the order of the Pulaski County Circuit Court, denying transfer of his case to juvenile court. The interlocutory appeal is proper pursuant to Ark. Code Ann. § 9-27-318(h) (Supp. 1995). Jurisdiction is properly in this Court pursuant to Ark. Sup. Ct. R. 1-2(a)(12). We find no error and affirm.

Ogelsby was arrested on April 23, 1996. A felony information was filed on June 19, 1996, charging Ogelsby with residential burglary, a Class B felony, and theft of property, a Class A misdemeanor.[1] At the time of the arrest, Ogelsby was seventeen years old. Oglesby turned eighteen on August 3, 1996.

On August 5, 1996, Ogelsby entered a plea of not guilty. On August 26, 1996, an omnibus hearing was held on Oglesby's motion to transfer the matter to juvenile court. The motion was denied based upon the seriousness of the offense and the age of the defendant.

Ark. Code Ann. § 9-27-318(e)(Supp. 1995) sets forth statutory factors that a trial court must evaluate when ruling upon a motion to transfer a matter to juvenile court. Specifically, § 9-27-318 provides:

> (e) In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors:
> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and

[1] Both parties agreed that jurisdiction of the misdemeanor was properly within the juvenile court. Ark. Code Ann. § 9-27-318(a)(3)(Supp. 1995).

(3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.
(f) Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect.

Oglesby contends that the trial court erred in denying his motion to transfer based solely upon the finding that the crime was serious; he argues that pursuant to the statute, a crime must be both serious and violent in order to justify denial of a motion to transfer.

In ruling upon a motion to transfer, a court is not required to give equal weight to each of the factors enunciated in Ark. Code Ann. § 9-27-318(e). *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996); *Sebastian v. State*, 318 Ark. 494, 885 S.W.2d 882 (1994). According to Ark. Code Ann. § 9-27-318(f) (Supp. 1995), a trial court decision to try a juvenile as an adult must be supported by clear and convincing evidence. A trial court's decision will not be overturned unless it is clearly erroneous. *Booker v. State, supra; Davis v. State*, 319 Ark. 613, 893 S.W.2d 768 (1995).

According to *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996), it is the movant's burden to prove the transfer to juvenile court was warranted. *See also, Williams v. State*, 313 Ark. 451, 856 S.W.2d 4 (1993); *Pennington v. State*, 305 Ark. 312, 807 S.W.2d 660 (1991). This is a burden appellant has not met.

The defense conceded that the offense was serious but claims that the denial of the motion to transfer was improper because the offense was not violent as well. The defense offered no evidence to prove that the motion to transfer was warranted; therefore, the trial court ruling was not clearly erroneous.

Additionally, the State argued below that Ogelsby had turned eighteen and was not eligible for juvenile rehabilitative programs. In the recent case of *Smith v. State*, 328 Ark. 736, 946 S.W.2d 667 (1997), we held that the age of the juvenile is a permissible factor to evaluate when determining whether a transfer is proper. *See also, Maddox v. State*, 326 Ark. 515, 931 S.W.2d 438

(1996); *Brooks v. State, supra; Hansen v. State*, 323 Ark. 407, 914 S.W.2d 737 (1996).

Based upon the seriousness of a Class B felony and the fact that Oglesby is now eighteen years old, we cannot say that the denial of transfer was clearly erroneous. We therefore affirm.

Affirmed.

CORBIN, J., not participating.

Randy PORTER *v.* David HARSHFIELD, Jr., M.D.

96-940 948 S.W.2d 83

Supreme Court of Arkansas
Opinion delivered June 23, 1997

[redacted]

[redacted]

[redacted]

[redacted]

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

Michael Angel, for appellee.

W.H."DUB" ARNOLD, Chief Justice. The appellant, Randy Porter, brought suit against appellee David L. Harshfield, Jr.,

M.D., d/b/a Riverside Radiology Group, to recover damages for injuries sustained when Dr. Harshfield's employee, Jerry Pearrow, a radiology technician, sexually assaulted Porter while conducting a gallbladder ultrasound. Porter's separate suit against Pearrow resulted in a default judgment and a subsequent award to Porter in the amounts of $15,000 in compensatory damages and $15,000 in punitive damages. In the present appeal, Porter challenges the trial court's granting of summary judgment in Dr. Harshfield's favor. We affirm.

The facts as set out in Porter's complaint are as follows. On October 4, 1993, Porter went to Riverside Radiology Group in North Little Rock for an ultrasound for suspected gallbladder problems. Pearrow escorted him to an examining room and requested that he partially disrobe, don a hospital gown, and lie on his back on the examining table. Pearrow put gel on Porter's stomach and proceeded to examine his side several times. He then unbuckled and unzipped Porter's pants, pulled them down, and examined around his testicles. Feeling something on his penis, Porter looked down to find Pearrow performing oral sex on him. Porter immediately got off the table, put on his clothes, and left the clinic.

In his complaint, Porter claimed that Pearrow's actions were within the course and scope of his employment and thus should be imputed to Dr. Harshfield. In his answer, Dr. Harshfield admitted that Porter had been referred to his clinic on the date in question, but denied any knowledge of the sexual assault. He pleaded affirmatively that, if Pearrow indeed committed the actions alleged, his actions were outside the scope of his employment.

Both parties filed motions for summary judgment. Attached to Dr. Harshfield's motion was the affidavit of Dr. Joseph Calhoun, the supervising radiologist at the clinic while Dr. Harshfield was the acting Chief of Radiology at the Veterans Administration Hospital. Dr. Calhoun averred that he had been practicing radiology in Little Rock since 1950. "Eminently familiar" with the standard of care in this area, Dr. Calhoun explained that it was standard procedure to allow radiology technicians to perform

ultrasound tests unsupervised unless the examination was of an unusual nature. A routine gallbladder exam, according to Dr. Calhoun, was not of an unusual nature.

Dr. Harshfield also presented his own affidavit in which he stated that, at the time of the incident, he had no knowledge that Pearrow had the intent to touch or physically contact Porter in an inappropriate way, nor did he possess knowledge of any facts that would have alerted him to the probability that Pearrow would engage in such behavior. He further averred that Pearrow's actions were wholly outside his employment and beyond the duties and responsibilities of a radiology technician at the clinic. According to Dr. Harshfield, Pearrow's actions did not benefit him and were unexpectable.

In response to Dr. Harshfield's motion, Porter claimed that Dr. Harshfield had conducted virtually no background check on Pearrow. He further complained that Dr. Harshfield failed to supervise Pearrow; instead, he allowed Pearrow to "be his own boss." Porter also filed a motion for summary judgment, claiming that Dr. Harshfield had knowledge of Pearrow's past misconduct. In support of this contention, Porter submitted the affidavit of Little Rock Police Officer Sam Morshedi, who averred that he interviewed Pearrow on October 6, 1993, at which time Pearrow told him that he had previously engaged in homosexual conduct and had had a prior complaint filed against him at the clinic for sexually assaulting a female during a breast examination. After considering the pleadings, affidavits, discovery, and arguments of counsel, the trial court granted summary judgment in Dr. Harshfield's favor.

[redacted] We have recently summarized our standards for summary judgment review in *O'Mara v. Dykema*, 328 Ark. 310, 315-316, 942 S.W.2d 854 (1997):

> The standard of review for a grant of summary judgment is familiar. Summary judgment should only be granted when it is clear that there are no disputed issues of material fact. *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992). It is appropriate to sustain a grant of summary judgment if the evidence brought before the trial court by the moving party shows "that there is no

> genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Tullock v. Eck*, 311 Ark. 564, 567, 845 S.W.2d 517, 519 (1993); Ark. R. Civ. P. 56(c).
>
> Appellees, as movants for summary judgment, bear the burden of showing that there is no issue of material fact. *Gleghorn v. Ford Motor Credit Co.*, 293 Ark. 289, 737 S.W.2d 451 (1987). All evidence must be viewed in the light most favorable to appellants, as they are the parties resisting the motion; and they are also entitled to have all doubts and inferences resolved in their favor. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996). However, they may not rest upon the mere allegation of their pleadings; Ark. R. Civ. P. 56 requires their response, by affidavits or other evidence, to specifically show that there is a genuinely disputed issue of material fact. *Guthrie v. Kemp*, 303 Ark. 74, 793 S.W.2d 782 (1990). Once a movant makes a prima facie case for summary judgment, the respondent must then meet proof with proof by showing that there remains a genuine issue of material fact. *Mt. Olive Water Ass'n v. City of Fayetteville*, 313 Ark. 606, 856 S.W.2d 864 (1993).
>
> Even if there are disputed facts, if reasonable minds would not differ as to the conclusion to be reached, then a grant of summary judgment is proper. *Chalmers v. Toyota Motor Sales*, 326 Ark. 895, 935 S.W.2d 258 (1996). Further, if a respondent to a motion for summary judgment cannot present proof on an essential element of the claim, the movant is entitled to summary judgment as a matter of law. *Short v. Little Rock Dodge, Inc.*, 297 Ark. 104, 759 S.W.2d 553 (1988).

In asking us to reverse the trial court's granting of summary judgment, Porter suggests that we analyze his case under at least three different theories discussed in a recent law review article. *See* Jorgensen, *Transference of Liability: Employer Liability for Sexual Misconduct by Therapists*, 60 BROOK. LAW REV. 1421 (1995). First, he asks that we apply the common-carrier theory of recovery to his case. According to Porter, as a patient, he was in a position at least as vulnerable as a passenger of a common carrier, and that, accordingly, Dr. Harshfield had a duty to protect him from willful assaults by his employee. Under this theory, which emerged from railroad-passenger cases, liability is based on the exclusive control that the carrier has over the passenger. *Id.* at 1449. It calls for an extraordinary, nondelegable duty of care that imposes liability on the employer for any harm befalling the plaintiff. *Id.* at 1450. In a common-carrier analysis, the plain-

tiff is never obligated to prove that the employee was acting under the scope of his or her employment or even that the actor was the defendant's employee. *Id.*; *see also Stropes v. Heritage House Children's Ctr.*, 547 N.E.2d 244 (Ind. 1989).

Another theory of liability propounded by Porter is one of "job-created power." Under this theory, employers are held vicariously liable for an employee's intentional torts. Jorgensen, 60 Brook. L. Rev. at 1435. Porter claims that, by giving Pearrow supervisory authority, Dr. Harshfield granted job-created power to Pearrow, who in turn abused this power when he sexually assaulted Porter while performing the ultrasound. Porter further suggests that "the scope of risks attributable to an employer increases with the amount of authority and freedom of action granted to the servant in performing his assigned tasks." *Id.* at 1437; *quoting Samuels v. Southern Baptist Hospital*, 594 So.2d 571 (La. App. 1992), *cert. denied* 599 So.2d 316 (La. 1992). However, courts have been generally reluctant to extend this theory of vicarious liability too far beyond the realm of police officers or those with special duties and powers associated with their positions. *Id.* at 1439.

Porter also asks us to examine his case on the basis of what was "reasonably incidental" to Pearrow's legitimate work activities. *See Stropes v. Heritage House Children's Ctr.*, *supra*; and *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344 (Alaska 1990). He asserts that Pearrow's actions, while not desired or authorized by Dr. Harshfield, were reasonably incidental to Pearrow's job as a radiology technician.

Rather than analyze the present case under one of the aforementioned theories from other jurisdictions, we think that the better course is to adhere to the theory of master-servant liability that we have followed since 1910. *See Sweeden v. Atkinson Imp. Co.*, 93 Ark. 397, 125 S.W. 439 (1910)(an act of an employee, in order to render the employer liable, must pertain to something that is incident to the employee's duties and which it is his duty to perform or for the benefit of the employer). Our test

was further explained in *Life & Cas. Ins. Co. of Tenn. v. Padgett*, 241 Ark. 353, 355, 407 S.W.2d 728 (1966):

> We think the law as it stands today is fairly summarized in the Restatement of Torts, where it is said that the master is subject to liability for his servant's intentional tort "if the act was not unexpectable in view of the duties of the servant." Restatement, Torts (2d), 245 (1958).

More recently, we reviewed our test, commonly referred to as the respondeat superior doctrine, in *Gordon v. Planters & Merchants Bankshares*, 326 Ark. 1046, 935 S.W.2d 544 (1996). There, we said that an employer may be held liable for punitive damages for the acts of his employee if the employee was acting within the scope of his or her employment at the time of the incident. *Id.*; *J.B. Hunt Transp., Inc. v. Doss*, 320 Ark. 660, 899 S.W.2d 464 (1995). Whether the employee's action is within the scope of the employment depends on whether the individual is carrying out the "object and purpose of the enterprise," as opposed to acting exclusively in his own interest. *Id.*

Applying these principles to the facts before us, we must agree with the trial court that Pearrow's sexual assault of Porter was unexpectable. Pearrow was not, by any stretch of the imagination, acting within the scope of his duties as a radiology technician when he assaulted Porter. Rather, Pearrow's actions were purely personal. Because Pearrow's actions were not expectable in view of his duties as a radiology technician, we conclude that Dr. Harshfield may not be held liable for Pearrow's actions and was thus entitled to summary judgment as a matter of law. *See Life & Cas. Ins. Co. of Tenn. v. Padgett*, 241 Ark. 353, 407 S.W.2d 728 (1966).

Dr. Harshfield contends that Porter's remaining claims for negligent hiring, retention, and supervision are procedurally barred because he failed to amend his complaint to include these theories of recovery. While it is true that Porter did not present these claims in his complaint, Dr. Harshfield acknowledged in his brief in support of his motion for summary judgment that Porter had raised three theories of recovery: negligent hiring and retention; negligent supervision; and respondeat superior. Under these

circumstances, we must conclude that the negligence claims were tried by the express or implied consent of the parties and thus should be treated in all respects as if they had been raised in Porter's complaint. *See* Ark. R. Civ. P. 15(b).

Turning to the merits of Porter's negligent-hiring claim, Dr. Harshfield contends that our decision in *St. Paul Fire & Marine Ins. Co. v. Knight*, 297 Ark. 555, 764 S.W.2d 601 (1989) is dispositive. We agree. In that case, a patient argued that the hospital's background check on an employee who sexually molested him was very inadequate and that a proper investigation would have shown that he was not qualified for the position of psychiatric technician. The investigation conducted by the hospital revealed that the technician had received apprentice counselor's credentials, supervised a summer playground staff, completed a work-study program, and received an honorable discharge from the Air Force. *Id.* He had no criminal record and no history of violent acts or sexual misconduct. *Id.* On appeal, we concluded that there was no evidence that the hospital gained any information that would have led them to conclude that the employee might be predisposed to commit violent acts against anyone. *Id.*, *citing Williams v. Feather Sound, Inc.*, 386 So.2d 1238 (Fla. App. 1980). We further surmised that "[i]t would take a vivid imagination to glean from this evidence any predisposition of appellant to molest adolescent males or commit sexual assault." *Id.*; *citing Strauss v. Hotel Continental Co., Inc.*, 610 S.W.2d 109 (Mo. App. 1980).

In the present case, Dr. Harshfield stated in his deposition that Pearrow had the highest ultrasound degree available. He had known Pearrow for some eight years while the two worked together at Arkansas Children's Hospital before he hired him as a technician and described him as very dependable. Porter claims that Dr. Harshfield should have inquired as to why Pearrow left Arkansas Children's Hospital; however, he has not abstracted any evidence or testimony to show what, if anything, Dr. Harshfield would have discovered had he conducted a background check that would have led him to believe that Pearrow was predisposed to commit sexual assault. Porter further points to Dr. Harshfield's testimony in his deposition that Pearrow had described himself as "asexual." Yet Porter has stated no connection, and we know of

none, between sexual orientation and a predisposition to commit sexual assault.

Regarding the negligent-retention claim, Porter refers to Pearrow's statement to Officer Morshedi, made after the incident in question, that he had engaged in prior homosexual misconduct and had had a prior sexual-assault complaint against him stemming from a breast examination that he had conducted while employed at Dr. Harshfield's clinic. Again, the fact that Pearrow had engaged in homosexual conduct in no way indicates that he would commit a sexual assault. As to the prior complaint, Dr. Harshfield claimed that he was unaware that such a complaint existed. Officer Morshedi's affidavit did not address whether a complaint was made before the incident in question, much less whether Dr. Harshfield knew that such a complaint existed or whether the complaint had any validity. As such, Porter failed to meet proof with proof on this issue.

In support of his negligent supervision claim, Porter points to Dr. Harshfield's policy at the clinic of having a female employee in the room when a male employee examines a disrobed female patient. He claims that Dr. Harshfield should have had a similar policy in place for Pearrow since he was aware that Pearrow had described himself as asexual. However, he offers no convincing authority or argument in support of his contention. We do not consider assignments of error that are unsupported by convincing legal authority or argument. *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997).

Finally, Porter asserts that public-policy considerations mandate reversal of the granting of summary judgment in his case. Particularly, he claims that Dr. Harshfield, who made a profit from his clinic while being employed by the VA Hospital, received an economic benefit by allowing Pearrow to be his own boss. Thus, according to Porter, Dr. Harshfield must bear the risks that go along with the economic benefit. In our view, the connection between Pearrow's authority as a radiology technician and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to include within those risks allocated to his

employer. Based on the foregoing, we affirm the decision of the trial court.

Affirmed.

CORBIN, J., dissents.

DONALD L. CORBIN, Justice, dissenting. The Appellant raises four possible theories that this court could utilize in order to place liability on the health-care provider — the ultimate person upon which blame should lie. I address only two of them, as the other two were not adequately developed by Appellant. I would be willing, however, to consider the remaining two theories in the future, in the event they are properly developed for appeal.

I would apply the common-carrier liability theory to allow recovery in this case. True enough, that theory originated with companies that were in the business of transporting passengers, but I believe the reasons behind this theory could be applied to the situation presented in this case. The basis of the theory, as it relates to common carriers in Arkansas, is a recognition of an enhanced liability to passengers because they are most vulnerable due to the fact that they have entrusted the common carrier with their lives. Under this doctrine, common carriers are responsible for the intentional torts of their employees. The policy reason that militates such a high standard of care is the vulnerability of the patron.

I would extend this high standard of care to medical-care providers. I can think of no greater responsibility than the duty owed by medical-care providers to safely exercise their skills and maintain control and supervision over their support staff upon accepting a patient into their care. A patient entrusts his body to the physician and necessarily to any of the physician's support staff. The patient subjects himself to a loss of dignity by even divulging his personal thoughts as to what ails him. Who does not feel the most vulnerable when told to disrobe and put on one of those split-tail gowns? Nakedness makes one feel the weakest, the most vulnerable. In addition to these feelings of vulnerability, we are conditioned since childhood to do what the doctor or his staff say "if we want to get well." Do we refuse to follow or question the

control of physicians or their staffs? No. We blindly obey their orders. Upon their direction, we bend over, we make a fist, we turn this way or that, we take a deep breath, and we even cough on command. We are essentially like sheep being led to slaughter, blindly doing as we are told. The reason for this blind faith lies within the trust we have for all medical-care providers, whom we are told will help us in our time of need.

I do not think it is proper for the medical-care provider, the authoritative figurehead, to be let off the hook of accountability because his employee's assault on his patient did not pertain to something that is incident to the employee's duties — that it was not foreseeable in view of the duties of the servant pursuant to our doctrine of respondeat superior. This is where I believe the majority is wrong. Certainly, the record reflects that Dr. Harshfield is a decent and fine physician, who employed Pearrow on the basis of his skills and reputation in the health-care field. The record further reflects that Dr. Harshfield did not in any manner desire or authorize Pearrow to make the sexual assault on his patient. But in this situation, control, trust, and vulnerability are the buzz words. This physician, acting through his radiology technician, Pearrow, to whom he had delegated the responsibility of solely caring for his patient, must and should bear the ultimate responsibility for the outrageous harm done to his patient, the Appellant herein. The majority's decision is very disturbing to me. After reading this decision, who will ever totally trust any health-care provider? If it happened once, it can do so again.

What makes the majority's decision even more disturbing is the fact that it is common practice that a male medical-care provider have a female medical-care provider present when he is examining a female patient. Although I suspect that the concern for the female patient is merely secondary to the male medical-care provider's desire to protect himself from unwarranted accusations arising from such intimate encounters, this decision has the potential of undermining such practice. Because if such acts by the employer are not foreseeable under the instant facts, then there is no need to continue this practice. It has a smack of gender bias. The bottom line is that if it is foreseeable that a one-on-one encounter between a male medical-care provider and a female

patient could lead to improper sexual assaults being perpetrated on a female patient, then it is just as foreseeable that such assaults may be perpetrated on a male patient. The key to viewing such a situation lies not within a heterosexual-versus-homosexual attraction; rather, the situation turns on the fact that the vulnerable patient finds himself or herself alone with a stranger while the patient is in a submissive situation. In fact, I agree with the majority's observation that there is no connection between a person's sexual orientation and a predisposition to commit sexual assault. Thus, I can discern no valid reason for having a third party present in the examining room when the medical-care provider is male and the patient is female, all the while continuing to allow a male medical-care provider to be alone with a male patient.

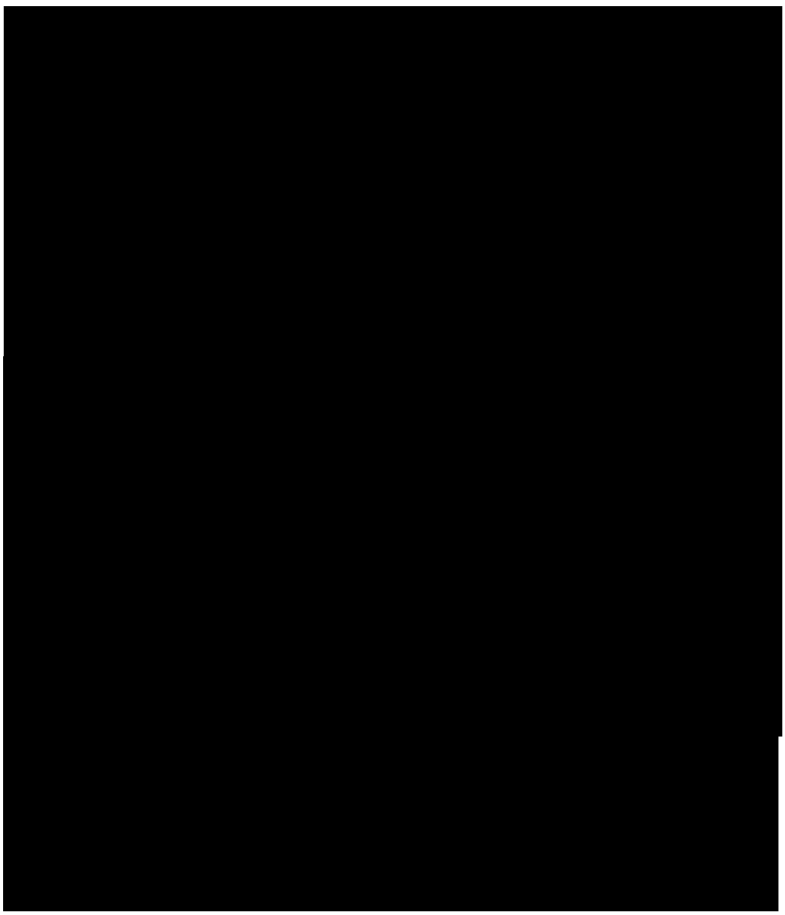
My observations would just as easily support liability under the theory of job-created power. Under this theory, employers are held vicariously liable for an employee's intentional torts. Because Dr. Harshfield gave Pearrow supervisory control over his patient, he gave job-created power to Pearrow. The scope of risks attributable to a health-care provider should increase with the amount of authority and freedom of action granted to a servant in performing his assigned tasks. This is particularly true when those supervisory duties include one-on-one encounters with patients.

Based upon the foregoing reasons, I respectfully dissent.

Marlan Dale SHANNON, Individually and as Administrator of the Estate of Charles Shannon, Deceased *v.* L.K. WILSON and Elizabeth Ashworth, Individually and as Partners of City Liquor, a Partnership

96-762 947 S.W.2d 349

Supreme Court of Arkansas
Opinion delivered June 23, 1997



The Mulkey Attorneys Group, P.A., by: *Bruce L. Mulkey* and *Ramona G. Stein*, for appellants.

Ball & Mourton, Ltd., by: *Kenneth R. Mourton* and *Rayburn W. Green*, for appellees.

Everett, Shemin, Mars & Stills, by: *David D. Stills*, for Amici Curiae.

W.H."DUB" ARNOLD, Chief Justice. This is an appeal asking us to reconsider our decisions in *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965), and the line of decisions following that ruling in which we determined that there is no liability imposed upon one who sells intoxicants to minors for injuries caused by minors who became inebriated. Appellant asks us to modify our rule to allow the issue of whether the seller is negligent to go to a jury for determination. We reverse and remand holding that, under the facts which may be proved by the pleadings, a cause of action for common-law negligence against the vendor has been stated.

Marlan Dale Shannon filed suit against L.K. Wilson and Elizabeth Ashworth, individually and as partners of City Liquor in Fayetteville, for the wrongful death of his son Charles Shannon. The trial court dismissed the complaint pursuant to an Ark. R. Civ. P. 12(b)(6) motion made by appellees. Upon our review, we accept all facts alleged in the complaint as true and view them in the light most favorable to the appellant. *Neal v. Wilson*, 316 Ark. 588, 596, 873 S.W.2d 552, 556 (1994).

On the evening of January 28, 1995, Charles Shannon and Jarred Sparks, both aged thirteen, were passengers in a Ford pickup truck driven by David Farmer, aged sixteen. Between 7:00 p.m. and 8:30 p.m., the three boys drove up to the drive-through window of City Liquor, located in Fayetteville, Arkansas. An employee of City Liquor sold them a six-pack of beer and a six-pack of malt liquor without asking for identification.

After leaving City Liquor, the three boys began drinking as they drove to St. Paul, Arkansas. At a pool hall in St. Paul, David Farmer exited the vehicle. Charles Shannon and Jarred Sparks remained in the vehicle drinking the rest of the liquor. At some time, the two boys left the pool hall in the pickup.

At approximately 9:10 p.m., the Arkansas State Police were notified of an accident in Madison County. Arriving at the scene, police found the Ford pickup had left the road, traveled through a fence, hit a telephone pole and finally come to rest after hitting a tree. The police surmised that the pickup was traveling at excessive speed and that the accident occurred while the driver was attempting to negotiate a curve. Jarred Sparks was found in the driver's seat of the truck and Charles Shannon in the passenger's seat. Both were pronounced dead at the scene. Blood tests revealed that Jarred Sparks had a blood-alcohol level of .10% and that Charles Shannon had a level of .07%.

Marlan Dale Shannon, father of Charles Shannon and executor of the estate, filed suit asserting that appellees were negligent in selling alcohol to the three minors. The complaint alleged that it was foreseeable that the minors who purchased the liquor at a drive-through window would drive the vehicle on the roads of Arkansas thereby endangering their health and safety as well as that of other persons traveling on the roads. The trial court granted the appellee's motion to dismiss for failure to state a claim upon which relief could be granted. Appellant appeals the dismissal and urges that the law in Arkansas be changed to recognize the potential liability for a vendor who knowingly sells alcohol to minors.

In *Carr v. Turner, supra,* this Court first addressed the issue of whether a person who was injured in a collision with a drunk driver had a cause of action against a tavern owner whose unlawful sale of liquor brought upon the inebriation. This Court determined, at that time, that it should follow the view of the majority of other jurisdictions in observing the common-law view that the proximate cause of any subsequent accident was the consumption of liquor, not its sale. *Id.* at 890 (citations omitted).

In *Carr,* we noted that the enactment of a dramshop act by the legislature would be the appropriate method to change the

common-law principle. This Court in Carr examined two existing Arkansas statutes to determine whether in either of them the legislature had acted to change the common-law rule. The first statute directed that liquor be sold in packages and not consumed on the premises; this was enacted to avoid the return of "saloons" to the State. Ark. Stat. Ann. § 48-309 (Repl. 1946), recodified at Ark. Code Ann. § 3-3-604 (Repl. 1996). The second statute established a misdemeanor crime for anyone who sold or gave away liquor to a minor, a habitual drunkard, or an intoxicated person. Ark. Stat. Ann. § 48-901 (1947), recodified at Ark. Code Ann. § 3-3-206-210 (Repl. 1996).

This Court determined that neither of these two statutes changed the common-law rule of nonliability. In making this determination, we noted that the majority of other jurisdictions adhered to this principle and that the "cases finding liability are so few that they may be reviewed quickly." *Carr*, 238 Ark. At 891.

Since *Carr*, this Court has been entreated to reevaluate the issue of a seller of alcohol's liability on numerous occasions. Repeatedly we have held that absent a change in the common-law principle by the legislature, this Court would not depart from the ruling in Carr and its progeny.

In *Milligan v. County Line Liquor Inc.*, 289 Ark. 129, 709 S.W.2d 409 (1986), we addressed the issue of liability for the provider of alcohol. In *Milligan*, the appellee, County Line Liquor, was charged with violation of an Arkansas statute by selling beer to a minor. Ark. Stat. Ann. § 49-8-901 (Repl. 1977). We upheld the premise that there is no liability for selling alcohol, even in the instance where a statute was violated. Specifically, we held:

> It may be that a Dramshop Act is to be desired, but such a measure should be the result of legislative action rather than of judicial interpretation. The primary purpose of this appeal is to see if we will reverse our position and now adopt such a measure by judicial fiat. . . . we decline to change our position because of the essential soundness of the common-law rule. That is, it is the consumption of intoxicants, not the sale standing alone, which is the proximate cause of injuries.
>
> Appellant next argues that the trial court erred in ruling that as a matter of law there was no proximate cause between violation of

> the statute prohibiting the sale of beer to a minor and the accident. The argument, in essence, is simply another way to contend that Ark. Stat. Ann. 48-901 (Repl. 1977) is a Dramshop Act. We have previously rejected the argument. In *Carr v. Turner, supra*, we stated it is clear that in enacting Ark. Stat. Ann. 48-901 the General Assembly did not intend to change the common-law rule of nonliability.

In several cases following *Milligan*, we rejected appeals to deviate from the *Carr v. Turner* rule. In *Yancy v. The Beverage House of Little Rock, Inc.*, 291 Ark. 217, 723 S.W.2d 826 (1987), the appellee twice sold alcohol illegally to a minor; on the second occasion, the minor was intoxicated at the time of the sale. The minor then had an accident where two teenagers were killed. Also, in *First American National Bank of North Little Rock v. Associated Hosts, Inc.*, 292 Ark. 445, 730 S.W.2d 496 (1987), a "happy hour" customer was allowed to leave the bar in an intoxicated state after having consumed more than a dozen drinks in three hours. Upon leaving the bar, the customer fell and was injured. In both of these cases, we reaffirmed the Carr holding of nonliability for the seller of alcohol. In 1995, we again held in *Mann v. Orrell*, 322 Ark. 702, 912 S.W.2d 1 (1995), that the holdings of *Carr* and its progeny were controlling and that there is no liability to be imposed on tavern owners or liquor store owners for injury to a patron or third person when injury results from the consumption of alcohol.

Since 1965, our holdings have been consistent in declining to impose liability on the provider of alcohol by holding that the proximate cause of any injuries later occurring is the consumption of the alcohol, not its sale. In fact we have continually stated that a dramshop act is the preferred measure to deal with this issue and that "such a measure should be the result of legislative action rather than of judicial interpretation." *Carr* at 892, *supra*. For twenty years, we have followed precedents while stating that the legislature should address this issue, and we have held to the contention that replacing the common-law rule is a matter of public policy best left to the legislature. Despite this Court's preference for legislative action, there has been no action directly addressing this troublesome question; so, we will address this issue now.

In *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), this Court addressed the issue of abolishing the common-law principle of governmental immunity from tort actions and noted that "[t]he Legislature's broad investigative powers to determine facts and its greater flexibility in dealing with complex problems indicate a preference for a solution by statutory action." *Id.* at 1242. While a legislative deliberation was the preferred method to address the issue, this Court concluded that "considerations of public policy are not and never have been for determination by the legislature alone." *Id.*, *citing* Oliver Wendell Holmes, *The Common Law*, 35 (1881).

Carr was decided in 1965 utilizing a rule of law from the early 1800s. In the 1800s, when the common-law rule was formulated, most people walked and some rode in horse-drawn carriages, no unreasonable risk to third persons was created by selling alcohol to a visibly intoxicated person or a minor. Today, patrons of bars and liquor stores no longer typically walk or ride on horses. They almost always travel by motor vehicle. The reality of modern life is evidenced by the fact that most drinking establishments and liquor stores provide patrons parking lots. *Meade v. Freeman*, 462 P.2d 54, 64-65 (Idaho 1969). *See also*, *Right of Action at Common Law for Damages Sustained by Plaintiff in Consequence of Sale of Intoxicating Liquor or Habit-forming Drugs to Another*, 120 A.L.R. 352 (1941); *see generally*, Bender, *Tort Liability for Serving Alcohol: An Expanding Doctrine*, 46 MONT. L. REV. 381 (1985). Today, motor-vehicle crashes are the single greatest health hazard to people under the age of forty-five. Over 50% of all highway fatalities result from driving under the influence of alcohol. Over 250,000 people died in the United States in alcohol-related motor-vehicle accidents in the years between 1980-1990. *Interim Report to the Nation from the Presidential Commission on Drunk Driving*, p.1-2 (Dec. 13, 1995).

The law has undergone massive change since the 1800s. The ultimate test in determining the existence of a duty to use due care is found in the foreseeability that harm may result if care is not exercised. Common experience dictates that when a person is imbibing alcohol, that person reaches a level of toxicity after

which continued imbibing alcoholic beverages will render him unable to operate an automobile safely.

The rule espoused in *Carr* was judicially created. When a judicially created rule becomes outmoded or unjust in its application, it is appropriate for the judiciary to modify it.
The Oklahoma Supreme Court, in *Brigance v. Velvet Dove Restr., Inc.*, 725 P.2d 300 (Okla. 1986), wrote:

> Inherent in the common-law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of stare decisis, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying common-law to new situations as the need arose. If this were not so, we must succumb to a rule that a judge should let others 'long dead and unaware of the problems of the age in which he lives, do his thinking for him.'

Id., citing, Bielski v. Schulze, 114 N.W.2d 105 (Wisc. 1962), *quoting* Mr. Justice Douglas, *Stare Decisis*, 49 COLUM.L.REV. 735,736 (1949).

In *Parish v. Pitts, supra*, this Court noted that "the field of common law is not primarily the Legislature's problem, it is the primary concern of this Court. Accordingly, the Court, not the Legislature, should extirpate those rules of decision which are admittedly unjust, for it is to the judiciary that the power of government is given to provide protection against individual hurt." *Id. citing*, Green, *Freedom of Litigation*, 38 ILL. L. REV. 355, 382 (1944). Thus, as a part of our common-law doctrine, this Court is free to amend the common law. True, as we have frequently stated, the legislature may amend or change our common law, but we are not bound to adhere to outmoded holdings pending legislative action. This Court has a duty to change the common law when it is no longer reflective of economic and social needs of society. We conclude, therefore, on the basis of past cases decided by this Court regarding our obligation to adapt our common law to an ever changing society and as a matter of policy, we should recognize a common-law cause of action against a vendor of liquor who knowingly sells alcohol to a minor.

The absolute rule of nonliability for vendors who sell alcohol to minors in violation of a criminal statute is unjust jurisprudence because the furnishing of alcohol to minors may seriously endanger the health, safety and welfare of Arkansas' minors. The doctrine of *stare decisis* is not a sufficient reason to preclude the recognition of liability.

Many other jurisdictions have held that such a rule is unjust and have acknowledged liability for those who illegally sell liquor; we are in the minority by continuing with the rule from *Carr*. This Court concluded in *Carr* that it did not wish to be in the minority of jurisdictions on this issue, so this Court adhered to what then was the majority rule — nonliability of the seller. Ironically, over the passage of years the holding in Carr has now become the clear minority rule which is the position that this Court expressly stated it wanted to avoid when it first considered the vendor nonliability issue twenty years ago. Most state and federal courts that have considered this issue since the 1960s have reevaluated and rejected as patently unsound the rule that a seller cannot be held liable for furnishing alcoholic beverages to an intoxicated or minor patron who injures a third person based upon the grounds that the sale or service is causally remote from the subsequent injurious conduct of the patron. A substantial majority have decided that the furnishing of alcoholic beverages may be a proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person.

The State of Kentucky initially followed the common-law rule of nonliability for a vendor of intoxicating liquor; however, the Kentucky Court of Appeals found that the constitution, statutes, and case law of Kentucky provide a policy of special protection for minors from injury; therefore, in instances involving minors, such liability for vendors can exist. Statutes relied upon as creating this special protection include minimum ages for employment; prohibition against harming minors; prohibition on exhibition of minors; and other child-protection acts. *See, Pike v. George*, 434 S.W.2d 626 (Ky. 1968).

The expanding view of common-law liability is evidenced by the overwhelming number of other jurisdictions which have

found liability under similar facts. Other jurisdictions that have adopted the theory of allowing the issue of negligence to go to a jury follow: Alaska: *Nazareno v. Urie*, 638 P.2d 671(Alaska 1981) (sale violating minor-sale statute is evidence of negligence for jury to examine); Arizona: *Ontiveros v. Borak*, 667 P.2d 200 (Az. 1983) (do not favor special rules of tort nonliability because no group should be given special privileges to negligently injure others without bearing the consequences of that act); California: *Strang v. Cabrol*, 691 P.2d 1013 (1984) (sale of liquor to obviously intoxicated person gives rise to liability; however, other forms of common-law civil liability are rejected); Colorado: *Kerby v. Flamingo Club, Inc.*, 532 P.2d 975 (Colo. App. 1974) (illegal sale to minor basis for common-law negligence suit); District of Columbia: *Marusa v. District of Columbia*, 484 F.2d 828 (1973) (violation of a statutory duty is evidence of negligence); Florida: *Davis v. Shiappacossee*, 155 So.2d 365 (Fla. 1963) (illegal sale to minor evidence of negligence for jury to consider); Georgia: *Sutter v. Hutchings*, 327 S.E.2d 716 (Ga. 1985) (provider of alcohol is liable for injury to third party by an intoxicated person if he had knowledge that the consumer of alcohol was intoxicated at the time the alcohol was furnished; however, there is no liability for provider to consumer because consumer is solely responsible for his or her own injuries); Georgia also has dramshop act: Ga. Code § 3-3-22 (1982); Hawaii: *Ono v. Applegate*, 612 P.2d 533 (Ha. 1980) (modern trend and injustice of nonliability rule lead to a conclusion that a person injured by an inebriated tavern customer may recover from the tavern); Idaho: *Alegria v. Payonk*, 619 P.2d 135 (Idaho 1980) (situation analogous to negligent entrustment, so jury should determine whether it was proximate cause of later injuries); Illinois: *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959) (sale in violation of criminal statute held to be basis for common-law negligence claim); Illinois also has dramshop act: Ill. Stat. Ann. ch. 43, § 135 (Smith-Hurd 1984 Supp.); Indiana: *Elder v. Fisher*, 217 N.E.2d 847 (Ind. 1966) (in the absence of a special statutory provision, the general principles of common-law negligence should be applied to cases involving intoxicating liquor); Indiana also recognizes statutory liability: Ind. Code § 7.1-5-10-15 (1982 ed.); Iowa: *Lewis v. State*, 256 N.W.2d 181 (Iowa 1977) (in instances involving an illegal sale of alcohol

to a minor, the proximate cause of any subsequent injury is an issue to be resolved by the fact finder); Louisiana: *Thrasher v. Leggett*, 373 So.2d 494 (La. 1979) (there should not be civil immunity for alcoholic retailers even when there is no dramshop statute); Massachusetts: *Adamin v. Three Sons, Inc.*, 233 N.E.2d 18 (Mass 1968) (illegal sale to intoxicated person can be basis for common-law negligence claim); Michigan: *Thaut v. Finley*, 213 N.W.2d 820 (1973) (violation of statute for illegal sale of alcohol is negligence per se); also recognize statutory liability: Mich. Stat. Ann. § 18.993 (Callaghan 1984 Supp.); Minnesota: *Trail v. Christian*, 213 N.W.2d 618 (Minn. 1973) (common-law rule overruled because of change in public policy, law is not "chiseled in marble to be left unchanged"); Minnesota also recognizes statutory liability: Minn. Stat. § 340.95 (1984); Mississippi: *Munford, Inc. v. Peterson*, 368 So.2d 213 (Ms. 1979) (violation of a statute is negligence *per se*, there is no justification to exclude sellers of alcohol from this requirement); Missouri: *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo.App. 1980) (statute prohibiting sale to minors gives rise to cause of action for civil damages); Montana: *Nehring v. LaCounte*, 712 P.2d 1329 (Mon. 1986) (it is foreseeable that injury can occur resulting from sale of alcohol to obviously intoxicated person); *Jevning v. Skyline Bar*, 726 P.2d 326 (Mont. 1986) (it is foreseeable that injury can occur resulting from sale of alcohol to minor); New Hampshire: *Ramsey v. Anctil*, 211 A.2d 900 (N.H. 1965) (common-law action based upon a violation of criminal statute prohibiting sale to minor; court noted this would advance protected policy of state); New Jersey: *Rappaport v. Nichols*, 156 A.2d 1 (N.J. 1969) (violation of criminal statute is evidence of negligence); New Mexico: *Lopez v. Maez*, 651 P.2d 1269 (N.M. 1982) (the breach of a statutory duty may constitute negligence); New York: *Berkeley v. Park*, 262 N.Y.S.2d 290 (N.Y.Supp.Ct. 1965) (liability for supplier of alcohol under both common-law theories as well as dramshop act); New York also recognizes statutory liability: N.Y. Gen.Oblig.Law § 11-101 (McKinney 1984 Supp.); North Carolina: *Hutchens v. Hankins*, 303 S.E.2d 584 (N.C.App. 1983) (allows persons injured a right to recover from tavern owners providing liquor to customer after proof of owner's negligence); North Carolina also recognizes statutory liability: N.C. Gen. Stat. § 18B-121 et seq. (1983); Ohio: *Mason v. Rob-*

erts, 294 N.E.2d 884 (Ohio 1973) (illegal sale to intoxicated person evidence of negligence); Ohio also recognizes statutory liability: Ohio Rev. Code Ann. § 4399.01 (1982); Oklahoma: *Brigance v. Velvet Dove Restr.*, 725 P.2d 300 (Okla. 1986) (third party injured by intoxicated driver had civil cause of action against vendor for illegal sale of alcohol); Oregon: *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 485 P.2d 18 (Ore. 1971) (illegal furnishing to minor warrants finding of liability); Pennsylvania: *Jardine v. Upper Darby Lodge No. 1973*, 413 P.2d 626 (Penn. 1964) (plaintiff may maintain a common law action for injuries received as a result of vendor's sale of liquor); South Carolina: *Scott v. Greenville Pharmacy, Inc.*, 410 S.E.2d 324 (S.C. 1984) (sale of alcohol to a minor is evidence of negligence for jury to examine in determining proximate cause of injuries); South Dakota: *Walz v. City of Hudson*, 327 N.W.2d 120 (S.D. 1982) (statute prohibiting sale to minors protects them as a class, so violation of statute is negligence *per se*); Tennessee: *Mitchell v. Ketner*, 393 S.W.2d 755 (Tenn. 1964) (where it affirmatively appears that the violation of a statute was the proximate cause of injury, the violation of a penal statute is negligence *per se*); Texas: *Poole v. El Chico Corp.*, 713 S.W.2d 955 (Tx.Ct.App 1986) (inquiry of whether licensee's illegal sale of alcohol was proximate cause of injuries should be determined on case-by-case basis by jury); Utah: *Rees v. Albertson*, 587 P.2d 130 (Utah 1978) (reasonable minds could believe that selling beer to a minor could be the foreseeable proximate cause of an accident, so the jury should be given this to determine); Utah also has dramshop act: Utah Code Ann. § 32-11-1 (1983 Supp.); Washington: *Callan v. O'Neil*, 578 P.2d 890 (Wash. 1978) (suit allowed against tavern owner and employee based upon violation of criminal statute prohibiting sale to minors); West Virginia: *Anderson v. Moulder*, 394 S.E.2d 61 (W.Va. 1991) (violation of statute prohibiting sale of alcohol to minors evidence of negligence for jury to consider); Wisconsin: *Sorenson v. Jarvis*, 350 N.W.2d 108 (Wisc. 1984) (vendors are guilty of negligent acts if they sell intoxicants to persons they knew or should have known were minors); and Wyoming: *McClellan v. Tottenhoff*, 666 P.2d 408 (Wyo. 1988) (vendor of liquor owes a duty to exercise the degree of care required of a reasonable person in light of all of the circumstances).

The following states have addressed the issue of a seller's liability and have expressly declined to recognize common-law liability: Delaware: *Samson v. Smith*, 560 A.2d 1024 (Del. Supr. 1989) (no common-law liability for supplier of alcohol, such a rule is desirable; however, responsibility of legislature); Kansas: *Mills v. City of Overland Park*, 837 P.2d 370 (Kan. 1992) (if liability is to be imposed, it is a decision of the legislature); Maryland: *Felder v. Butler*, 438 A.2d 494 (Md. 1981) (only legislature can properly address issue); Nebraska: *Pelzek v. American Legion*, 463 N.W.2d 321 (Neb. 1990) (liability is a question of public policy better left to the legislature); Nevada: *Hamm v. Carson City Nugget, Inc.*, 450 P.2d 358 (Nev. 1969) (status as a minority view on this issue is not a rational basis to abrogate the common-law rule of nonliability).

Several states' legislatures have enacted statutes imposing dramshop liability. The following states courts have found that there is no co-existing common-law liability and that the dramshop statutes govern all liability of sellers: Alabama: Ala Code § 6-5-71 91975); Connecticut: Conn. Gen. Stat. § 30-102 (1985); Maine: Me. Rev. Stat. Ann. Tit. 17, § 2002 (1983); Rhode Island: R.I. Gen. Laws § 3-11-1 (1956). Conversely, Connecticut, Georgia, Illinois, and Utah currently have dramshop statutes; those states' courts have found the existence of common-law liability as well. Citations, *supra*. The States of Vermont and Virginia have not addressed this issue.

[redacted] Under the existing common-law rule, no cause of action exists against one selling liquor because the drinking of liquor, not the remote sale of it, is considered to be the proximate cause of any injury. *See*, 48A C.J.S., *Intoxicating Liquors*, § 553 (1969); 97 A.L.R.3d 528, § 2 (1980). This strict nonliability rule that keeps the issue of a vendor's illegal sale of alcohol to a minor from a jury takes away the basic jury function of determining proximate cause. We have long held that questions of foreseeability and causation may be ones of fact, depending on the case. *See, Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980); *Brinkley Car Works & Mfg. Co. v. Cooper*, 60 Ark. 545, 31 S.W. 154 (1895). Usually, however, proximate causation is a question for the jury. *Larson Mach., Inc. v. Wallace, supra*. Like any

other question of proximate causation, the question whether an act or condition is an intervening or concurrent cause is usually a question for the jury. *Helena Gas Co. v. Rogers*, 104 Ark. 59, 147 S.W. 473. *See also, Rhoads v. Service Mach. Co.*, 329 F.Supp. 367 (E. D. Ark. 1971).

The rule of nonliability predicated on the "proximate cause" of injuries being the consumption, not the sale of intoxicants, is not persuasive. Implicit in the common-law rule is that proximate cause must be the immediate cause. This is contrary to our cases interpreting proximate cause. This Court has held that proximate cause is the efficient and responsible cause, but it need not be the last or nearest one. *Bennett v. Bell*, 176 Ark. 690, 3 S.W.2d 996 (1928). The mere fact that other causes intervene between the original act of negligence and the injury for which recovery is sought is not sufficient to relieve the original actor of liability, if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable. *Butler v. Arkansas Power & Light Co.*, 186 Ark. 611, 54 S.W.2d 984; *Arkansas Power & Light Co. v. Marsh, supra; Hayes v. Missouri Pac. R.R. Co.*, 208 Ark. 370, 186 S.W.2d 780 (1945). The original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is of itself sufficient to stand as the cause of the injury. *Butler v. Arkansas Power & Light Co., supra; Arkansas Power & Light Co. v. Marsh, supra.* The intervening cause must be such that the injury would not have been suffered except for the act, conduct, or effect of the intervening agent totally independent of the acts or omission constituting the primary negligence. *Arkansas Power & Light Co. v. Marsh, supra; Hayes v. Missouri Pac. R.R. Co., supra.*

We find no basis for determining that the proximate cause is solely the voluntary consumption of alcohol. Under our theory of proximate cause, the selling of alcohol may be a proximate cause of injuries along with the proximate cause of the consumption. The two are not mutually exclusive. In order to relieve liability as a matter of law, we have to accept that a minor's intoxication is not reasonably foreseeable and merely possible, but not within the range of probability as viewed by the ordinary man. *Hayes v. Missouri Pac. R.R. Co., supra.* We believe that selling

alcohol to minors can be a proximate cause because the consumption, resulting intoxication, and injury-producing behavior is reasonably foreseeable.

As we noted, *supra*, most states have rejected the rule that the sale of alcohol cannot be the proximate cause of subsequent injuries. Nearly every court that has recognized that liability may be imposed has predicated this upon the duty of a licensed vendor to refrain from selling alcohol to minors.

[redacted] In order to prove negligence, there must be a failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. *See generally, Bowie v. Missouri Pac. R.R. Co.*, 262 Ark. 793, 561 S.W.2d 314 (1978). Duty is a concept which arises out of the recognition that relations between individuals may impose upon one a legal obligation for the other. *See*, W. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 42 at 244 (4th ed. 1971).

The existence of a duty to act with care when selling liquor to patrons can be found for an entity licensed to sell alcohol in this state in the affirmative requirements of statutes. The legislature has enacted statutes which regulate the liquor industry. Foremost, our legislature has declared that holding a license to sell alcoholic beverages is a privilege, not a right. Ark. Code Ann. § 3-3-218(a) (Repl. 1996). In regulating those who hold such licenses, the legislature enacted Ark. Code Ann. § 3-3-218(a), (b) (Repl. 1996) that provides that licensed seller of alcohol is to be held to "a high duty of care in the operation of the licensed establishment" and that "every holder of an alcoholic beverage permit. . . to operate the business wherein alcoholic beverages are sold. . . in a manner which is in the public interest, and does not endanger the public health, welfare, or safety." Additionally, the legislature has established a training program, the "Responsible Permittee Program" to "eliminate the sale of [alcohol] and consumption of [alcohol] by underaged persons; to reduce intoxication and to reduce accidents, injuries, and deaths in the state which are related to intoxication; and to encourage alcoholic beverage permit holders to be prudent in the sale and service of [alcohol]." Ark. Code Ann. § 3-4-803(a) (Repl. 1996).

In addition to the special statutes regulating the liquor industry, Ark. Code Ann. § 3-3-202(b)(1) (Repl. 1996) makes it a felony to knowingly sell or furnish liquor to a minor for monetary gain. The specific code section follows:

> 3-3-202. Knowingly furnishing or selling to minor.
>
> . . .
>
> (b)(1) It shall be unlawful for any person knowingly to sell or otherwise furnish for money or other valuable consideration any alcoholic beverage to any person under twenty-one (21) years of age.
>
> (2)(A) Any person violating this subsection shall, upon a first conviction, be deemed guilty of a Class D felony and shall be punished as provided by law.
>
> (B) Upon a second conviction within five (5) years, a person violating this section shall be deemed guilty of a Class C felony and may be imprisoned or fined, or both as provided by law.

The legislature determined that the prohibition of the selling or furnishing alcohol to minors for monetary gain was of such importance that this criminal sanction was amended in 1993 by Act 875 establishing the violation as a Class D felony. In the emergency clause for Act 875, the legislature made the determination that existing statutes criminalizing the sale of alcohol to minors were too lenient and thus heightened the penalty from a misdemeanor to a felony. Specifically, the legislature found, "supplying alcoholic beverages to underage persons is strictly contrary to the public policy and is detrimental to the young people of this State, and that the penalties for this conduct should be increased to deter and to punish these violations of Arkansas law and policy." 1993 Ark. Acts 875.

In enacting the foregoing statutes, it is clear that the legislature determined it is the public policy of the State of Arkansas to protect minors as a special class of citizens from the adverse consequences of alcohol consumption. The statutes establish an affirmative duty for alcoholic beverage license holders to safeguard against minors purchasing alcohol. These statutes serve to regulate the liquor industry and to promote the safety of our citizenry as a whole. We conclude that the statutes establishing affirmative obligations upon license holders authorized to sell alcohol and the

statute classifying the criminal act of selling or furnishing alcohol to minors for monetary gain a felony create a duty for licensees to exercise a high standard of care for the protection of minors. A breach of this duty can lead to a suit for negligence.

In *Rogers v. Stillman*, 223 Ark. 779, 268 S.W.2d 614 (1954), we concluded that the violation of a statute is evidence of negligence. *See also, Gussell v. Missouri Pac. R.R.*, 237 Ark. 812, 376 S.W.2d 545 (1964); *Franco, Admn'x v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (1977). On the issue of proximate cause, it is often enough to point out that the act could not have occurred if the law had been obeyed. *Franco, supra*, 261 Ark. at 147. It is our conclusion a licensed vendor's violation of the statute prohibiting the sale of alcohol to minors is evidence of negligence to be submitted to a jury.

For the foregoing reasons, the holding in *Carr* is hereby modified to allow juries to determine whether the violation of the criminal statute for selling alcohol to minors by a licensed vendor is the proximate cause of any subsequent alcohol-related injury to a minor or third party. Due to the legislative enactment of a higher duty of care, a licensed vendor who violates the regulatory policy and the criminal statutes of this state by selling alcohol to minors should be held accountable for any consequences of that action if a jury determines the results were foreseeable. Therefore, such violations of the statute prohibiting the sale of alcohol to minors by a licensed vendor can be presented to the jury as evidence of negligence with the jury to determine whether such was the proximate cause of any harm.

We conclude that the rule of liability adopted herein should be prospective. With the exception of the claims at issue here, there shall be liability for acts of negligence of a vendor selling to a minor pursuant to the application of this holding commencing with trials held on or after the date this opinion becomes final. With respect to *this* case, our decision is given immediate effect so that the efforts of a litigant to bring about needed changes in the law will not go unrewarded, because without such inducements changes might not occur. *See Special Sch. Dist. of Ft. Smith v. Sebastian Co.*, 277 Ark. 326, 641 S.W.2d 702 (1982). For the

foregoing reasons, this matter is reversed and remanded for proceedings consistent with this opinion.

Reversed and remanded.

NEWBERN, J., dissents.

DAVID NEWBERN, Justice, dissenting. It is indeed proper for an appellate court of last resort to overrule a prior decision when that decision was made on the basis of a mistake or when conditions have changed so as to make it outmoded. *Stare decisis* does not require stagnation. The law develops through the application of tried-and-true principles to changing times. That is not what the majority is about in this case.

In *Carr v. Turner,* 238 Ark. 889, 385 S.W.2d 656 (1965), we recognized that the General Assembly had criminalized giving or selling liquor to an intoxicated person or to a minor. We wrote, however, that

> Even if the prohibition against the sale of liquor to an intoxicated person [the subject at hand; *see* Ark. Code Ann. § 3-3-209 (Repl. 1996)], had the comprehensive implications that the appellant attributes to it, [*i.e.,* civil liability of the seller] we do not see how the impact of the statute could be confined to those who *sell* liquor, legally or illegally. The same reasoning would be applicable in the case of a person entertaining his friends in his home. . . . It may be that a Dramshop Act is to be desired, but such a measure should be the result of legislative action rather than of judicial interpretation.

The legislation to which we referred in the *Carr* case appeared in Ark. Stat. Ann. § 48-903 (1947). At the legislative session following our decision, the General Assembly added Act 277 of 1967 which made it a misdemeanor chargeable to one who would "knowingly sell, give, procure, or otherwise furnish any alcoholic beverage to any person under twenty-one years of age." An exception was provided for furnishing wine for a religious ceremony. A second offense within three years of the first offense was made a felony. The penalty was stiffened somewhat by Act 875 of 1993 which called for a fine and imprisonment rather than stating those penalties in the disjunctive.

Although the majority opinion does not mention it, the law, as found in Ark. Code Ann. § 3-3-202(a)(1) (Repl. 1996), continues to make it a crime "to give . . . or otherwise furnish any alcoholic beverage to any person under twenty-one . . . ." In addition, Ark. Code Ann. § 3-3-201 (Repl. 1996) makes a misdemeanor "The sale, giving away, or other disposition of intoxicating liquor to a minor. . . ." whether it is done knowingly or not. *See State v. Jarvis,* 244 Ark. 753, 427 S.W.2d 531 (1968).

The majority opinion apparently attempts to limit its effect to sale of alcoholic beverages to minors, but the principle or "public policy" upon which the opinion is based, to the extent it comes from these criminal statutes, cannot be limited to those facts. The policy involves not only sale but giving or furnishing. It involves not only selling, giving, and furnishing alcoholic beverages to minors but giving, selling, and furnishing alcoholic beverages to persons who may not be minors but who are not yet twenty-one years of age. It flies in the face of a basic tenet of the *Carr* decision. As we said in that case, "we do not see how the impact of the statute could be confined to those who *sell* liquor, legally or illegally." In that respect, nothing has changed.

Clearly, the public policy expressed by the General Assembly in the regulation of the retail liquor industry and in the criminalization of the sale of liquor to persons under twenty-one has not been extended by that body to impose civil liability. If the decision to do so were one this Court should make, we should have made it in 1965. Our decision then in the *Carr* case was not an ovine submission to a majority of other state courts. It was, rather, a principled conclusion that basing a departure from the common law on the legislation then extant would be unwise and that the public policy aspect of such a departure required legislative action. None of that has changed.

If we were mistaken in 1965, we surely would have corrected our mistake in one of the several decisions in which the issue has been raised since that time — most recently in *Mann v. Orell,* 322 Ark. 701, 912 S.W.2d 1 (1995). Rather, we have continuously stated that the issue is one for the General Assembly. In *Yancey v. The Beverage House of Little Rock, Inc.,* 291 Ark. 217, 723 S.W.2d

826 (1987), it was argued that the General Assembly would be powerless to change the law because we had stated it was the consumption of intoxicants, not the sale standing alone, that was the proximate cause of injuries. There, we even went so far as to say "We meant to place no roadblock to legislation commonly called a 'Dramshop Act.'"

Our *Carr* decision is no more outmoded today than when it was made or reaffirmed over the years. Citizens were not riding horses up to package-store drive-in windows in 1965, 1987, and 1995. Apparently the change on which the majority opinion relies primarily is the fact that some courts have found ways in which to answer the question we have said should be addressed to the General Assembly. Being in a majority, like being politically correct, offers superficial comfort, but it may not be right in the long run. It is especially harmful to the stability of the system we serve for any court to legislate in an area it has consistently staked out as belonging to the legislators.

I respectfully dissent.

IN THE MATTER OF THE ADOPTION OF Kristen Dyan LYBRAND; John Wesley King *v.* Sharon Lybrand

97-94 946 S.W.2d 946

Supreme Court of Arkansas
Opinion delivered June 23, 1997

Thurman, Lawrence & Heuer, P.L.C., by: *Sam Heuer*, for appellant.

No response.

DAVID NEWBERN, Justice. This is an adoption case in which the natural father of the adopted child challenges the adoption on the ground that he received no notice and did not give his consent. He further contends the adoption was not in the best interest of the child. We affirm the decision.

The appellant, John Wesley King, and a woman whose name is now Sharon Lybrand married in 1976. They divorced and then remarried. After the divorce and prior to their remarriage in 1984, Kristen Dyan Lybrand was born to Ms. Lybrand. Mr. King and Ms. Lybrand thereafter divorced again, and the decree did not mention Kristen. Ms. Lybrand married Joseph Lybrand in 1986. In 1987, Ms. Lybrand sued Mr. King alleging that he was the father of Kristen and seeking child support. Mr. King denied paternity, and apparently the action was dropped by Ms. Lybrand.

In March 1995, Mr. King filed a "visitation motion" in Pulaski County where he resides, asserting that he is the father of Kristen. In May 1995, Mr. Lybrand petitioned the Grant Probate Court to adopt Kristen. On June 13, 1995, Mr. King's Pulaski County action was dismissed, as venue was improperly laid. It was refiled as a paternity action by Mr. King in Grant County on June 16, 1995. Ms. Lybrand answered and denied Mr. King's allegation that he was Kristen's father.

On August 22, 1995, a final adoption order was entered in favor of Mr. Lybrand. On August 31, 1995, Ms. Lybrand moved to dismiss Mr. King's paternity suit, attaching to her motion the final adoption decree making Kristen the daughter of Mr. Lybrand.

Mr. King moved to set aside the adoption decree and to "reopen" the adoption proceeding. He claimed he was entitled to have notice of the adoption proceeding but had not received notice. The motion to set the adoption aside was granted, and the proceeding was thus reopened. Prior to the ensuing hearing, Ms. Lybrand filed a further response to Mr. King's paternity action, and she admitted that Mr. King was Kristen's father.

At the ultimate hearing, there was testimony about acrimony between Ms. Lybrand and Mr. King. The evidence showed that, although Ms. Lybrand allowed the child to spend considerable time with Mr. King's mother, she attempted to keep Mr. King from seeing the child. Mr. King asserted that he had indeed seen Kristen despite the attempts to keep her away from him and that he had supported her to some extent by reimbursing his mother for gifts and expenditures she had made for Kristen.

The Lybrands contended Mr. King was not entitled to notice of the adoption proceeding because he had not registered as a putative father pursuant to Ark. Code Ann. § 20-18-702 (Repl. 1991) and because he had abandoned or deserted Kristen. The Trial Court's order dismissed Mr. King's paternity petition and granted Mr. Lybrand's adoption petition. Mr. King has raised four points of appeal.

1. Jurisdiction

Mr. King contends that he was not given notice of the initiation of the adoption petition by Mr. Lybrand. He contends the failure to give him notice was fatal to the Trial Court's "jurisdiction" because of the lack of strict compliance with the adoption statutes requiring such notice. Although he does not say so directly, Mr. King's suggestion seems to be that the Court in that circumstance lacks jurisdiction of the subject matter. That is not so. The cases Mr. King cites have to do with jurisdiction of the person.

In *Hughes v. Cain,* 210 Ark. 476, 196 S.W.2d 758 (1946), the natural parent of an adopted child petitioned for *habeas corpus* contending that the adoption was invalid because the natural parents had not been given notice. The writ was granted, and we affirmed. Our holding was that the adoption was void because the nonresident parents of the child had not been given notice by publication as required by statute. We held, "it was necessary that service be obtained by publication as provided in § 256 of Pope's Digest, . . . before the probate court could acquire *jurisdiction of the person* of the appellee." *Hughes v. Cain,* 210 Ark. at 482, 196 S.W.2d at 760 (emphasis added).

In *Pender v. McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979), we held that lack of notice was not sufficient to void an adoption where the complaining natural parent had entered an appearance in the proceeding. In *Schrumm v. Bolding,* 260 Ark. 114, 539 S.W.2d 415 (1976), the natural parent of the child sought to be adopted was a minor. We voided the adoption because she had not received service of process. The opposing argument was that she had entered her appearance in the adoption proceeding. We rejected that argument on the ground that, as a minor, she was unable to enter an appearance except through a guardian, and that had not occurred.

The last case cited by Mr. King on the jurisdiction point is *Olney v Gordon,* 240 Ark. 807, 402 S.W.2d 651 (1966), in which we held a foreign adoption decree entered without notice to the natural parent or evidence of his entry of appearance was void and

thus not entitled to full faith and credit. Again, the issue was not jurisdiction of the subject matter.

[redacted] Mr. King did clearly appear in the adoption proceeding. Instead of asking that it be dismissed for lack of notice to him, he asked that the adoption be set aside and the proceeding reopened. The request was honored, and we have no hesitation in concluding the Trial Court had personal jurisdiction of Mr. King.

2. Putative Father Registry Act

[redacted] One of the Lybrands' contentions before the Trial Court with respect to the notice issue was that, as Mr. King had not registered his paternity claim pursuant to the Putative Father Registry Act, Ark. Code Ann. §§ 20-18-701 through 20-18-705 (Repl. 1991 and Supp. 1995), he was not entitled to notice. On appeal, Mr. King argues, as he did before the Trial Court, that the Act is unconstitutional. We decline to address the argument, as the abstract of the record does not demonstrate that any ruling was made on the point. *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997); *Vanderpool v. Fidelity & Casualty Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997); *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996).

3. Consent

Mr. King contends his consent to the adoption was necessary and was obviously not given. Ark. Code Ann. § 9-9-207 (Repl. 1993) provides:

> (a) Consent to adoption is not required of:
>
> (1) A parent who has deserted a child without affording means of identification or who has abandoned a child;
>
> (2) A parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree.
>
> ***

"Abandonment" is defined in Ark. Code Ann. § 9-9-202(7) (Repl. 1993) as:

> . . . the failure of the parent to provide reasonable support and to maintain regular contact with the child through statement or contact, when the failure is accompanied by an intention on the part of the parent to permit the condition to continue for an indefinite period in the future, and failure to support or maintain regular contact with the child without just cause for a period of one (1) year shall constitute a rebuttable presumption of abandonment.

This definition is relevant to § 207(a)(1), as that provision excuses the necessity of consent from a parent who has "abandoned" a child and was cited by the Trial Court as a ground for granting the adoption despite the lack of consent from Mr. King.

The "abandonment" definition overlaps a bit with the language in § 207(a)(2). Under both provisions, the question is whether the periods of non-communication or non-support resulted "without just cause" or were "justifiable." The justification proffered by Mr. King is that Ms. Lybrand was the sole reason he was unable to see his daughter.

Adoption statutes are strictly construed, and a person who wishes to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence. *In Re Adoption of K.F.H. and K.F.H.,* 311 Ark. 416, 844 S.W.2d 343 (1993); *Harper v. Caskin,* 265 Ark. 558, 561, 580 S.W.2d 176, 179 (1979)(stating adoption petitioner's burden is "heavy"). A finding that consent is unnecessary on account of a failure to support or communicate with the child is, however, not reversed unless clearly erroneous. *K.F.H, supra.* "We view the issue of justifiable cause as factual but one that largely is determined on the basis of the credibility of the witnesses. This court gives great weight to a trial judge's personal observations when the welfare of young children is involved." *K.F.H.*, 311 Ark. at 423, 844 S.W.2d at 347.

In analyzing these consent statutes, some additional principles are relevant. A "failure to communicate without justifiable cause" is one that is "voluntary, willful, arbitrary, and without

adequate excuse." *K.F.H.*, 311 Ark. at 421, 844 S.W.2d at 346. The one-year period, moreover, may be any one-year period, not merely the one-year period preceding the filing of the adoption petition. *Pender v. McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979). It is not required that a parent fail "totally" in these obligations in order to fail "significantly" within the meaning of the statutes. *Pender v. McKee*, 266 Ark. at 28, 582 S.W.2d at 934. The duty to support is not excused on the basis of other people's conduct unless such conduct prevents the performance of the duty of support. *Pender v. McKee*, 266 Ark. at 31, 582 S.W.2d at 935.

Mr. King's justification argument must be considered in light of his denial of paternity when support for Kristen was sought by Ms. Lybrand in 1987 and his failure to assert his paternity until 1995. Although Mr. King and his mother testified that he supported Kristen somewhat through his mother and that he sneaked visits with Kristen when she was visiting with his mother, there is no "paper record" of support whatever. Given the deference we accord to the Trial Court's determination of the credibility of the witnesses, we cannot say it was clearly erroneous to hold Mr. King's consent was not required.

4. Best interest

In this fourth point, the question is whether the judge was correct to conclude that the adoption was in Kristen's best interest. We will not reverse a probate court's decision regarding the best interest of a child to be adopted unless it is clearly against the preponderance of the evidence, giving due regard to the opportunity and superior position of the trial court to judge the credibility of the witnesses. *In the Matter of the Adoption of Perkins/ Pollnow,* 300 Ark. 390, 779 S.W.2d 531 (1989); *Dixon v. Dixon,* 286 Ark. 128, 689 S.W.2d 556 (1985).

The evidence presented with respect to Mr. Lybrand's relationship with Kristen was all positive. His marriage to Ms. Lybrand is apparently stable, and he has worked for the same employer for sixteen years and is apparently able to continue supporting his family. There was some evidence that in the past Mr. Lybrand had a drinking problem and exhibited some tendency

toward violence, but there was also evidence that he had quit drinking. On the whole, we cannot say that the Trial Court erred in granting Mr. Lybrand's petition.

Affirmed.

Sean RIGGINS *v.* STATE of Arkansas

CR 96-652 946 S.W.2d 691

Supreme Court of Arkansas
Opinion delivered June 23, 1997

Montgomery, Adams & Wyatt, PLC, by: *Dale E. Adams*, for appellant.

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

DAVID NEWBERN, Justice. Sean Riggins appeals from denial of his request for postconviction relief sought pursuant to Ark. R. Crim. P. 37. Mr. Riggins was convicted of first-degree murder and sentenced to fifty years' imprisonment on July 20, 1993. We affirmed his conviction in an opinion delivered on September 12, 1994. *Riggins v. State*, 317 Ark. 636, 882 S.W.2d 664 (1994). Mr. Riggins sought postconviction relief on the ground that his counsel failed to communicate to him an offer by the State of a plea agreement pursuant to which the State would have recommended a sentence of fifteen years' imprisonment in exchange for Mr. Riggins's agreement to testify against others involved in the crime. He also contended his counsel failed to seek a sentence consistent with those received by others involved in the crime of which he was convicted as an accomplice. The other defendants received sentences of no more than 35 years. We affirm the denial of postconviction relief.

As recited in our opinion affirming the conviction, the evidence showed that Mr. Riggins joined with others in shooting at a vehicle in which one occupant was killed and the other wounded. Mr. Riggins wielded a shotgun while his compatriots shot with pistols. The death and injury were caused by pistol bullets, but two shotgun slugs also hit the target car.

1. Plea agreement

Counsel who represented Mr. Riggins at the trial testified at the postconviction hearing that he could not remember whether an offer of a plea agreement had been made by the State. Mr. Riggins and the State, however, stipulated that such an offer

was made. Failure to communicate a plea agreement offer to a defendant has been held to be ineffective assistance of counsel. *Elmore v. State,* 285 Ark. 42, 684 S.W.2d 263 (1985); *Rasmussen v. State,* 280 Ark. 472, 658 S.W.2d 867 (1983). The issue thus became whether the offer was communicated to Mr. Riggins.

We cannot gainsay the Trial Court's remark that "there [was] no substantial evidence to support the defendant's claim that his counsel failed to convey a plea offer to him." Counsel's statement that he could not recall a plea offer to Mr. Riggins did not constitute an admission of failure to convey such an offer. He was not asked if he failed to communicate any offer that might have been given or if it was his practice in any case to decline to convey such an offer to a client.

The Trial Court's statement that there was no substantial evidence that the offer was not conveyed was a clear indication that he did not regard Mr. Riggins's testimony as credible on the point. The Judge was, of course, not required to believe that testimony. *Thompson v. State,* 307 Ark. 492, 821 S.W.2d 37 (1991); *Smith v. State,* 286 Ark. 247, 691 S.W.2d 154 (1985).

2. Comparative sentences

While it is true that the Trial Court could have honored a request for leniency pursuant to Ark. Code Ann. § 16-90-107(e) (1987), Mr. Riggins has not shown that the outcome of his trial would have been different had his counsel requested consideration of the sentences received by the others who were involved in the crime of which he was convicted. We do not reverse absent such a showing, *Strickland v. Washington,* 466 U.S. 668 (1984); *Johnson v. State,* 325 Ark. 44, 924 S.W.2d 233 (1996), and absent a showing that the Trial Court's decision on the matter was clearly erroneous. *Rowe v. State,* 318 Ark. 25, 883 S.W.2d 804 (1994).

Affirmed.

Allen Lee POLK *v.* STATE of Arkansas

CR 96-1426 947 S.W.2d 758

Supreme Court of Arkansas
Opinion delivered June 23, 1997

Herbert T. Wright, Jr., P.A., for appellant.

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

TOM GLAZE, Justice. Appellant Allen Polk was charged as a habitual offender with (1) being a felon in possession of a firearm under Ark. Code Ann. § 5-73-103(a)(1) (Supp. 1995), and with two class C misdemeanors, (2) disorderly conduct, and (3) obstructing governmental operations. At a bench trial, the circuit judge found Polk guilty on all charges. He sentenced Polk to six years on the felony count and ninety days and a $1,000 fine on the misdemeanor crimes, to run concurrently. On appeal, Polk's sole argument is that, under Ark. Code Ann. § 5-2-604 (Repl. 1993), commonly labeled the choice-of-evils defense, he was justifiably in possession of the gun found on him when arrested, and asks that his case be remanded for a new trial.

Polk commences his contention by arguing that the constitution and legislation provides for all citizens to defend themselves regardless of their classification. He specifically relies on § 5-2-604(a)(1) and (2) as an affirmative defense, which in relevant part provides as follows:

> (a) Conduct which would otherwise constitute an offense is justifiable when:

(1) The conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

(2) The desirability and urgency of avoiding the injury outweigh, according to ordinary standards of reasonableness, the injury sought to be prevented by the law proscribing the conduct.

In arguing § 5-2-604's applicability, Polk points to his and his fiancee's (Virginia Irene Johnson's) testimony where they claimed they met a "John" and his wife at the Arkansas River "somewhere" in North Little Rock. During the initial visit, Polk and Virginia claim they agreed to meet at John's house. Upon arrival, Polk suggests John wanted to show him some bombs and books on how to make them, and sometime after discussing the subject, "John placed a fake bomb and bomb information or material in Polk's truck." Polk said that he complained about John placing the bomb and material in the truck, and John sometime thereafter pulled a gun on him. In self-defense, Polk said he snatched the gun from John. Polk admitted both he and John were drunk. Polk called for Virginia, and during this period, John allegedly had obtained a crowbar, and struck Polk on his arm, fracturing it. Polk shot the gun to scare John, threw the gun in the seat of his truck, and he and Virginia drove away and returned to Virginia's house in Vilonia in Faulkner County.

After returning to Virginia's house, Polk said that he called the Faulkner County Sheriff's Office, and upon the officers finding a gun on Polk, they cuffed and arrested him. Polk further testified that he had never intended to keep the gun found on him. In her testimony, Virginia confirmed most of Polk's story, but she claimed (contrary to Polk's own testimony) that she would not have called Polk drunk. Virginia added that, when they returned to Faulkner County, Polk retrieved the gun from the truck and took it into her house. She also said she knew Polk had just been released from the penitentiary, but she did not know he was not to possess a weapon.

In sum, Polk's justifiable defense argument is that, under § 5-2-604(a)(1) and (2), having someone pull a gun on him constituted an emergency measure, and the urgency of avoiding the

injury outweighed the harm sought to be prevented by § 5-73-103, which prohibits a felon from possessing a firearm. Because he chose to flee and notify the police concerning the firearm, Polk concludes that his conduct is not the type the General Assembly intended to punish.

First of all, Polk's argument wholly ignores subsection (c) of § 5-2-604, which provides that the justification defense is unavailable if the actor is reckless or negligent in bringing about the situation requiring a choice of evils or in appraising the necessity for his conduct. It has been said that, the choice of evils, or more modernly called the defense of necessity, is a rarely used defense. *See* WAYNE R. LAFAVE, ET AL., CRIMINAL LAW § 5.4, at 441-450 (2d ed. 1986). We mention, too, *Maryland v. Crawford*, 521 A.2d 1193 (1987), where the Maryland Supreme Court held that necessity is a valid defense to the crime of unlawful possession of a handgun when five elements are present. The Maryland Court stated the following:

> (1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury or reasonably believe himself or others to be in such danger; (2) *the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to chose the criminal conduct*; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design; and (5) *the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends*. We emphasize that if the threatened harm is property damage or future personal injury, the defense of necessity will not be viable; nor can the defense be asserted if the compulsion to possess the handgun arose directly from the defendant's own misconduct. *Maryland v. Crawford*, 521 A.2d 1193 (1987). (Emphasis added.)

Consistent with such observation, § 5-2-604 is to be narrowly construed and applied. *See Koonce v. State*, 269 Ark. 96, 598 S.W.2d 741 (1980).

Here, Polk conceded that, as a parolee, he knew he was not allowed to leave Faulkner County; nonetheless, he did. He had been drinking all day, and admitted he was drunk. Obvi-

ously, even by his own testimony, Polk had knowingly and recklessly placed himself in a position or in circumstances where he could get into trouble — if for nothing else, for violating parole conditions. Also, our case law is well settled that the trial court was not required to believe Polk's version of what occurred, especially since Polk had an interest in the outcome of the proceedings. *See Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991); *Hudson v. State*, 294 Ark. 148, 741 S.W.2d 253 (1987).

In summarizing the evidence, the trial judge revealed there were several factors about the case that concerned him. The judge was bothered that "John" could not be identified and that, if Polk's concern was to give John's gun to law enforcement, Polk could have traveled a short distance to the North Little Rock Police Department to turn in the firearm or he could have given the weapon to Conway's or Vilonia's police. He also could have called his parole officer. From the defense's testimony, the judge further did not understand how or why the firearm was found in Polk's possession after it was first placed in Polk's truck, and then seen in Virginia's house, if Polk's only intention was to turn the gun over to the police. To confuse this matter further, the Faulkner County officers testified that they were called regarding a "bomb threat" and that was what the officers said they were investigating when arriving at Virginia's house — not a firearm. In fact, Polk never mentioned a gun, until an investigating officer asked Polk to take his hand out of his pocket. Only then did Polk reveal he had a gun in his possession.

In conclusion, we believe the record supports the trial court's holding that Polk was not justified in possessing the firearm, and therefore we affirm.

STATE of Arkansas *v.* Adrian ZAWODNIAK

CR 96-1503 946 S.W.2d 936

Supreme Court of Arkansas
Opinion delivered June 23, 1997
[Petition for rehearing denied September 11, 1997.]

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

William R. Simpson, Jr., Public Defender, by: *Jeffrey A. Weber*, for appellee.

TOM GLAZE, Justice. On May 14, 1995, a Jacksonville police officer was dispatched to check a report that a person was passed out or sleeping in a car parked in front of a restaurant. Upon arriving at the scene, the officer awakened the person identified as Adrian Zawodniak. Zawodniak was subsequently found in possession of methamphetamine, a loaded handgun, and drug paraphernalia. The paraphernalia included a portable scale, a small

spoon, and gold tweezers. He was charged with simultaneous possession of drugs and firearms under Ark. Code Ann. § 5-74-106(a) (Repl. 1993), and with possession of drug paraphernalia under Ark. Code Ann. § 5-64-403 (Repl. 1993).

Zawodniak waived a jury trial, and was tried at a bench trial on March 11, 1996. The State called three police officers and a drug chemist who established that when Zawodniak was arrested, he possessed methamphetamine, drug paraphernalia, and a 3.80 Loracin automatic pistol, containing four bullets — one in the chamber. The weapon was found in Zawodniak's waistband.

Immediately upon the State resting its case, Zawodniak moved for a directed verdict. He claimed the simultaneous-possession statute, § 5-74-106(a), required that, in addition to proving he was in the simultaneous possession of drugs and a firearm, the State must show he was involved in criminal gang or group activity. The trial court agreed with Zawodniak's interpretation of the statute and granted his motion. The trial court then reduced Zawodniak's charge and convicted him only of possession of a controlled substance and of drug paraphernalia. The trial court placed Zawodniak on five years' probation. If convicted of violating § 5-74-106, Zawodniak would have been guilty of a Class Y felony and punishable by a sentence of not less than ten years and not more than forty years, or life. *See* Ark. Code Ann. §§ 5-74-106(b), 5-4-104(c)(1), and 5-4-401(a)(1) (Repl. 1993 and Supp. 1995).

The State appeals the trial court's decision under Rule 3 of the Arkansas Appellate Procedure—Criminal, asserting that the lower court committed error to the State's prejudice and that the correct and uniform administration of the criminal law requires this court's review. We agree.

As previously indicated, the State's appeal focuses on the trial court's construction of § 5-74-106, which in pertinent part provides as follows:

> (a) No person shall unlawfully commit a felony violation of § 5-64-401 (Uniform Controlled Substances Act) or unlawfully attempt, solicit, or conspire to commit a felony violation of § 5-64-401 while in possession of:

(1) A firearm;

* * *

The State submits that its evidence at trial clearly showed Zawodniak simultaneously possessed drugs and a loaded firearm at the time of his arrest, and that was all that was required under the wording in § 5-74-106(a). However, Zawodniak argues § 5-74-106(a) is a part of the Arkansas Criminal Gang, Organization, or Enterprise Act codified in §§ 5-74-101 -108, and § 5-74-102 of that Act reflects that, to violate § 5-74-106(a), a person must also be shown to have been associated with "gang activity" at the time of the violation.

[redacted] Zawodniak's and the trial court's reading of these statutes is contorted and fails to give the language of § 5-74-106(a) its plain meaning, as our cases direct. *See State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994). This court has also stated that it is very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent. *Id.* at 786. No error or omission is evident here. In fact, § 5-74-106(a), as we read it, not only serves to deter organized gang and criminal activities, but also seeks the broader purpose to curtail any person's use of a firearm when that person is involved in the illegal trafficking in or possession of controlled substances. Such interpretation is in keeping with the plain language employed in § 5-74-106(a), and in no way diminishes the General Assembly's declared intent to combat criminal gang activity. Because the trial court erroneously engrafted an element of proof — gang activity — not required under § 5-74-106(a), we reverse its ruling that required the State to prove that element.

The State further requests we remand this case for retrial, but Zawodniak rejoins, stating that, when the trial court reduced his charge to possession of a controlled substance, the reduction resulted in an acquittal of the simultaneous-possession charge. Citing *Green v. United States*, 355 U.S. 184 (1957), and *United States v. Scott*, 437 U.S. 82 (1978), he argues any retrial is barred by the Double Jeopardy Clause.

The Supreme Court in *Burks v. United States*, 437 U.S. 1 (1978), undertook to review its earlier cases involving the Double Jeopardy Clause, and in doing so distinguished between reversals due to trial error and those resulting from evidentiary insufficiency. *Id.* at 12-18. The Court said that the most reasonable justification for allowing retrial to correct trial error was espoused in *United States v. Tateo*, 377 U.S. 463 (1964), as follows:

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

The *Burks* court then concluded by stating the following:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. *See* Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U. Chi. L. Rev. 365, 370 (1964).
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. 437 U.S. at 15-16.

The *Scott* case relied on here by Zawodniak was decided after *Burks*, and the *Scott* court pointed out that one problem in understanding or applying the Double Jeopardy Clause in prior cases was that the United States had no right to appeal a criminal case during the first century of the Court's existence. The Court in *Scott* pointed out that its growing experience with Government appeals required its re-examination of the rationale of its decisions regarding the Double Jeopardy Clause. Upon making its review, the Court announced that, while the State should not be allowed to make repeated attempts to convict an individual for an offense, the principle underlying double jeopardy cannot be expanded to include situations in which the defendant is responsible for the second prosecution.

The *Scott* Court further concluded that, where a defendant chooses to avoid conviction, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail, the defendant by deliberately choosing to seek termination of the trial, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a trial court ruling favoring the defendant. The Court proclaimed, "[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." 437 U.S. at 99.

[redacted] In applying the Double Jeopardy Clause rationale set out in *Burks* and *Scott* to the circumstances present here, it is clear that Zawodniak was the one who initiated the legal claim, albeit erroneous, that § 5-74-106(a) contained an element — gang activity — that the State must prove in order to convict him of simultaneous possession. As discussed above, the trial court erred by adopting Zawodniak's legal argument, and as previously mentioned, the State had the right to appeal the trial court's decision. The State also correctly points out that the proof it offered at trial indisputably showed that Zawodniak possessed both drugs and a loaded firearm at the time of his arrest, and such evidence was sufficient to convict him of the simultaneous- possession charge under § 5-74-106(a). *See Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995).

In sum, Zawodniak received a favorable trial court decision not because the State had failed to prove its case, but because the trial court, at Zawodniak's instigation, erred in applying erroneous law. In other words, defendant Zawodniak, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the simultaneous-possession charge of which he was accused, suffers no injury cognizable under the Double Jeopardy Clause. *See Scott*, 437 U.S. at 98-99. With considerable clarity, the *Scott* court, holding in favor of the government, said as follows:

> This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of *a defendant who choses to avoid conviction and imprisonment, not because of his assertion that the Government failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.* (Emphasis added.)

To bar appeal, the trial court's judgment must be one that indicates that the government's factual case has failed either as to the statutory elements of the offense charged, or as to the burden shifted to the government when a defendant raises a prima facie defense that, unrebutted, would justify a finding of innocence. 437 U.S. at 87-98. Permitting retrial in this instance is not the sort of oppression at which the Double Jeopardy Clause is directed, but instead simply affords the defendant an opportunity to obtain a fair adjudication of his guilt free from error. *See Lockhart v. Nelson*, 488 U.S. 33 (1988); *see also Parker v. State*, 300 Ark. 360, 779 S.W.2d 156 (1989).

For the reasons above, we reverse and remand for further proceedings.[1]

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[1] While the concurring and a dissenting opinion suggest the result reached here is at odds with *Brooks v. State*, the situations involved in the two cases are not at all the same. *Brooks* did not concern trial error; instead, the trial court properly considered the elements of aggravated robbery, and at the end of the state's case in chief, initially determined the State's evidence was insufficient to prove the offense. Then, after all the evidence was introduced, the trial court, considering the same elements of aggravated robbery, changed

NEWBERN, J., concurs; BROWN, IMBER, and THORNTON, JJ., concur in part and dissent in part.

DAVID NEWBERN, Justice, concurring. The majority correctly holds that "gang activity" is not an essential element of the simultaneous-possession offense created by Ark. Code Ann. § 5-74-106 (Repl. 1993). The Trial Court concluded otherwise and "reduced" the simultaneous-possession charge to a charge of possession of methamphetamine due to the State's failure to establish that Mr. Zawodniak simultaneously possessed drugs and firearms while engaging in "gang activity." That was error.

Upon remand, Mr. Zawodniak may be retried consistently with the Double Jeopardy Clause of the United States Constitution. My analysis of the important double-jeopardy question presented in this case differs from that of the majority.

The majority opinion discusses the decisions of the United States Supreme Court in *Burks v. United States,* 437 U.S. 1 (1978); *United States v. Tateo,* 377 U.S. 463 (1964); and *Lockhart v. Nelson,* 488 U.S. 33 (1988), as well as our decision in *Parker v. State,* 300 Ark. 360, 779 S.W.2d 156 (1989), *cert. denied* 498 U.S. 883 (1990). These cases stand for the proposition that the Double Jeopardy Clause does not prohibit the State from retrying a defendant who has successfully appealed a *conviction* and obtained a reversal on the basis of "trial error" as opposed to evidentiary insufficiency.

A critical distinction between this case and the ones mentioned above is that the "error" committed by the Trial Court

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its mind, and held the State proved the defendant's guilt. In short, no trial error occurred — only a factual finding of guilt transpired which was unquestionably subject to the Double Jeopardy Clause.

Also, we note that, while the dissenting opinion seems to rely on *Sanabria v. United States*, 437 U.S. 54 (1978), neither the State, Zawodniak, nor the trial court made mention of that holding as relevant to the circumstances here. We additionally emphasize that *Sanabria* has been severely critized on the grounds that it met the appeal test of *Scott* (only legal issues would be before the appellate court, and defendant had himself sought to teminate the first prosecution short of jury verdict), and that it would seem to give the trial court some leeway "to control the double jeopardy consequences of its ruling by choosing the form employed" in terminating the case. LaFave and Israel, III, *Criminal Procedure*, § 24.3, pgs. 81-82 (1984).

with respect to the simultaneous-possession charge resulted not in a conviction of Mr. Zawodniak on that charge but in a "reduction" of it to a charge of possession of methamphetamine. The *Burks, Tateo, Nelson,* and *Parker* cases do not hold that the Double Jeopardy Clause permits a defendant to be retried for the same offense after a trial court, as the result of error, has "reduced," dismissed, or granted a directed verdict on the charge, acquitted the defendant, or otherwise terminated the proceedings in the defendant's favor. In the absence of a conviction that is reversed on the basis of trial error, these cases are inapposite, and authority for our decision in the case at bar must be found elsewhere.

As the majority opinion suggests, such authority lies in the United States Supreme Court's decision in *United States v. Scott,* 437 U.S. 82 (1978). The controlling principle from that case is that, where a trial court, at the defendant's request, terminates the proceedings on legal grounds without *acquitting* the defendant of the offense charged, the State may appeal the trial court's decision and retry the defendant if the reviewing court determines that the trial court's ruling was in error.

In the *Scott* case, the Supreme Court held that the Double Jeopardy Clause did not bar the Government from appealing the ruling of the District Court that granted the respondent's motion to dismiss two counts of narcotics distribution on the basis of preindictment delay. The Government's appeal from the District Court's ruling had been dismissed by the Sixth Circuit Court of Appeals on the basis of the Double Jeopardy Clause, and the Supreme Court reversed.

The Court acknowledged that a genuine acquittal, "whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by reversal." *United States v. Scott,* 437 U.S. at 91. The Court also recognized, however, that certain rulings by the Trial Court — such as the District Court's ruling on the issue of preindictment delay — that terminate the proceedings favorably to the defendant do not constitute acquittals for double-jeopardy purposes and thus do not foreclose an appeal and the possibility of

retrial on the same offense. According to the Court, a defendant who does not obtain an acquittal but instead "deliberately choos[es] to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused . . . suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant." *Id.* at 98-99.

According to one commentator's view of the Court's double-jeopardy jurisprudence, "[a]ny resolution that falls within the Supreme Court's definition of an acquittal becomes an absolute bar to further prosecution. Therefore, determining whether a particular result is an acquittal is crucial." Ann Bowen Poulin, *Double Jeopardy and Judicial Accountability: When Is an Acquittal Not an Acquittal?,* 27 ARIZ. ST. L.J. 953, 970 (1995). Another commentator agrees that the Double Jeopardy Clause, as interpreted in the *Scott* case, "protects a defendant from a second trial only if he has been acquitted in the first." James D. Gordon III, *Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach,* 69 CALIF. L. REV. 863, 872 (1981). *See also* Jason Wiley Kent, *Double Jeopardy: When is an Acquittal an Acquittal?,* 20 B.C. L. REV. 925, 935 (1979)(stating that, under the *Scott* case, the availability of a double-jeopardy defense following judgment of dismissal "depends on subtle distinctions in the reason for the judgment").

Our inquiry here is thus broader than the majority opinion suggests it to be. The issue is not merely whether "trial error" occurred below or whether the termination of the first trial occurred at Mr. Zawodniak's behest. We must resolve the more precise question of whether the Trial Court's ruling constituted an "acquittal" of the simultaneous-possession charge given the definition of that term announced in the *Scott* case. We are constrained merely to declare error if we answer the question affirmatively. We may remand for further proceedings, and the State may retry Mr. Zawodniak, if we answer the question in the negative.

According to the *Scott* decision, a defendant is acquitted and thus protected by the Double Jeopardy Clause from an appeal by

the State and the possibility of retrial "only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott,* 437 U.S. at 97, *quoting United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977). Thus, "in order to bar appeal the trial court's judgment must be one that indicates that the government's factual case has failed either as to the statutory elements of the offense charged, or as to the burden shifted to the government when a defendant raises a prima facie defense that, unrebutted, would justify a finding of innocence." Kent, *supra,* at 940. Another commentator understands the *Scott* case as barring "appeal of midtrial dismissals based on factual grounds but not those based on legal grounds." Gordon, *supra,* at 876.

In determining whether the Trial Court's ruling constitutes an acquittal, we are not bound by the "form of the judge's action" or the manner in which the judge or counsel have characterized the ruling. *United States v. Martin Linen Supply Co.,* 430 U.S. at 571. *See United States v. Scott,* 437 U.S. at 96, *quoting United States v. Jorn,* 400 U.S. 450, 478 n.7 (opinion of Harlan, J.)(1971); *United States v. Wilson,* 420 U.S. 332, 336 (1975); *United States v. Sisson,* 399 U.S. 267, 270 (1970). *But see Sanabria v. United States,* 437 U.S. 54, 66 (1978)("While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, . . . neither is it appropriate entirely to ignore the form of order entered by the trial court . . . .")(citations omitted).

Although "the line between an acquittal and a non-acquittal is sometimes hard to draw," Poulin, *supra,* at 979, and "the question of what constitutes an acquittal has proven difficult to answer," *United States v. Markus,* 604 F. Supp. 736, 739 (D. N.J. 1985), *aff'd* 786 F.2d 1147 (3d Cir. 1986), in this case it seems clear that there was not an acquittal of the offense charged based on failure to prove any of its elements. Rather, the Trial Court in effect nullified the charge because of failure of the State to prove a non-extant element. The Double Jeopardy Clause therefore does not prevent the State from retrying Mr. Zawodniak because the

Trial Court did not find that the State failed to prove any of the factual elements of the offense charged.

The result we reach is at odds with our decisions in *Brooks v. State,* 308 Ark. 660, 827 S.W.2d 119 (1992); *State v. Johnson,* 317 Ark. 226, 876 S.W.2d 577 (1994); and *State v. Young,* 315 Ark. 656, 869 S.W.2d 691 (1994). In those cases, however, we failed to consider the definition of "acquittal" espoused by the Supreme Court in the *Scott* case. The *Brooks, Johnson,* and *Young* cases are thus not controlling here.

Mr. Zawodniak has urged that a retrial would violate his double-jeopardy rights under both the United States Constitution and the Arkansas Constitution, but he has neither argued that the latter affords greater protection than the former nor presented us with any other "independent and adequate state ground" on which to decide this case. *See Michigan v. Long,* 463 U.S. 1032 (1988).

ANNABELLE CLINTON IMBER, Justice, dissenting in part, concurring in part. I agree with the majority that the trial court erroneously construed the simultaneous-possession statute, Ark. Code Ann. § 5-74-106(a), to require proof of gang or other organized criminal activity, a nonexistent element of the offense. However, I depart from the majority's analysis that simply because the judge committed "trial error," the Double Jeopardy Clause does not bar a remand of the present case. Instead, Justices Newbern and Thornton frame the correct inquiry — whether the trial court's ruling acquitted Zawodniak on the simultaneous-possession charge. If in fact Zawodniak was acquitted, then the Double Jeopardy Clause bars a subsequent prosecution. *See United States v. Scott,* 437 U.S. 82 (1978). Unlike Justice Newbern, my reading of the guiding cases suggests that the trial court's ruling was an acquittal on the simultaneous-possession charge.

In *United States v. Scott, supra,* the defendant moved to dismiss a count due to preindictment delay, which the trial court granted. While the Fifth Circuit held that double jeopardy prevented retrial, the United States Supreme Court "granted certiorari to give further consideration to the applicability of the Double Jeopardy Clause to Government appeals from orders granting defense

motions to terminate a trial before verdict." *United States v. Scott, supra.* The Court reversed the Fifth Circuit, recognizing that two separate lines of cases had developed concerning trials where no final determination of guilt or innocence had been made: i) where the trial court declares a mistrial and ii) where "the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence." *United States v. Scott, supra.*

The defendant's case fell into the latter category. The dismissal of the first count was based on preindictment delay and not on the sufficiency of the evidence to establish his guilt. The defendant had voluntarily elected to seek termination of his trial on grounds unrelated to guilt or innocence. He had not been acquitted on the first count because "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott, supra* (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)). In contrast to an acquittal, the dismissal of the charge for preindictment delay merely represented a legal judgment that the defendant, although potentially criminally liable, could not be punished for a supposed constitutional violation. The *Scott* Court thus concluded that where a "defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred. . . ." *United States v. Scott, supra.*

The Court reached an opposite result in *Sanabria v. United States*, 437 U.S. 54 (1978), handed down the same day as *Scott.* In *Sanabria*, the trial court erroneously excluded evidence, leading to a judgment of acquittal on a count due to insufficiency of the evidence. The *Sanabria* Court held that double jeopardy barred a retrial. While the Government argued that the trial court had merely dismissed a portion of the charge (thus permitting a retrial of that portion) while actually acquitting only on a separate theory of liability, the Court found it impossible to accept this characterization. The Court stated that the "the judgment of acquittal was entered on the entire count and found [defendant] not guilty of

the crime. . . without specifying that it did so only with respect to one theory of liability." The Court instead characterized the trial court's action as an "erroneous evidentiary ruling," which led to an acquittal based on insufficient evidence — due to the fact that the trial court found that the indictment's description of the offense was too narrow to justify the admission of certain evidence. *Sanabria v. United States, supra.* This judgment of acquittal, "however erroneous," barred further prosecution on any aspect of the count, given that "when a defendant has been acquitted at trial he may not be retried on the same offense, even if the *legal rulings* underlying the acquittal were erroneous." *Sanabria v. United States, supra* (emphasis added).

In the present case, the trial court concluded that the State's case was factually insufficient to convict Zawodniak, albeit premised on an erroneous legal ruling. Defense counsel moved for a "directed verdict," arguing that "the [S]tate has failed to prove that element [of gang or organized criminal activity] and it is required by law to be proven." The trial court "grant[ed] [Zawodniak's] motion to reduce this to possession of methamphetamine. And I do so because of the language in what I consider to be a preamble to that whole area passed by the Legislature, looking to their intent, as to deal with gang activity. . . ." While the State argued that gang activity was not an element required by the statute, it did address the sufficiency issue as framed by Zawodniak:

> [A]lso with this defendant, we have a statement written by him, although there's — other than that statement, we did not have anyone here as far as what organizations or who else he's involved. He states in his written statement that he is part of the life and he's part of this whole particular life-style, the power, the money, the drugs, everything. So, I don't believe this is — if he wanted to fit it into here, we don't have any idea who else he is, I guess, organizing with. But apparently as far as his statement states he is part of this whole life-style that includes possession and use of methamphetamine and, I guess, carrying of weapons and everything.

The trial court responded to the State's argument, "as you say, those witnesses are not here today. And the Court still looks then

at the particular areas of this case." In sum, the trial court applied the State's proof to the simultaneous possession statute, erroneously "added" a non-existent element, and concluded that the State's evidence was insufficient to convict, resulting in a final determination that the defendant was innocent of the crime charged. At the very least this involved a factual determination, and was more than a purely legal ruling. It was certainly qualitatively different than a defendant "seek[ing] to have the trial terminated without any submission to either judge or jury as to his guilt or innocence," as was the dismissal for preindictment delay in *Scott*. Instead, Zawodniak argued that he was innocent of the crime charged, due to a failure of proof in the State's case. As such, the present case is far more like the situation presented in *Sanabria*, where the trial court entered a judgment of acquittal based on an erroneous legal ruling.

Moreover, this court has established a precedent directly on point. In *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992), the trial court granted the appellant's directed verdict motion on an aggravated robbery charge, on the mistaken assumption that aggravated robbery required that something be taken from the victim. After the close of all evidence, the trial court reversed itself, explaining that its prior ruling was an "error of law." The reinstated aggravated robbery charge was then submitted to the jury, resulting in a conviction.

Relying on *Sanabria*, this court reversed the conviction on double jeopardy grounds, holding that the trial court's dismissal based on insufficient evidence *was an acquittal* on the aggravated robbery charge. This was true even though the trial court made an erroneous legal ruling effectively "adding" an element to the aggravated robbery statute that did not exist.

Brooks is therefore indistinguishable from the present case. As in *Brooks*, Zawodniak submitted to the trial court's final determination as to his guilt or innocence, which was ultimately resolved in favor of the defendant, based on the trial court's erroneous legal conclusion. That the acquittal was founded on an erroneous legal ruling — that the simultaneous-possession statute required proof of gang activity — is irrelevant for purposes of double jeopardy

analysis. *See Sanabria v. United States, supra*; *State v. Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994); *State v. Young*, 315 Ark. 656, 869 S.W.2d 691 (1994); *Brooks v. State, supra*; *State v. Joshua*, 307 Ark. 79, 818 S.W.2d 249 (1991), *overruled on other grounds*, 310 Ark. 244, 835 S.W.2d 869 (1992). The trial court's judgment of acquittal based on insufficiency of the evidence, however erroneous, bars any further prosecution on any aspect of the simultaneous-possession charge.

For these reasons, I concur with the majority to reverse the trial court's ruling that the State was required to prove gang activity under Ark. Code Ann. § 5-74-106(a); however, I respectfully dissent from the majority's remand for further proceedings. I would reverse and declare error.

BROWN and THORNTON, JJ., join.

RAY THORNTON, Justice, dissenting in part and concurring in part. While I agree with the majority that the trial court erred in granting a directed verdict acquitting appellee of simultaneous possession of drugs and firearms, I respectfully disagree that appellee can be tried a second time for the same offense. He was put in jeopardy, found guilty of the crime of possession of a controlled substance and possession of drug paraphernalia, and sentence was imposed.

The Double Jeopardy Clause of the Fifth Amendment states: "[N]or shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb." Article 2, § 8, of the Arkansas Constitution provides: "No person. . . shall be twice put in jeopardy of life or liberty. . . ."

Many of the general principles underlying the Double Jeopardy Clause are analyzed in *United States v. DiFrancesco*, 449 U.S. 117, (1980), where the Supreme Court notes that the guarantee against double jeopardy has been said

> to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Around 10:00 in the morning of May 14, 1995, a Jacksonville Police Officer found appellee passed out or sleeping by a pay phone in front of a restaurant. After several attempts to awaken him, he identified himself, and the officer determined that there was an outstanding warrant for his arrest on hot check charges. The officer arrested and handcuffed appellee who volunteered that he had a handgun in his waistband, which the officer recovered, along with some drug paraphernalia, and 0.044 grams of methamphetamine and nicotinamide.

The State filed charges for violation of Ark. Code Ann. § 5-74-106 (Repl. 1993), simultaneous possession of drugs and firearms, and a second charge of violation of Ark. Code Ann. § 5-64-403 (Repl. 1993), possession of drug paraphernalia. Appellee waived his right to a trial by jury, and the trial took place on March 11,1996. After the State rested, appellee moved for a directed verdict because the State failed to prove that he intended to use the gun to protect his drugs, or further his delivery of drugs, specifically stating: "So, Judge what I am saying is that element is lacking and the state has failed to prove that element and it is required by law to be proven. Therefore, I would ask for the charge to be reduced to possession of a controlled substance, methamphetamine."

The trial court then granted the motion, basing its decision upon the legislative history of the statute as being related to gang activity, and found the appellee guilty of possession of methamphetamine and guilty of possession of drug paraphernalia. Sentence was imposed for these convictions.

We have previously addressed similar double jeopardy issues. In *Strickbine v. State*, 201 Ark. 1031, 148 S.W.2d 180 (1941), we held that a determination of guilt in an inferior court on a lesser included charge operates as implied acquittal of the greater offense barring any further proceedings on the greater offense that places the defendant's life or liberty in jeopardy. It should be noted that we were applying the Arkansas constitutional standard to this review. We have applied the same principle to a DWI second offense, and reversed the judgment of conviction in *Hagar v. City of Fort Smith*, 317 Ark. 209, 877 S.W.2d 908 (1994).

In *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992), we held that a trial court's granting of a motion to dismiss constituted a judgment of acquittal on the robbery charge, and that the action of the judge later in the same trial in reversing that ruling and submitting the robbery charge to the jury constituted double jeopardy. To the same effect are our decisions in *State v. Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994), and *State v. Young*, 315 Ark. 656, 869 S.W.2d 691 (1994).

While these decisions clearly reflect the rule that a conviction of a lesser included offense constitutes an acquittal of the greater offense, it is not essential that there be an acquittal in order for jeopardy to attach so that a second trial is prohibited. Wayne R. Lafave and Jerold H. Isreal, *Criminal Procedure* § 25.1(g)(7), at 1064 (2nd ed. 1992) states the following:

> If the jury reaches a verdict of acquittal or the judge grants a judgment of acquittal prior to jury verdict, double jeopardy bars a new trial even if it appears that the acquittal was based on an erroneous interpretation of the law. Included in the concept of an acquittal is the implied acquittal that comes when a jury returns a verdict of guilty on a lesser-included offense and fails to indicate its disposition of the higher charge.

In the case before us, jeopardy attached on the charge of simultaneous possession of drugs and firearms when the first witness was sworn. As stated in *United States v. Scott*, 437 U.S. 82 (1978), "a defendant once acquitted may not be again subjected to trial without violating the Double Jeopardy Clause."

In *Sanabria v. United States*, 437 U.S. 54 (1978), a case handed down on the same day as *Scott, supra*, the Supreme Court expanded upon the principle as follows:

> That "[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [the defendant] twice in jeopardy, and thereby violating the Constitution," has recently been described as "the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), quoting *United States v. Ball*, 163 U.S. 662, 671 (1896). The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is "based upon an egregiously erroneous foundation." *Fong Foo v. United States*,

> 369 U.S. 141, 143 (1962); *see Green v. United States*, 355 U.S. 184, 188 (1957). In *Fong Foo* the Court of Appeals held that the District Court had erred in various rulings and lacked power to direct a verdict of acquittal before the government rested its case. We accepted the Court of Appeals' holding that the District Court had erred, but nevertheless found that the Double Jeopardy Clause was "violated when the Court of Appeals set aside the judgment of acquittal and directed that petitioners be tried again for the same offense." *Fong Foo*, 369 U.S. at 143. Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous.

Id. at 64.

In *Sanabria*, there were charges involving horse-betting and numbers violations, in a single gambling business. The defendant was acquitted on the horse-betting charge for insufficient evidence, and the numbers charge was dismissed. The First Circuit determined that the District Court had erred in "dismissing" the numbers theory, and remanded the case so that the defendant could be tried on the numbers charges. The Supreme Court reversed because retrial would violate the Double Jeopardy Clause, stating the following: "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* at 72 (quoting *Brown v. Ohio*, 432 U.S. 161, 169 (1977)).

Here, appellee committed one offense. He was found sleeping in a public place with a small quantity of drugs, paraphernalia, and a gun in his possession. Jeopardy attached on the offense of violating the provisions of Ark. Code Ann. § 5-74-106(a), when the first witness was sworn. Upon conclusion of the State's case, the court determined that a necessary element of proof had not been presented on the question of simultaneous possession, granted a motion to dismiss, and found appellee guilty of possession of drugs and drug paraphernalia.

Appellee was tried and convicted. Certainly jeopardy attached, and his conviction resulted in deprivation of liberty. To send the matter back for a new trial on the offense for which he

has already been in jeopardy violates the principles of the prohibition against double jeopardy. We should determine that the trial court committed error in granting the motion to dismiss but that the appellee cannot be retried. There was no appeal from the conviction and the sentence for possession, and of course that conviction and sentence remain fully effective.

It is my view that remanding the case for a new trial violates the prohibition against double jeopardy. We should declare error and reverse.

BROWN and IMBER, JJ., join.

Gerald SCHENEBECK, Executor of Estate of J. Eric Schenebeck, Deceased *v.* Dorothy F. SCHENEBECK

96-1438 947 S.W.2d 367

Supreme Court of Arkansas
Opinion delivered June 23, 1997
[Petition for rehearing denied September 11, 1997.]

[redacted]

Pike & Bliss, by: *George E. Pike, Jr.*, and *Deborah Pike Bliss*, for appellant.

Wright, Lindsey & Jennings, by: *Isaac A. Scott, Jr.*, *Nancy Bellhouse May*, and *J. Betsy Meacham*, for appellee.

ROBERT L. BROWN, Justice. This appeal involves the interpretation of a will and a testamentary trust. James Eric Schenebeck died on October 4, 1993, at age 70. His last will and testament was dated April 4, 1991, and in his will he named his son, appellant Gerald Schenebeck, executor of the estate. After Schenebeck's death, Gerald petitioned to open his probate estate. The petition showed the testator's surviving spouse to be appellee Dorothy Schenebeck. It further showed the estimated value of

real property to exceed $1,000,000 and personal property to exceed $100,000.

Under the will, Gerald was left specific bequests of household goods and furniture, with Dorothy receiving the remaining furnishings in the home. The will also provided that Dorothy could live in the house for one year, although the testator added that it was his request, but not his direction, that she live there longer, if she maintained the property. The will further contained a legacy of $20,000 to Dorothy. Two other children were left legacies of $5,000 each. Gerald was to receive the remainder of the estate.

The will, in addition, created a testamentary trust. The testator ordered his executor to transfer approximately 400 acres of land located on two plots to the trust. The land was used for a fish farm. The two beneficiaries of the trust were Gerald and Dorothy. Gerald was named trustee of the trust. The testator directed that the trustee distribute $36,000 per year to Dorothy from the income of the trust so long as she lived, with the remaining income from the trust going to Gerald. The trust was to terminate at Dorothy's death, with Gerald receiving the corpus of the trust.

Probate of the estate ensued, and it consisted of a series of squabbles between Gerald and Dorothy. The disputes involved allegations of Dorothy's auctioning furnishings at the house, Gerald's failure to file an adequate accounting for the estate, debts and rental owed the estate by Dorothy, Dorothy's failure to maintain the property, and, of primary importance, the failure of Gerald to pay the $20,000 legacy and the $36,000 annual income from the testamentary trust. Litigation also developed around a 1972 premarital agreement between James Eric Schenebeck and Dorothy, where he agreed to leave a life estate in his property to Dorothy. Dorothy sought to enforce the premarital agreement in chancery court, but her claim was denied.

During the probate of the estate, it came to light that on April 1, 1987, James Eric Schenebeck entered into a 15-year lease of farmland with Gerald where Gerald was to pay $75 an acre as annual rent with incremental increases of five percent every five years. Dorothy signed this lease on April 15, 1991.

On July 3, 1995, matters came to a head with Dorothy's motion entitled Motion For Proof of Respondent's Fulfillment of Duties as Trustee and Requirement of Remittance of Income Owed to Petitioner. In the motion, Dorothy asked for payment of the $20,000 legacy, her $36,000 annual income under the testamentary trust, proof that the testamentary trust had been funded, and an accounting of income from the 400 acres, including income from Gerald's subleases of the leased farmland.

The probate court ordered that Gerald file an inventory for the estate and that estate taxes be paid. Gerald filed the updated accounting and inventory of assets and liabilities as well as the federal estate tax return. In connection with the federal estate tax return and in order to qualify Dorothy's life interest in the testamentary trust as a Qualified Terminable Interest Trust, Gerald disclaimed all interest in the property and income from the testamentary trust for the balance of Dorothy's life. Because of Gerald's disclaimer, Dorothy claimed as hers all of the income from the farmland which formed the *res* of the testamentary trust, including income from the subleases.

In a motion filed with the probate court, Gerald conceded that he made annual lease payments to the estate for the leased farmland, which totaled $63,000 for 1994 and 1995. Of that lease payment he used $37,434.70 to repair the irrigation system and pay other expenses, leaving Dorothy the balance of $25,565.30. Dorothy complained that these expenses should be borne by Gerald as lessee of the farmland under the lease agreement and not by the testamentary trust.

At a hearing held on May 8, 1996, Gerald admitted that Dorothy had not been paid the $20,000 bequest and testified that the testamentary trust had not been funded because the 400 acres of farmland had not been deeded to the trust. He also admitted that he disclaimed his right to trust income so that the estate would get the marital deduction for estate tax purposes. He further agreed that there was no separate accounting for the testamentary trust, since the trust did not yet exist.

The probate court filed a detailed letter opinion followed by an order. The salient points of the order for purposes of this appeal follow:

- Gerald had a conflict of interest in serving as executor, lessee, sublessor, trustee, and remainderman of the trust and should be removed as trustee. It was suggested by the court that a financial institution replace him as trustee.
- Certain repairs to the irrigation pipes and pump were not a proper expense to be charged to the testamentary trust but were the responsibility of Gerald as lessee of the farmland.
- Dorothy was entitled to the full income of the testamentary trust or else the estate would lose the benefit of the marital deduction trust.
- Gerald was directed to pay the $20,000 legacy with eight percent interest from the date that Dorothy's right to take against the will expired.
- The filed accountings are insufficient with respect to the farmland, and an accountant should be appointed to file a new accounting.

I. Probate Court Jurisdiction

Gerald first contends that the probate court lacked jurisdiction to enter the orders that affect the administration of the testamentary trust. Dorothy responds that the probate court merely undertook the administration of the probate estate, including marshalling assets of the estate, and did not improperly exercise control over the trust because the trust, though created by the will, had yet to be funded.

The Arkansas Constitution provides that probate courts have "exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind." Ark. Const. art. 7, § 34. Although probate courts clearly have jurisdiction over the probate of a will, the construction, interpretation, and operation of trusts are matters that lie within the jurisdiction of

chancery courts. *Thomas v. Arkansas Dep't of Human Servs.*, 319 Ark. 782, 894 S.W.2d 584 (1995); *Anna Flippin Long Trust v. Holk*, 315 Ark. 112, 864 S.W.2d 869 (1993). The probate court also has authority to order distribution of assets of the probate estate to a trust. *See* Ark. Code Ann. § 28-1-104 (1987). However, a probate court has no jurisdiction to administer a trust created by a will. *Clement v. Larkey*, 314 Ark. 488-A, 863 S.W.2d 578 (1993); *Alexander v. Alexander*, 262 Ark. 612, 561 S.W.2d 59 (1978). Chancery courts, on the other hand, have no jurisdiction to probate a will or distribute an estate. *Gaylor v. Gaylor*, 224 Ark. 644, 275 S.W.2d 644 (1955). In sum, the probate court has no authority to make certain that the parties comply with the terms of a testamentary trust beyond the normal process of probating the will and overseeing the distribution of assets. In *Alexander v. Alexander, supra*, for example, this court held that the probate court lacked jurisdiction to order that all future sales and dispositions of the trust property must have the assent of all the beneficiaries — "if it was an attempt [by the probate court] to administer the trust."

Bearing these principles in mind, we turn to Gerald's specific claims that the probate court lacked jurisdiction or, alternatively, erred in ruling as it did with respect to certain aspects of its order. We review probate cases *de novo* on appeal, and the probate court will not be reversed unless the court's findings are clearly erroneous. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996). Due deference is given to the trial judge's position to ascertain the credibility of the witnesses. *Id.*

Prorated rental payment.

Gerald first argues that the trial court erred in making him pay an extra $15,435 for prorated rent due the estate under his lease for the farmland in 1993. He contends that he had already made his lease payment for the entire year, that is, from April 1, 1993 to March 31, 1994, and that he owed nothing more to the estate after James Eric Schenebeck's death on October 4, 1993. Dorothy answers that the record does not support Gerald's claim of payment, and, thus, there is no proof that he made it. Without proof, the probate court correctly ruled as it did, according to Dorothy.

The testamentary trust was created but not funded, and the probate court was simply collecting the assets of the estate and distributing them to the proper entity when it ordered the prorated rental payment to be paid into a special account established for the benefit of trust beneficiaries. *See* Ark. Code Ann. § 28-1-104 (1987). We do not perceive this action as constituting administration of the testamentary trust. Hence, jurisdiction over the rent payment owed to the estate lay in probate court, and the probate court had the authority to enforce collection of it. Without proof that a prorated payment was a duplication of rent already paid, the probate court was correct in its ruling.

Increase in rental payments.

Gerald next argues that the trial court lacked jurisdiction to order an increase in Gerald's rent payments. He essentially maintains that the testamentary trust is clear that he was to receive all income from the farmland in excess of his annual lease payment to the estate under the rental agreement. He contends that his disclaimer of income in the testamentary trust did not affect the lease arrangement and that the income from the trust property would include nothing more than the landlord's interest in the trust property and not the tenant's. Dorothy responds that Gerald's disclaimer prevents him from accepting any portion of the income generated from the lease and subleases of the trust farmland.

The essence of this issue concerns payment of income from the testamentary trust to competing beneficiaries and the effect of Gerald's disclaimer on the income distribution. We have no hesitancy in concluding that this action fell into the category of trust administration, which lies wholly within the jurisdiction of the chancery court. *Clement v. Larkey, supra.* We hold that the probate court lacked jurisdiction to decide distribution of trust income as between Gerald and Dorothy.

Payment of irrigation costs.

Gerald contends that he had the authority as trustee to incur the expenses for farm maintenance without the need to seek probate court approval, when the action was in the best interest of the

estate. He states that the extra expenses associated with dividing larger fish ponds on the farmland into smaller ones was commensurate with what had happened prior to his father's death. Dorothy responds that Gerald, as lessee, was responsible for repair expenses under the terms of the lease agreement.

The lease agreement provided: "It shall be the responsibility of the Lessee [Gerald] to maintain all constructed and reconstructed fish ponds and farm levees, as well as the constructed and reconstructed stand pipes and well pumps in as good a condition as furnished to Lessee . . . ." The probate court ruled that it was a breach of fiduciary duty for Gerald as trustee to credit these irrigation repair costs against trust income rather than as costs that should be borne by Gerald as lessee. The probate court did find that one expense for a well was properly assigned to the trust under the terms of the lease.

Again, the testamentary trust had yet to be funded at the time of the probate court's ruling. Nonetheless, the probate court was without jurisdiction to determine proper costs attributable to the trust and whether Gerald had breached his fiduciary duty as trustee of that trust. Had the probate court decided this point based on Gerald's role as executor of the estate, it probably would have passed muster. But the court did not and manifestly intruded upon the domain of chancery court when it determined what was an appropriate trust expense and whether the trustee had breached his fiduciary role. We reverse the probate court on this point as well for lack of jurisdiction.

Removal of trustee.

Gerald claims for his final jurisdictional point that the probate court erred in removing him as trustee because he had not breached his fiduciary duty. Our holding here is a corollary to the last point raised. The probate court had no jurisdiction to remove a trustee of a testamentary trust from his duties, even though the trust, at that juncture, had yet to be funded. This is a matter that rests solely within the judgment and discretion of chancery court. Again, had the probate court limited its ruling to the removal of the executor, there most likely would have been no infringement

on the chancery's jurisdiction. *See* Ark. Code Ann. § 28-48-105 (1987) (allowing for removal of personal representative when estate is mismanaged or where a duty remains unperformed). We reverse the probate court on this point.

II. $20,000 Legacy

For his last point, Gerald claims that the estate should not be saddled with an eight percent interest payment, or, alternatively, should be assessed less of an interest payment than what was ordered by the probate court. The crux of Gerald's argument is that the estate asserted various offsetting claims against Dorothy and the legacy, and, as a result, there could be no accrual of interest because the amount owed for the legacy was uncertain.

Under the Arkansas Probate Code, general legacies bear interest at the rate of six percent or the then prevailing legal rate, beginning 15 months after commencement of probate administration. Ark. Code Ann. § 28-53-112(a) (1987). Specific devises of property, however, only include income or increments accruing to the property while in the hands of the personal representative. Ark. Code Ann. § 28-53-112(b) (1987). No interest provision is included by statute for specific legacies, and we have recognized that specific legacies ordinarily do not bear interest. *Bransford v. Jones*, 284 Ark. 121, 679 S.W.2d 798 (1984), *citing Atkinson, Law on Wills* (2d ed. 1953). The issue then is whether the $20,000 legacy in this case was a general or specific legacy.

The treatise, *Page on the Law of Wills*, has this to say about the distinction between specific and general legacies:

> A legacy which is payable in money may be specific if it is not payable out of the estate generally, but if it is a fund or a particular thing which is described with sufficient accuracy, and if the legacy can be satisfied only by the payment of such fund. A gift of money which is deposited in a specific bank, or a gift of cash on hand or in the bank, is a specific legacy. A gift of a specific fund, or a gift of the proceeds of specific property, or of a sum of money payable only out of such proceeds, and not out of the estate generally, is a specific legacy as distinguished on the one hand from a general legacy and from a demonstrative legacy on the other hand.

6 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 48.5, at 17-19 (3d ed. 1962). *See also* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 132, at 732-34 (2d ed. 1953). Here, the $20,000 legacy was not tied to a precise source but was payable out of the estate generally. We conclude that it constitutes a general legacy. Because we can discern no proof of the then prevailing legal rate of interest from the record in this case, interest should accumulate at the rate of six percent, with accrual beginning 15 months after the date of commencement of probate administration. Ark. Code Ann. § 28-53-112(a) (1987).

Gerald, as executor, did claim various offsets against the $20,000 legacy for debts owed by Dorothy to the estate. The probate court appeared to allow offsets for attorneys fees and the cost of replacing locks on the house. Nevertheless, the probate court ordered Gerald to pay the full $20,000 legacy plus interest. Under these facts, we consider the amount of the legacy to be sufficiently certain to accrue interest in accordance with § 28-53-112(a). Any claims by the estate against Dorothy should be handled as separate matters.

III. Conclusion

The order of the probate court on the points raised in this appeal is affirmed in part and reversed in part, and we remand with directions to transfer the claims affecting administration of the testamentary trust to chancery court in accordance with this opinion. We further reverse the probate court on the assessment of an eight percent interest rate and direct that the appropriate interest rate to be applied in this case is six percent as set forth in § 28-53-112(a).

Affirmed in part. Reversed in part and remanded.

BOATMEN'S NATIONAL BANK of Arkansas *v.* Hon. John COLE, Judge, et al.

96-887 947 S.W.2d 362

Supreme Court of Arkansas
Opinion delivered June 23, 1997

Allen Law Firm, by: *H. William Allen*, for petitioner.

Morgan Welch & Associates, by: *Donald K. Campbell, III*, for respondents.

ANNABELLE CLINTON IMBER, Justice. Pursuant to Ark. Sup. Ct. R. 1-2(a)(6), Petitioner Boatmen's National Bank of Arkansas, Inc., has filed a petition for a writ of prohibition alleging that venue for the underlying action does not lie in the Saline County circuit court. We deny the writ for the reasons stated below.

Respondent Fleming Electric, Inc., filed a complaint and an amended complaint in Saline County circuit court, substantially alleging as follows. Fleming, an Arkansas corporation located in Saline County, established a number of checking accounts at various times with Worthen National Bank of Arkansas (and therefore its successor in interest, Boatmen's).[1] In 1990, Fleming hired Respondent Alicia Ives, a resident of Saline County, to handle its accounts payable. In 1992, Ives was designated as Fleming's chief financial officer. Fleming notified Boatmen's that Ives had authority to request information concerning Fleming's accounts.

[1] Fleming's complaint names both Worthen and Boatmen's at various times. For ease of reference, we shall simply refer to Boatmen's.

Beginning in August of 1994, Ives allegedly presented a Fleming check to Boatmen's, payable to Respondent L.C. Brock and bearing the forged signature of C. Ann Fleming, Fleming's president and chief executive officer. Boatmen's paid the $3,258.00 check despite having the actual signature of C. Ann Fleming on file. This check represented the first in a continuing course of alleged check forgeries that would continue through July of 1995. In September of 1994, Ives presented Boatmen's with a letter bearing C. Ann Fleming's forged signature, purporting to give Ives unlimited authority over all Fleming accounts. Fleming alleges that Boatmen's had a duty to inquire to C. Ann or Loren Fleming in an attempt to confirm the letter, which it failed to do. Following September 1, 1994, Fleming alleges numerous instances where Ives forged the signature of C. Ann Fleming on Fleming checks, causing Boatmen's to debit various Fleming accounts and to make various deposits or transfers into accounts not owned by Fleming. Boatmen's allegedly paid these checks "despite the forged signature and despite the fact that the actual (and distinctly different) signature of C. Ann Fleming was on file with [Boatmen's] at the time." Some of the checks bearing the forged signatures were payable to Brock while others were payable to corporations, partnerships, or proprietorships owned by Ives and/or Respondent Matthew Carman, a resident of Pulaski County.

Ives also allegedly made various transfers and deposits into a "forged" Fleming checking account that Ives created at Boatmen's without authorization. At the time Ives opened this account, Fleming alleges that Boatmen's did not require any corporate resolution authorizing its creation. After the creation of the forged Fleming account, Ives orally transferred funds from legitimate Fleming accounts into the forged Fleming account.

Ives eventually presented Boatmen's with a forged Fleming resolution bearing Ives's signature and the forged signature of C. Ann Fleming, purporting to authorize the creation of the forged Fleming checking account. Fleming further alleges that at various times Ives orally requested that Boatmen's transfer Fleming funds into the forged Fleming checking account, and that Boatmen's also allowed Ives to orally transfer funds from the forged account into accounts owned by entities other than Fleming. Fleming also

contends that Boatmen's permitted the placement of Fleming deposits in the forged account, despite its knowledge that Fleming normally placed its deposits into a designated "deposit" account. Ives additionally drew several checks on the forged Fleming account using the forged signature of C. Ann Fleming. These checks were made payable to L.C. Brock and various entities owned by Ives and Carman.

Fleming's amended complaint alleges causes of action against Boatmen's for negligence, conversion, breach of contract, breach of warranty, breach of fiduciary duty, and constructive fraud. On the negligence count, Fleming specifically alleges that Boatmen's improperly disbursed funds credited to or payable to Fleming, and that it failed to act with due care in debiting and failing to credit Fleming's account. Fleming also sued Ives for conversion, breach of fiduciary duty, and breach of warranty. The complaint contains an allegation that the defendants should be held jointly and severally liable.

Boatmen's, a resident of Pulaski County, moved to dismiss the complaint for lack of venue. The trial court denied this motion, finding that venue was proper "due to the simultaneous or 'successive' tortious conduct of the various defendants in this suit which resulted in a single injury to [Fleming.]" The trial court also found that Fleming's "well-pleaded" claim of constructive fraud against Boatmen's established venue. Boatmen's seeks a writ of prohibition from this court, arguing that venue does not lie with the Saline County circuit court.

[redacted] We have often stated that a writ of prohibition will issue only when the trial court completely lacks jurisdiction and there is no other way to stop the proceedings. *See, e.g.*, *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997); *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996). While venue is a procedural matter, rather than an issue of jurisdiction, this court has historically issued the writ when venue is improper as to a party. *See Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995). In doing so, we have characterized the venue issue "as one of jurisdiction of the person, the improper assertion of which, in that instance, justifies issuance of a writ of

prohibition." *Id.* (citing *Prairie Implement Co., Inc. v. Circuit Ct.*, 311 Ark. 200, 844 S.W.2d 299 (1992) (explaining this court's tradition of issuing writ of prohibition where venue is improper)). In deciding whether prohibition will lie, we confine our review to the pleadings. *Wise Co., Inc. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (1993).

Arkansas Code Annotated § 16-60-116(a) (1987), the "catch-all" venue provision, reads as follows:

> (a) Every other action may be brought in any county in which the defendant, or one (1) of several defendants, resides or is summoned.

Additionally, this court has added a so-called "gloss" to this venue statute — when venue is appropriate as to one defendant, then it is only proper as to co-defendants who are jointly liable with the resident defendant. *See Steve Standrige Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995). Therefore, we must decide whether Fleming has alleged joint liability as between Boatmen's and Ives, the resident defendant.

It is of no consequence that Fleming has failed to allege that Boatmen's and Ives acted together in causing it harm. Arkansas has long since abolished the requirement that joint tortfeasors act in concert to result in joint and several liability. *See, e.g., Wymer v. Dedman*, 233 Ark. 854, 350 S.W.2d 169 (1961). Rather, we have said that joint and several liability is determined by impact; where there is a single injury, it is irrelevant that the acts of the individual defendants would not have caused the ultimate result. *McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 365 (1996). Stated another way, "where concurrent negligent acts result in a single injury, each tortfeasor is jointly and severally liable, and a plaintiff can institute an action against any or all tortfeasors, individually or jointly." *Woodward v. Blythe*, 249 Ark. 793, 462 S.W.2d 205 (1971).

While Boatmen's might concede the above-recited definition of joint liability, it nonetheless argues that the principle has no application in the present case due to the character of the alleged tortious conduct found in Fleming's complaint. Against Boatmen's, Fleming's allegations involve the bank's negligence, while

the allegations against Ives sound in intentional tort. Therefore, the question presented is whether for purposes of venue under Ark. Code Ann. § 16-60-116(a), multiple defendants may be held jointly liable where the plaintiff claims that the nonresident defendant is liable for negligent conduct and the resident defendant is liable for intentional tortious conduct.

Neither party cites us an Arkansas case directly answering the question. Boatmen's relies on a line of cases beginning with *Barr v. Cockrill*, 224 Ark. 570, 275 S.W.2d 6 (1955), where a receiver for an insurance exchange sued to recover assessments against a number of policyholders on their individual policies. The receiver filed suit against all of the policyholders in Pulaski County, yet only a few of the defendants resided there. The receiver asserted proper venue on a theory of joint liability.

On a petition for writ of prohibition to this court, we held that venue did not lie as to the nonresident policyholders. The *Barr* court held that they did not share joint liability with the resident policyholders. The court explained that "[w]e use the term 'jointly liable' in the sense that there must be a common liability of the defendants on the same cause of action." *Id.* In examining the complaint, the court reasoned that it only alleged several liability and that separate judgments were sought against each policyholder on different debts.

A related case cited by Boatmen's is *Junction City Sch. Dist. v. Alphin*, 313 Ark. 456, 855 S.W.2d 316 (1993), where teachers in a Union County school district sued their district alleging that it distributed an increase in revenue to certified personnel in violation of a statute, and sued the state department of education for failing to terminate state aid to the district when it failed to comply with the statute. The lawsuit was filed in Pulaski County, and the district moved to dismiss for lack of venue. The trial court denied the motion and the teachers obtained a judgment against the district and the department.

On appeal, this court reversed the judgment against the district for lack of venue. The issue framed by the court was "whether joint liability was alleged against the School District and the Department." Relying in part on *Barr, supra*, the court

answered the question in the negative. The court emphasized that the remedies requested from each defendant were different. While the teachers requested damages against the district, they requested "a directive that state aid be terminated due to violation of the statute" against the department. Given that the two requested remedies were exclusive as to each defendant, liability could not be considered "joint" — the district could not terminate state aid, while the department was not liable for damages. This was separate liability arising out of the same circumstance, but was not joint liability.

Boatmen's also relies on *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995), a prohibition case where the owners of a destroyed airplane sued their insurance carrier alleging coverage, and brought a negligence action against the insurance agency who procured their policy. The lawsuit was brought in the county where the carrier was served. The insurance agency, which resided in a different county, petitioned for a writ of prohibition alleging that venue was improper.

The airplane owners contended that venue was proper as to both defendants under a theory of joint liability, but this court rejected the argument finding that "there was no allegation of joint liability." *Steve Standridge, supra.* Noting the added "gloss" on the catch-all venue statute, we quoted from *Barr, supra,* and its explanation of joint liability as common liability on "the same cause of action." While the claims in *Steve Standridge* arose out of the same occurrence or transaction, they were not joint liability claims, and stated different causes of action: a breach-of-contract claim against the insurance carrier and a negligence action against the insurance agency.

Boatmen's relies on *Barr* and its progeny to argue that it cannot be jointly liable with Ives given that Fleming's theory of recovery is not based on the "same cause of action," i.e., negligence and intentional tort. However, we do not read *Barr* to mandate such an interpretation of joint liability on the alleged facts of the present case. *Barr's* explanation of joint liability was easily understandable where the plaintiff there sued individual policyholders on their individual insurance contracts. Since recovery

was sought on individual debts and contracts, there was no common liability on the same cause of action. Likewise, in *Alphin, supra*, the plaintiffs sought different and exclusive remedies from each defendant, while in *Steve Standridge, supra*, the plaintiff sued one defendant in contract and the other in tort.

None of these cases addresses the situation alleged in the present case, where the *tortious* conduct of multiple defendants has combined to produce a single and indivisible injury, albeit on different theories of tort recovery. The RESTATEMENT (SECOND) OF TORTS § 875 (1979), provides that:

> Each of two or more persons whose *tortious* conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.

(Emphasis added.) Fleming alleges that "[t]he acts and omissions of each of the defendants. . . as alleged herein. . . combined and concurred, proximately caused [sic] indivisible injury to the plaintiff." Thus, it is one of Fleming's theories that but for the failure of Boatmen's to exercise ordinary care with respect to Fleming accounts, Ives would not have been able to carry out her embezzlement scheme. In other words, Fleming alleges that Boatmen's negligence is a legal cause of the harm it suffered. While the intentional or criminal act of a third party may be a superseding cause of harm to another, such issues of legal or proximate causation are ill-suited for analysis at this stage of the proceedings, where our review is confined to the pleadings.

For example, in *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983), the plaintiff sued the employment agency that directed her to a prospective employer who raped her. The trial court granted the employment agency a directed verdict, finding no substantial evidence of negligence. This court reversed, holding that a jury question of negligence existed given that the plaintiff had properly stated a negligence claim based on the agency's duty of care and a breach of that duty. While the criminal act of the third party might have relieved the agency of liability, the *Keck* court observed that "[t]he Restatement of Torts recognizes by two rules that simply because a third person commits a crime, that does not always exonerate one who

created the situation which allowed the crime to occur." *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 448-49 (1965)). Similarly, in *Franco v. Bunyard*, 261 Ark. 144, 547 S.W.2d 91 (1977), *cert. denied*, 434 U.S. 835 (1977), we held that a question of fact existed as to the foreseeability of harm created when a gun dealer negligently sold a gun to an individual who shot and killed the plaintiff's decedent.

Guidance can also be found in Arkansas law pertaining to contribution. Arkansas's version of the Uniform Contribution Among Tortfeasors Act defines "joint tortfeasors" as follows:

> two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

Ark. Code Ann. § 16-61-201 (1987). Furthermore, Ark. Code Ann. § 16-61-202(4) (1987) allows for the consideration of the "relative degrees of fault" of joint tortfeasors where an equal distribution would be inequitable. Therefore, when the jury is faced with joint tortfeasors liable in different degrees of fault, it may apportion fault accordingly.

Illustrative is *Erkins v. Case Power & Equip. Co.*, 164 F.R.D. 31 (D.N.J. 1995), a case involving the New Jersey Joint Tortfeasors Contribution Act. In *Erkins* the plaintiff, whose decedent was killed in a construction accident, brought a products-liability suit against the manufacturer of a backhoe. The manufacturer alleged that the accident was due to the decedent's negligence, but additionally sought contribution from contractors that had hired the decedent's employer based on their negligence in failing to conduct safety meetings. The manufacturer thus sought leave to file a third-party complaint against the contractors.

The contractors argued that impleader was inappropriate because the manufacturer's third-party negligence claims were separate and distinct from the plaintiff's strict products-liability claim. However, the federal district court refused to construe the New Jersey contribution statute so narrowly. In examining the statute's definition of joint liability, the *Erkins* court observed that "the parties must act together in committing the wrong, or their acts, if independent of each other, must unite in a single injury."

Id. All three parties were potentially liable, the manufacturer in strict products liability, and the contractors for negligence. The court further found that the contribution statute "contain[ed] no requirement that joint tortfeasors be liable in tort under the same theories of liability." Furthermore, Fed. R. Civ. P. 14 allowed a defendant to seek contribution in a single action, rather than instituting a second action after an initial determination of liability:

> That the joint tortfeasors' conduct gives rise to liability under two entirely different theories does not foreclose a third-party claim for contribution, nor does the fact that the plaintiff has failed to sue either of the putative third-party defendants under any theory of recovery.

Id. Given that New Jersey law allowed contribution among parties held liable under different theories of liability, the *Erkins* court granted the manufacturer's motion for leave to file a third-party complaint.

[redacted] While the present case does not yet involve a claim for contribution, the rationale presented in *Erkins* is persuasive. The fact that Boatmen's and Ives are allegedly liable on different theories of tort recovery does not preclude a finding of joint liability in tort. This is because their negligent and intentional acts have allegedly combined to produce a single injury. Based on these alleged facts, we find that Fleming's complaint alleges joint liability as between Boatmen's and Ives, and hold that venue properly lies as to Boatmen's in Saline County under Ark. Code Ann. § 16-60-116(a). We therefore deny the writ of prohibition.

Because we deny the writ on joint-liability grounds, we do not reach the sufficiency of Fleming's constructive-fraud allegation. Additionally, we decline to address the merits of Boatmen's claim that various provisions of the Uniform Commercial Code have displaced Fleming's negligence claim, and that the UCC's liability scheme precludes any potential joint liability between Ives and Boatmen's. Such a determination would be premature at this stage of the proceedings, where we merely examine the pleadings for allegations to support venue.

Writ denied.

STATE of Arkansas *v.* Leon Jackson RICE

CR 97-301 947 S.W.2d 3

Supreme Court of Arkansas
Opinion delivered June 23, 1997

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

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

ANNABELLE CLINTON IMBER, Justice. The State has appealed the trial court's dismissal, on double jeopardy grounds, of a felony charge and a revocation petition. We dismiss the appeal involving the revocation petition, and reverse and remand finding that the trial court erroneously dismissed the felony charge.

On July 16, 1995, Leon Jackson Rice was pulled over during a traffic stop. The investigating officer arrested Rice for possession of a controlled substance. On August 31, 1995, the State filed a civil *in rem* forfeiture action against Rice's seized vehicle pursuant to Ark. Code Ann. § 5-64-505(a)(6) (Repl. 1993). The case was filed in Pulaski County circuit court and styled "State of Arkansas, Petitioner, vs. One 1985 Chevrolet Caprice VIN #IN69JAJ111615, Defendant, Leon Rice, Potential Claimant."

On January 26, 1996, the State obtained a default judgment in the forfeiture action.

On September 26, 1995, the State filed an information against Rice charging him with possession of a controlled substance with intent to deliver. On November 28, 1995, the State filed an amended petition for revocation alleging that Rice violated the terms of his prior probationary sentence due to his drug possession.

Rice filed a motion to dismiss the charge and the revocation petition on double jeopardy grounds, arguing that the civil forfeiture of his vehicle was punishment barring further criminal prosecution. The trial court granted the motion to dismiss, and the State now appeals the order, arguing that the trial court erroneously determined that double jeopardy barred the prosecution and revocation.

1. Appellate Jurisdiction — Appeal from Dismissal of Petition for Revocation.

Rice essentially concedes the merits of the case, but instead argues that this court lacks jurisdiction to entertain the State's appeal. Arkansas Rule of Appellate Procedure—Criminal 3(b) (formerly codified as Ark. R. Crim. P. 36.10(b)) allows the State to appeal following a felony or misdemeanor prosecution. Additionally, the attorney general must inspect the record and be satisfied that error has prejudiced the State, and that the correct and uniform administration of the criminal law requires our review. Ark. R. App. P.—Crim. 3(c). Pursuant to the rule, this court accepts appeals by the State "when our holding will set a precedent that would be important to the correct and uniform administration of justice." *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

Rice independently asserts that even if the State may appeal from the dismissal of the felony charge, it may not appeal the dismissal of the revocation petition given that it is not an appeal "following either a misdemeanor or felony prosecution" as required by Ark. R. App. P.—Crim. 3(b). Rice cites to *State v. Hurst*, 296 Ark. 132, 752 S.W.2d 749 (1988), where this court

plainly held that the State may not appeal from the dismissal of a petition to revoke a felon's probation under Rule 36.10. We agree that *Hurst* is controlling and dismiss the State's appeal from the dismissal of the revocation petition.

2. *Appellate Jurisdiction — Appeal from Dismissal of Possession of Controlled Substance Charge.*

We have accepted State's appeals generally involving double jeopardy issues. *See, e.g., State v. Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991); *State v. McMullen*, 302 Ark. 252, 789 S.W.2d 715 (1990); *compare with State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995) (dismissing State's appeal where federal statute at issue declared unconstitutional). We find that the State's appeal involving the dismissal of the felony charge implicates the correct and uniform administration of the criminal law and requires our review. It is true that subsequent to the trial court's ruling from the bench (but before the entry of the actual order of dismissal *nunc pro tunc*), *United States v. Ursery*, 116 S. Ct. 2135 (1996) and *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996) were handed down and definitively resolved whether a civil *in rem* forfeiture constitutes punishment for purposes of double jeopardy.[1] However, despite the fact that we have established a precedent, reaching the merits of this case will result in a *uniform* application of the criminal law. *See State v. Dennis*, 318 Ark. 80, 883 S.W.2d 811 (1994) (acceptance of State's appeal despite existing precedent in order to establish uniform application of sentencing law). Moreover, in *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996), we could not say that the General Assembly clearly indicated that forfeiture under Ark. Code Ann. § 5-64-505 was always civil in

[1] One of Rice's jurisdictional arguments is that the trial court had discretion to grant the dismissals given that at least two federal circuits had held that civil *in rem* forfeiture could constitute punishment for purposes of double jeopardy analysis. However, in *United States v. Ursery*, 116 S. Ct. 2135 (1996) the Supreme Court simply reversed these rulings and settled the law, holding that the Sixth and Ninth Circuit Courts of Appeals had *deviated* from a "long line of precedent" reflecting the Court's "traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause." The present case bears no resemblance to a situation where a change in law might implicate the prohibition against *ex post facto* laws. *See Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

nature. Because of this, the *Sims* court had to "examine the manner in which the statute was applied" to the facts of the particular case. *Id.* Therefore, while *Sims* is authority for finding that civil forfeiture under Ark. Code Ann. § 5-64-505 is not punishment for double jeopardy purposes, the analysis also hinges on how the statute was applied in the particular case. Thus, acceptance of this appeal fosters the correct and uniform application of the law by proceeding with an analysis of Ark. Code Ann. § 5-64-505 as applied in this case.

3. Section 5-64-505 Forfeiture Action — Double Jeopardy Analysis.

In *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996), we considered whether the appellant's prior conviction for possession of controlled substances with intent to deliver barred a subsequent § 5-64-505 forfeiture action brought against the $8,603.19 in the possession of the appellant at the time of his arrest. Relying on a two-part analytical framework reaffirmed by the United States Supreme Court in *United States v. Ursery*, 116 S. Ct. 2135 (1996), the *Sims* court determined that the forfeiture action was not "punishment" under the Double Jeopardy Clause.

We first examined whether the General Assembly intended for proceedings under Ark. Code Ann. § 5-64-505 to be criminal or civil. While the statute was generally remedial, some subsections had the "markings" of a criminal sanction. Thus, "we [could] not say that the General Assembly has *clearly* indicated that all parts of the statute provide civil, and not criminal, sanctions." *Sims v. State, supra.* (emphasis in original). As a result of this finding, the *Sims* court had to examine how the statute was applied in the particular case. The lawsuit was filed under the *in rem* provisions of the statute, and was filed against the appellant's money. Additionally, the rules of civil procedure governed the burden of proof, which was on the claimant. The statute as applied thus had "none of the ma[r]kings of punishment" and was applied as a civil sanction.

Next, the *Sims* court examined whether there was the "clearest proof" required to show that the forfeiture proceedings under

Ark. Code Ann. § 5-64-505 were so punitive in form and effect so as to render them criminal. The court found no such evidence:

> Forfeiture proceedings against property used to commit drug violations encourages owners to take care of property and ensures that it is not used in the drug trade. Forfeiture of property prevents illegal uses by imposing an economic penalty, thereby rendering illegal behavior unprofitable. Finally, to the extent that the statute applies to the proceeds of illegal drug activity, it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts. *See United States v. Ursery*, 116 S. Ct. at 2149.

Sims v. State, supra. The *Sims* court concluded its analysis and held that the *in rem* civil forfeiture was not punishment for purposes of the Double Jeopardy Clause.

[redacted] In the present case, as in *Sims*, there is little evidence suggesting that the forfeiture proceeding against Rice's vehicle was so punitive in form and effect so as to render the proceeding criminal. Moreover, the statute, as applied, was not used as a criminal penalty. The State brought the action under the *in rem* portion of the statute, and the action was brought against Rice's vehicle. In sum, the forfeiture action was civil in nature and did not constitute "punishment" for purposes of double jeopardy. Therefore, the trial court erred in concluding that the forfeiture barred Rice's subsequent prosecution on the possession charge.

[redacted] Because we conclude that the trial court erred in dismissing the felony charge, we address Rice's contention that the Double Jeopardy Clause bars a remand of the case. Clearly, the trial court's dismissal of the charge on double jeopardy grounds was not an acquittal on that charge. *See United States v. Scott*, 437 U.S. 82 (1978). Moreover, this court has previously reversed and remanded where the trial court erroneously dismissed charges on double jeopardy grounds. *See State v. McMullen, supra.* Accordingly, we reverse the trial court's order dismissing the charge of possession of a controlled substance with intent to distribute and remand for further proceedings consistent with this opinion.

Dismissed in part; reversed and remanded in part.

ALUMINUM COMPANY of AMERICA *v.* Richard A. WEISS, Director, Arkansas Department of Finance and Administration

97-258 946 S.W.2d 695

Supreme Court of Arkansas
Opinion delivered June 23, 1997

Mitchell, Williams, Selig, Gates & Woodyard P.L.L.C., by: *Marcella J. Taylor* and *Marsha Talley*, for appellant.

Kenneth R. Williams, for appellee.

RAY THORNTON, Justice. Beginning in August 1990, Aluminum Company of America, appellant, leased heavy equipment to mitigate environmental damages resulting from mining operations that it had conducted for many years until mining ended in 1990. ALCOA brings this appeal from an Arkansas Department of Finance and Administration decision that denied the company a refund of $61,196.50 paid by appellant as gross receipts taxes on the amounts paid in leasing that equipment. ALCOA claims that it is entitled to an exemption from gross receipts taxes for the lease of equipment used to prevent or reduce pollution, in accordance with the provisions of Ark. Code Ann. § 26-52-402(a)(3) (Supp. 1995).

ALCOA filed a complaint in chancery court, appealing the DF&A decision, and after hearing arguments on cross motions for summary judgment, the chancery court granted DF&A's motion for summary judgment. ALCOA brings its appeal to this court from that chancery court order, arguing that the trial court erred in (1) its construction of the pollution-control exemption; (2) in considering arguments from DF&A that were not presented at the agency level; and (3) in finding that DF&A's decision to

deny the exemption was not arbitrary and capricious. We review tax exemption cases de novo upon the record and we will not reverse the chancellor's findings unless they are clearly erroneous. *Martin v. Riverside Furniture Corp.*, 292 Ark. 399, 730 S.W.2d 483 (1987). We have decided that the denial of the exemption by DF&A was based upon a correct interpretation of the statute, and that the trial court agreed with that result; therefore it is not necessary to reach the remaining arguments.

DF&A informed ALCOA of the denial of payment of the requested tax refund, stating:

> With respect to ALCOA's claim for refund of sales tax accrued and reported on rentals of equipment from J.A. Riggs, the Department has determined that the rental of tractor scrapers, a backhoe, a tractor and a dozer are not exempt from tax under the "pollution control" exemption (Ark. Code Ann. § 26-52-402(a)(3)). This equipment was used in completing a post-mining reclamation project and was not used to reduce pollution from actual mining operations.

In denying the tax refund, DF&A reasoned that the leased equipment was not exempt from taxation pursuant to Ark. Code Ann. § 26-52-402(a)(3) because it was used in a post-mining reclamation project rather than to reduce pollution from ongoing mining operations. The statute provides exemptions from gross receipts taxes including the following:

> Gross receipts or gross proceeds derived from the sale of tangible personal property consisting of machinery and equipment required by state law or regulations to be installed and utilized by manufacturing and processing plants or facilities in this state to prevent or reduce air or water pollution or contamination which might otherwise result from the operation of the plant or facility.

Id. § 26-52-402(a)(3).

The legislative intent is articulated as follows:

> It is the intent of this section to exempt only such machinery and equipment as shall be utilized directly in the actual manufacturing or processing operations at any time from the initial stage where actual manufacturing or processing begins through the completion of the finished article of commerce and the packaging of the finished end product. The term "directly" as used in this act is to

> limit the exemption to only machinery and equipment used in actual production during processing, fabricating, or assembling raw materials or semifinished materials into the form in which such personal property is to be sold in the commercial market.

Ark. Code Ann. § 26-52-402(c)(1).

Agency interpretations of a statute, while not conclusive, are highly persuasive. *In Re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992). The first rule in interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997).

The exemption provided by the statute is applicable to machinery or equipment installed to mitigate pollution resulting from the continuing operation of the plant or facility. In *Heath v. Research-Cottrell, Inc.*, 258 Ark. 813, 529 S.W.2d 336 (1975), we held that a cooling tower used by the taxpayer was exempt as pollution control equipment because it was used to remove heat, as a pollutant, from water, before the water was discharged into the environment. The cooling tower was used in the operation of the facility and was also installed. By contrast, we have determined that the exemption does not apply to monitoring equipment, however useful, that does not mitigate environmental pollution. *Southern Steel & Wire Co. v. Wooten*, 276 Ark. 37, 631 S.W.2d 835 (1982).

Tax exemption provisions must be strictly construed against exemption, and if there is any doubt concerning its application, the exemption must be denied. *Martin v. Riverside Furniture Corp.*, 292 Ark. 399, 730 S.W.2d 483 (1987). It is the taxpayer's burden to establish an entitlement to an exemption from taxation beyond a reasonable doubt. *Pledger v. Baldor Int'l Inc.*, 309 Ark. 30, 827 S.W.2d 646 (1992); *Heath v. Research-Cottrell, Inc.*, 258 Ark. at 816, 529 S.W.2d at 337. A strong presumption operates in favor of the taxing power. *Ragland v. General Tire & Rubber Co.*, 297 Ark. 394, 763 S.W.2d 70 (1989).

We find that the interpretation by DF&A is based on the plain language of the statute. The language of Ark. Code Ann. § 26-52-402(b)(3) bases the exemption from taxes upon a require-

ment that pollution-control equipment be installed and used to prevent or reduce air or water pollution that results from the operation of a plant or facility. We agree with DF&A's determination that the statutory exemption does not apply to appellant's lease of equipment for a reclamation project.

ALCOA has not established that it is entitled to the exemption beyond a reasonable doubt, and because a tax-exemption provision must be strictly construed against the exemption, we affirm.

Affirmed.

Jerry MACKEY *v.* STATE of Arkansas

CR 97-312 947 S.W.2d 359

Supreme Court of Arkansas
Opinion delivered June 23, 1997

[redacted]

William R. Simpson, Jr., Public Defender, by: *C. Joseph Cordi, Jr.*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant consented to a bench trial in the Pulaski County Circuit Court and was convicted of residential burglary. Pursuant to Ark. Code Ann. § 5-4-501 (Repl. 1993), the trial court found that appellant was an habitual offender with more than one but less than four previous felony convictions and sentenced him to 108 months' imprisonment.

Appellant sought review from the court of appeals where he did not challenge the sufficiency of the evidence to convict him; rather, he claimed that there was insufficient evidence to support the finding that he was an habitual offender and should receive an enhanced sentence. In a 4-2 opinion, the court of appeals reversed and remanded the case for resentencing, asserting that this court has ruled that a defendant is not required to make a contemporaneous objection of any kind to preserve any issue in cases where a bench trial is held. In its opinion, the court of appeals stated that the supreme court has, "essentially relieved trial counsel of the duty to apprise the trial court of deficiencies in the evidence, including missing elements of proof." *Mackey v. State*, 56 Ark. App. 164, 167, 939 S.W.2d 851 (1997).

In its petition for review, the State prays for supreme court review and contends the court of appeals has misinterpreted our rulings which are directly on point to this issue.

We conduct our review pursuant to Ark. Sup. Ct. R. 1-2(f) as though the case had originally been appealed to this court, and we conclude that the trial court's decision should be affirmed.

Initially, we note that this appeal does not include a challenge to the sufficiency of the evidence to sustain the conviction but only seeks to raise the issue whether the sentence imposed on the appellant as an habitual offender was supported by appropriate evidence that he had been convicted of multiple prior felonies as required for sentencing him as an habitual offender.

The court of appeals' majority opinion relied upon our decision in *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995), where we held that, at a bench trial, a motion for a directed verdict for insufficient evidence to sustain a conviction was not required to preserve the issue on appeal. Our rationale for this decision was that in a bench trial, such a contemporaneous motion was superfluous, since the trial judge was required to consider the sufficiency of the evidence in determining guilt.

By contrast, we have long held that a contemporaneous objection must be made to the trial court before we will review an alleged error on appeal. In *Wicks v. State*, 270 Ark. 781, 785, 606 S.W.2d 366, 369 (1980), we noted that "exceptions to the basic requirement of an objection in the trial court are so rare that they may be reviewed quickly." We then delineated four exceptions to the contemporaneous-objection rule, none of which are applicable here.

Our decision in *Strickland v. State, supra,* was limited to the issue whether, at a bench trial, a directed-verdict motion was required to preserve for appeal the issue of sufficiency of the evidence to support a determination of guilt and conviction. We do not depart from either of these rules by following *Withers v. State*, 308 Ark. 507, 825 S.W.2d 819 (1992), and specifically requiring that a contemporaneous objection is necessary to preserve the issue whether previous convictions should have been considered in the sentencing phase at a bench trial.

As pointed out by the dissent, there is a line of cases which are directly on point. We find that this case cannot be distinguished from the facts of *Withers v. State*, 308 Ark. 507, 825 S.W.2d 819 (1992). In *Withers*, this court ruled that an appellant convicted at a bench trial failed to make a contemporaneous objection to the trial court's finding that he had four or more

felony convictions, and that failure to object barred him from raising the issue on appeal. The *Withers* court also noted that not only did the appellant fail to object to the habitual-offender finding, but that both the appellant and his own counsel admitted to his prior record, with his attorney arguing for leniency. On direct examination, the appellant admitted he had a record and testified as to those crimes. *Withers*, 308 Ark. at 510, 825 S.W.2d at 820. The supreme court found that it was understandable for the State to believe, in light of these admissions, that it was unnecessary to introduce a pen pack into evidence. *Id.*

Factually, this case cannot be distinguished. In this case, the felony information charging appellant with residential burglary included a provision that appellant had been convicted of more than one but less than four felonies, thereby providing notice that appellant would be treated as a habitual offender. Appellant signed a Waiver of Jury Trial for this burglary felony. On that form, the words "felony" and "habitual" were circled and appellant was put on notice that he could receive a sentence ranging from five to thirty years in the state penitentiary. On direct examination during the guilt phase, *appellant's own attorney* questioned: "Mr. Mackey, you've got prior convictions for what? Theft by receiving and possession of drug paraphernalia?" Appellant responded, "Yes, sir." Later, on re-cross examination, appellant was asked if he got in trouble in 1990 and 1993 and whether he was currently on probation for the later offense. Appellant responded, "Yes, sir."

Before ending the guilt phase, the State clarified the exact prior felonies it would use for habitual status, and stated it had certification for case 93-1657A for possession of drug paraphernalia. When the court asked how appellant had pled for that case, *appellant's own attorney* conceded that he had also represented appellant on that previous case and appellant had pled guilty for that Class C felony. Continuing on the certification issue, the trial court inquired, "What else?" and the State said the other case was 90-72A which resulted in a bench trial on that theft by receiving charge, a Class C felony. No contemporaneous objection was made challenging the existence of these prior felonies.

During the sentencing phase, *appellant's attorney* began calculating his client's possible sentence and stated:

> The only mistake we really saw with the presentence is that Miss Byrd counted the misdemeanors that were more than ten years old. So, I think the State will agree with me that it should be three point two five as opposed to a four.

After the State agreed that this reduction was accurate, *appellant's attorney* continued to figure the appropriate sentence based on his client's habitual-offender information:

> So, that's going to make it, if you follow the grid, seriousness level six, score of three. Going to make it a hundred and eight months in the Arkansas Department of Correction. . .

Appellant's attorney requested that the court depart down from the hundred and eight months in prison based on the fact that he was convicted of a property crime, that there was not extensive property damage, that the appellant had obtained rehabilitation, and that no injuries occurred during the crime. The court denied the leniency plea and set sentence at the lowest setting on the sentencing grid.

As in *Withers*, not only did appellant fail to object to the habitual-offender finding, but both appellant and his own counsel admitted to his prior record, with his attorney arguing for leniency. While he did move for a directed verdict on the sufficiency of the evidence, appellant never questioned the habitual-offender status from the time the information was filed until appeal. In fact, appellant admitted the prior convictions, and he guided the trial court to the proper length of his own sentence of 108 months in prison.

The 1992 *Withers* case reiterated this court's endorsement of the contemporaneous-objection rule in bench trials, at least to the extent of showing habitual-offender status for sentencing purposes. In 1993, we cited *Withers* in *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993), upholding the rule that a bench-trial contemporaneous objection must be made in order to challenge a judge's determination that multiple prior convictions existed which established the defendant's status as a habitual offender, and

that the issue is waived on appeal absent that objection. In *State v. Brummett*, 318 Ark. 220, 885 S.W.2d 8 (1994), another appeal from a bench-trial ruling, this court held that the purpose for the contemporaneous-objection rule is to give the trial court the opportunity to know the reasons for disagreement with its proposed action before or at the time that court makes its ruling. *Brummett*, 318 Ark. at 222.

It is clear that while we do not require a directed-verdict motion for sufficiency of the evidence during the guilt phase of a bench trial, we do require a bench-trial contemporaneous objection to challenge the existence of prior convictions to establish habitual-offender status for the purpose of sentencing. We hold appellant is procedurally barred from appealing this issue.

We affirm the trial court's decision.

Steven M. EDMONDSON *v.* STATE of Arkansas

CR 97-614 945 S.W.2d 943

Supreme Court of Arkansas
Opinion delivered June 23, 1997

Wes Bradford, for appellant.

No response.

PER CURIAM. Steven M. Edmondson, by his attorney, has filed a motion for a rule on the clerk.

His attorney, Wes Bradford, admits in his 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.

Harold D. QUALLS *v.* Daniel FERRITOR, Chancellor, and University of Arkansas, Fayetteville

97-223 947 S.W.2d 10

Supreme Court of Arkansas
Opinion delivered June 30, 1997

Appellant, pro se.

T. Scott Varady, Associate Gen. Counsel and *Jeffrey A. Bell*, Associate Gen. Counsel, for appellees.

TOM GLAZE, Justice. Appellant Harold D. Qualls filed suit, pro se, in Washington County Circuit Court, naming as defendants the State of Arkansas, the University of Arkansas at Fayetteville, and the University's Chancellor, Daniel Ferritor.[1] Qualls alleged that, in 1986, he was expelled from the University, but that, under an agreement dated March 23, 1987, the University agreed to readmit him, allow him to attend graduate school, and permit him to obtain a doctorate degree in education if he would surrender his Arkansas teacher certificate. Qualls further alleged he was readmitted and subsequently obtained his bachelor of special education and master of education degrees, but after completing ten hours towards his doctorate degree, was advised by the University that he did not qualify for a doctorate degree because

[1] On motion of Qualls, the trial court later dismissed the State from the lawsuit.

he had no teacher certificate. Qualls asserted the defendants' action caused him compensable damages in the total amount of $1,000,000, and punitive damages of $9,000,000.

The appellees responded to Qualls's complaint by moving to dismiss on the grounds that Qualls had failed to state a claim upon which relief could be granted, and that such suit against the University and Chancellor Ferritor was barred under the sovereign immunity clause (Ark. Const. art. V, § 20) and the statutory immunity provision set out in Ark. Code Ann. § 19-10-305(a) (Repl. 1994). The trial court granted appellees' motion, and Qualls brings this appeal, arguing the trial court erred in dismissing his suit.

We are unable to address Qualls's argument because his abstract is flagrantly deficient. *See* Ark. Sup. Ct. R. 4-2(b). This court's rules require abstracting of such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the court for decision. Ark. Sup. Ct. R. 4-2(a)(6).

Qualls's entire argument on appeal is premised on a document dated March 23, 1987, which he labels a "trade agreement, or waiver." However, that agreement appears nowhere in the abstract, and apparently was not presented to the trial court. Also, no testimony is abstracted concerning the March 23 document, even though Qualls mentions the document repeatedly in his statement of the case and argument in his brief. Qualls's briefing problem is exacerbated by his listing and placement of a number of letters, certificates, and other papers in his brief, which are not in the transcript and were never considered by the trial court. As a consequence, we cannot consider them on appeal. *See Rochelle v. Piles*, 244 Ark. 606, 427 S.W.2d 10 (1968).

Finally, we note that Qualls, as appellant, has the burden to demonstrate any reversible error and present a record evidencing such error. *See Rad-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). In addition, we are guided by the settled rule that when the appellant does not cite authority or make a convincing argument, and where it is not apparent without further research that the point is well taken, we

will affirm. *Firstbank of Ark. v. Keeling*, 312 Ark. 441, 850 S.W.2d 310 (1993). Here, Qualls cites *no* legal authority to support his argument, and while he offers five pages of argument, the argument is unclear, most likely because a proper record is not presented to help us understand his contentions. This court holds pro se litigants to the same requirement as attorneys. *Jewell v. Ark. Bd. of Dental Examiners*, 324 Ark. 463, 921 S.W.2d 950 (1996).

In sum, we affirm the trial court's ruling because of Qualls's deficient abstract and his failure to demonstrate reversible error.

NEWBERN, J., not participating.

DeAnthony Tyrone SMITH *v.* STATE of Arkansas

CR 96-1484 947 S.W.2d 373

Supreme Court of Arkansas
Opinion delivered June 30, 1997

Johnson & Richards, P.L.L.C., by: *B. Kenneth Johnson*, for appellant.

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

TOM GLAZE, Justice. Appellant DeAnthony Tyrone Smith, who was on probation for burglary and theft, was arrested and charged with aggravated robbery and aggravated assault. Smith retained attorney Lori A. Mosby to defend him against the State's revocation petition and its felony charges. At a bench trial, on July 30, 1996, Smith was found guilty of the aggravated robbery and assault offenses and sentenced to twenty-six years, and was found in violation of his probation agreement, for which he was given thirty-six years.

After the trial court found Smith guilty, it asked the prosecuting attorney and Ms. Mosby if they had any evidence to present during the sentencing phase. Mosby said no. When the sentencing phase began, the trial court learned Mosby had left the courthouse, and Smith was left to represent himself. The trial judge proceeded to explain the sentences he intended to impose for each crime — aggravated robbery, aggravated assault, burglary, and theft — and at the State's urging, the trial judge had Smith sign the conviction judgments.[1]

After Smith signed the judgments, the trial court advised Smith of his right to appeal, and that if he could not afford an attorney, the court would appoint one. The trial court also informed Smith that he could file a claim of ineffective assistance of counsel. After completion of the sentencing phase, new counsel was appointed to represent Smith, and, on August 28, 1996, that counsel filed a timely notice of appeal from the July 30, 1996 convictions. On the same August 28 date, he filed a motion for a new trial, alleging (1) Ms. Mosby had failed to procure certain material witnesses to testify at trial, and (2) his speedy trial rights had been violated. No hearing was held or ruling obtained on Smith's new-trial motion, and no additional or second notice of appeal was filed by Smith after the thirty-day deemed-denied period expired, as is required in Rule 2(a)(3) of Appellate Procedure—Criminal and Rule 4(c) of Appellate Procedure—Civil.

In his appeal, Smith contends that, because his counsel failed to appear and represent him during the sentencing phase, the trial court violated his Sixth Amendment right by proceeding without defense counsel being present. Smith relies upon *Mempa v. Rhay*, 389 U.S. 128 (1967), and argues the time of sentencing is a critical stage in a criminal case and counsel's presence is necessary.

The State counters by urging that this Court lacks jurisdiction to consider Smith's claim, because the trial court never ruled on Smith's new-trial motion, and therefore Smith was required to file an additional or second notice of appeal after thirty days

[1] At the same time, the prosecutor described to the judge that he had understood Mosby was going to explain the conditions of suspended imposition of sentencing, but there is no indication that happened.

expired from the time of filing his motion. The State further argues Smith could not simply rely on the "deemed denied" time period in any event because a hearing was required to give the trial court an opportunity to explore the facts surrounding the ineffective assistance of counsel allegations contained in Smith's posttrial motion. *See Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996). The State is mistaken. Although Smith did not obtain a hearing on his ineffective assistance of counsel claim or file a second notice of appeal when his new-trial motion was deemed denied, Smith's appeal from the conviction judgment is authorized by Rule 2(b) of Appellate Procedure—Criminal. Rule 2(b) provides as follows:

> (b) Time for Filing. A notice of appeal is invalid if filed at any time prior to the day that the judgment or order appealed from is entered or prior to the day that a post-trial motion is deemed denied except as provided herein. If a notice of appeal is filed on the same day that the judgment or order appealed from is entered or on the day that a post-trial motion is deemed denied, the notice of appeal shall be effective. *A notice of appeal filed within thirty (30) days of entry of the judgment of conviction shall be effective to appeal the judgment, even if a post-trial motion is subsequently filed. If a post-trial motion is filed after the notice of appeal, it shall not be necessary, to preserve the appeal of the judgment of conviction, to file another notice of appeal of the judgment.* If an appellant wishes to appeal an adverse ruling on a post-trial motion and the appellant has previously filed a notice of appeal of the judgment, the appellant must file a notice of appeal regarding the ruling on the motion within the time provided in subpart (a)(2) or (3) hereof. (Emphasis added.)

As gleaned from the foregoing rule, Smith's notice of appeal dated August 28, 1996, was filed within the thirty-day period from which to appeal the trial court's July 30, 1996 conviction judgment and was effective to appeal that judgment even though Smith had also filed a new-trial motion. Further, we have held that the issue of denial of counsel must be raised on direct appeal or be waived. *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996). The question remains, however, whether Smith preserved his Sixth Amendment or right-to-counsel issue in his direct

appeal of the July 30 judgment, since his appointed counsel never raised that constitutional issue below. We conclude that he has.

This court's decision in *Furr v. State*, 285 Ark. 45, 685 S.W.2d 149 (1985), is controlling. There, this court rejected the State's argument that Furr's failure to object to the lack of counsel at the trial level precluded such argument on appeal. The *Furr* court stated the following:

> The appellant's statutory rights are reinforced by the sixth amendment of the United States Constitution. The U.S. Supreme Court addressed the issue of right to counsel in *Mempa v. Rhay*, 389 U.S. 128 (1967) finding that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." The Court held that the time of sentencing is a critical stage in a criminal case and counsel's presence is necessary. *See* Annotation, *Parole or Probation Revocation*, 36 L.Ed. 2d 1077 § 23(a) p. 1117 (1974); Annotation, *Probation - Revocation - Right to Counsel*, 44 ALR3d 306 § 2 p. 311 (1972). The commentary after § 41-1209 [now Ark. Code Ann. § 5-4-310 in Ark. Crim. Code Ann., Original Commentary at 253-254 (1995)] cites *Mempa* for the proposition that indigent defendants are entitled to appointed counsel if sentencing is to follow revocation. *See also Hawkins v. State*, 251 Ark. 955, 475 S.W.2d 887 (1972).
>
> The right to counsel may be waived, but the waiver must be made knowingly, voluntarily, and intelligently. *Leak v. Graves & State*, 261 Ark. 619, 550 S.W.2d 179 (1977). Here the only potential evidence of waiver is the fact that appellant waived his right to counsel when he initially pled guilty. Almost one year passed between the appellant's plea of guilty and his revocation hearing. Obviously, it cannot be said that the waiver of counsel when the plea was entered constitutes an intelligent waiver to all further proceedings. Such a rule would circumvent the appellant's right to counsel during the most critical aspect of the criminal proceedings against him, revocation of his probation and sentencing nearly a year later.
>
> Under the circumstances of this case, the trial court had a duty to advise appellant, either by the service of notice of the revocation hearing, or in open court, of his right to be represented by counsel. When the court failed to do so it committed prejudicial error.

The circumstances in the present case are like the ones found in *Furr.* The trial court here never advised Smith that, during sentencing, he had a right to be represented by counsel. If for no other reason, counsel could ensure that Smith's convictions and sentences were not based on misinformation or a misreading of court records. *See Mempa*, 389 U.S. at 133.

In sum, the record reflects Smith was never informed that he had a right to counsel for the sentencing phase, or that he knowingly, voluntarily, and intelligently waived such right. Consequently, we reverse and remand this cause for resentencing.

J.T. *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

96-1006 947 S.W.2d 761

Supreme Court of Arkansas
Opinion delivered June 30, 1997

[redacted]

Suzanne Penn, for appellant.

Ed Wallen, Office of Chief Counsel, for appellee.

Merry Alice Bost Hesselbein, Guardian Ad Litem.

DONALD L. CORBIN, Justice. Appellant J.T. appeals the judgment of the Pulaski County Chancery Court terminating her parental rights to T.T., who is now thirteen years of age, pursuant to Ark. Code Ann. § 9-27-341 (Supp. 1995), and authorizing Appellee Arkansas Department of Human Services ("DHS") to consent to the adoption of T.T. Appellant raises three points for reversal that necessarily involve our interpretation of section 9-27-341; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(17)(vi) (as amended by *per curiam* July 15, 1996). We find no error and affirm.

Facts and Procedural History

The duration of this case was approximately two years, during which time there were numerous hearings conducted before the chancery court. The evidence presented below reveals the following facts. On March 18, 1994, DHS filed a petition for emergency custody of T.T., asserting that the child was dependent-neglected as defined in Ark. Code Ann. § 9-27-303 (Repl. 1993). The affidavit attached to the petition reflected that T.T. was at risk for emotional abuse due to the fact that she was living with her mother in a shelter, that her mother had a history of running from shelter to shelter, state to state, and that T.T. was not attending school regularly. The affidavit particularly described two specific incidents which had occurred at T.T.'s school. On March 16, 1994, Appellant forced T.T. into school through the use of an armlock behind the child's back and by pulling the child's hair. When T.T. visited with the school counselor that same date, the

child reported that she had experienced pictures in her head, that she had no memories of earlier times in her childhood, and that she had been in foster care when she was two years of age and had been sexually abused. On March 17, 1994, Appellant again accompanied T.T. to school where Appellant lost control, displaying disruptive behavior and loud cursing for approximately forty minutes. The affidavit also indicated that a psychiatrist at the Arkansas Children's Hospital had diagnosed Appellant as being mentally ill, but that Appellant had not accepted services which would comply with prescribed treatment. Additionally, T.T. was exhibiting the same symptoms that Appellant had, such as delusions and paranoia. The order granting the emergency custody was filed on March 22, 1994.

After a hearing on April 22, 1994, and based on the stipulation of the parties that the allegations contained in the petition were true, T.T. was adjudicated dependent-neglected. The stated goal of the case was one of reunification of the family. In the meantime, T.T. was ordered to pursue residential treatment and to participate in family therapy with Appellant. Appellant was likewise ordered to seek treatment by receiving a psychological evaluation and following any recommendations for medication and treatment.

On August 31, 1995, DHS filed a petition to terminate Appellant's parental rights. The petition stated that the minor child had resided outside the parental home for a period in excess of one year and, despite meaningful effort by DHS to rehabilitate the home and correct the conditions which caused removal, the conditions had not been remedied by Appellant to the extent that she was able to provide for the essential and basic needs, as well as the specific emotional needs, of T.T. Appellant responded to the petition by arguing that (1) DHS had violated the Americans with Disabilities Act by denying her visitation with T.T. and (2) the trial court had unlawfully delegated judicial authority by allowing visitation to be determined by what the child's therapist recommended and by what the child desired.

After receiving testimony and other evidence during four separate hearings conducted on December 8, 1995, January 26,

1996, March 5, 1996, and March 15, 1996, the trial court entered an order terminating Appellant's parental rights and authorizing DHS to consent to the adoption of T.T. This appeal followed.

Termination of Parental Rights

For her first point for reversal, Appellant argues that the trial court erred in finding clear and convincing evidence to terminate her parental rights. This court has stated that when the burden of proving a disputed fact in chancery is by clear and convincing evidence, the inquiry on appeal is whether the chancery court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). Clear and convincing evidence is defined as "that degree of proof which will produce in the factfinder a firm conviction as to the allegation sought to be established." *Id.* at 637, 839 S.W.2d at 198. In making such determination, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.*

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Id.*; *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984). Termination of parental rights is an extreme remedy and is in derogation of the natural rights of the parents. *Anderson*, 310 Ark. 633, 839 S.W.2d 196. This is not to say, however, that parental rights should be allowed to continue to the detriment of the child's welfare and best interests. In *Burdette v. Dietz*, 18 Ark. App. 107, 711 S.W.2d 178 (1986), the court of appeals held:

> While we agree that the rights of natural parents are not to be passed over lightly, these rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. Parental rights will not be enforced to the detriment or destruction of the health and well-being of the child.

Id. at 109, 711 S.W.2d at 180.

[redacted] Section 9-27-341 provides for the termination of parental rights upon petition by DHS. Subsection (a) provides in part:

> The intent of this section is to provide permanency in a juvenile's life in all instances where return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that return to the family home cannot be accomplished in a reasonable period of time.

Subsection (b) provides that an order terminating parental rights shall be based on a finding by clear and convincing evidence that it is in the best interest of the juvenile based upon one of the enumerated grounds, including a finding that the minor child has been adjudicated dependent-neglected, has been out of the home for twelve months, and, despite meaningful effort by DHS to rehabilitate the home and correct the conditions which caused removal, the conditions have not been remedied by the parent.

During the hearings conducted below, the following pertinent evidence was presented. T.T., who was eleven years of age at the time she testified, said she wanted to live with her foster mother because she had more of a normal life and she felt safer there. She said she had a regular school to go to and that she was not afraid that she would have to move around again. She said she did not really have a normal life when she lived with her mother, and that if she had to live with her mother again, it would not be good because her mother could not take care of her and would probably move again. She said her mother was hardly taking care of herself. She said that there were times when she was afraid while she was with her mother, and that sometimes her mother would "act like she was fighting a sumo wrestler or something." She indicated that she was afraid that she would catch her mother's disease, and that she knew for a fact that she could catch the disease because when she lived with her mother, she started acting like her mother. She said that she felt sad about her mother's right to visit her in the future being taken away because she did not want to hurt her feelings. She indicated that she loved her mother and wanted to see her have a good life, but that her visits with her mother made her feel uncomfortable. She said that even if her foster mother could not adopt her and DHS would have to look

for another place for her, she would still want her mother's parental rights taken away.

Catherine Chaumont, a therapist with the Centers for Youth and Families, testified that T.T. entered the children's residential program at the Arkansas Children's Hospital on June 6, 1994, and that she was initially diagnosed as having shared psychotic disorder for which she was hearing voices and having hallucinations. She described persons diagnosed with shared psychotic disorder as having a close relationship with someone who has a psychotic disorder and exhibiting those psychotic behaviors, which they are exposed to on a regular or long-term basis by the other person. She stated that, initially, T.T. was extremely oppositional and non-compliant, to the extent that she would not follow rules and, at times, she required restraints, physical holds, and closed-door seclusions in order to secure her safety and the safety of the staff and the other children. She indicated that T.T. was extremely fearful of her mother and that, initially, she had been very reluctant to have contact with her mother, even during family therapy sessions. She stated that by October 1995, T.T.'s diagnosis had changed to one of oppositional defiant disorder, a less severe diagnosis, which indicated that she was getting better. She indicated further that the relationship between Appellant and T.T. was improving and that there was a bond between them. She stated that there were, however, times when Appellant appeared to become very agitated by some of T.T.'s questions. In one recent session, when T.T. had continued to press for answers involving verification of her birth, Appellant's tone of voice had escalated and she became short with the child. She stated that recently T.T. had become more aggressive and noncompliant, requiring physical holds on her, which she had not required since she had been discharged from residential treatment in 1994. She stated further that it was apparent that T.T. began decompensating in early February 1996, coinciding with the continuance of the court hearing on the petition to terminate Appellant's parental rights.

Ms. Chaumont ultimately recommended that T.T. be placed for adoption and that Appellant's parental rights be terminated. She indicated that, although Appellant had done everything that had been asked of her by the court, and although her relationship

with T.T. had improved significantly, T.T. still required more than Appellant was able to provide. She stated that T.T. was a "high risk" child and that because of her high needs, Appellant would not be able to maintain the child and keep her stable. She stated that T.T. needed a structured environment and needed parents who would confront her, setting very firm limits on her behavior and being able to enforce those limits by resisting the child's challenges, threats, and verbal abuse. She stated further that when T.T. is around Appellant, she exhibits characteristics of a parentified child, one who assumes the role of acting parent, showing more parenting skills than the mother and sometimes assuming charge of the household. She stated that no amount of training or classes would enable Appellant to meet the needs of T.T. She stated that T.T. needed closure to this situation and that the child was even at the point of trying to recruit potential parents to adopt her.

Gail Brown, Appellant's therapist, testified that Appellant had been diagnosed as being alcohol dependent, having bipolar disorder, and being manic type. She stated that Appellant was at that time undergoing therapy and treatment by medication. She estimated that Appellant had a Global Assessment of Function score of 68, out of a possible 100. She stated that a normal functioning person would score somewhere in the 90s and that a score of 68 would put Appellant at a level of functioning with mild symptoms, some depressed mood or mild insomnia, some difficulty in social, occupational, or school functioning, but generally functioning pretty well and having some meaningful interpersonal relationships. She stated that Appellant would need to continue her therapy and take medication for the rest of her life. When asked if she thought T.T. should be returned to Appellant at that time, she stated that it would be best for Appellant that there be reunification with supervision through a gradual integration, involving visitation overnight and on weekends.

Dr. Nita Brown, a psychiatrist with the Centers for Youth and Families, testified that she had conducted a mental status examination on Appellant at the time T.T. was admitted to the Centers in June 1994. She stated she had observed Appellant having looseness of association, flight of ideas, and bizarre and para-

noid ideation. She stated that while she was conducting the examination, Appellant became increasingly agitated, such that Dr. Brown terminated the session when Appellant physically approached Ms. Chaumont in a threatening manner. She stated that T.T. had expressed some fears of her mother and that the child had indicated that her mother had told her that people were trying to kill her (T.T.) or trying to electrocute her. Pertaining to Appellant's mental condition, Dr. Brown described bipolar disorder as a mood disorder in which a person experiences mental states varying from manic, to psychotic, to depressed. During the manic moods, Dr. Brown stated, the person begins to have poor judgment and can become paranoid and have delusional and bizarre ideas. She stated further that bipolar disorder is a highly variable disease, at times affecting the person's life only minimally, and other times affecting the person to a point where she is totally incapacitated. She stated that T.T.'s emotional requirements are such that she needs an extremely stable environment, which could not be adequately provided by Appellant because the course of the bipolar illness is characterized by ups and downs and by periods of deterioration. She stated further that, in her opinion, no amount of parenting classes or education could enable Appellant to give T.T. the stability she needs.

Appellant testified at the December 8, 1995 hearing that T.T. should be returned to her custody "eventually," after they had more therapy and visitation. She stated that she was asking the court to give her more help and more parenting classes. At the January 26, 1996 hearing, Appellant again expressed a desire to have more therapy before she would be ready to take custody of T.T. She stated that she did not think it was a good idea for T.T. to come home with her at that time. She stated that she felt they needed to spend more time together, perhaps in the form of weekend visits, before she took custody of the child. She stated that she knew what it meant when the therapists referred to T.T. being oppositional and that she would deal with that behavior by taking additional classes. Appellant also indicated that she was not working and that she was currently in a relationship with a man who was an alcoholic and who had not stopped drinking. It was further deduced over the course of the hearings that Appellant had

had several relapses with alcohol, the most recent occurring in October 1995.

In making the determination to terminate Appellant's parental rights, the trial court stated:

> The Court finds that the mother's mental illness was a factor that caused the child to enter foster care. The Court further finds that the mother has had consistant [sic] treatment for her mental illness and will need continued treatment for the rest of her life. The child has had some psychiatric difficulties also and has improved since entering foster care. However, the Court cannot close its eyes to the fact that it must do what is in the best interest of [T.T.] who is entering adolescence, is parentified, and needs a parent or care giver who can be confrontive and set limits, be resistant to challenges, threats, and verbal abuse that this child can exhibit. This child also needs to definitely know what is going to happen in her life. The Court notes that this case had been ongoing and that now is the time to make a permanent plan for the child. Ms. Chaumont, the child's Therapist, testified last week that the child in the past several weeks has become markedly non-compliant and that school grades have plummeted, and that the child needs closure on this issue. *The Court finds that the mother is unable to be the type of parent that this child needs and she is not able to learn how to be that parent.* The Court notes that this is sad because the mother loves the child and has really tried to do what is required, but it has not yet transpired. The Court finds that long-term foster care is not appropriate for this child. This child is adoptable and, according to Ms. Chaumont, is very adoptable. [Emphasis added.]

We conclude that the finding of the trial court that Appellant does not have the capacity to be the type of parent T.T. needs was not clearly erroneous, in light of the testimony provided by Catherine Chaumont, Gail Brown, and Dr. Nita Brown, along with Appellant's concession that she was not yet ready to take care of T.T. on a permanent basis. The foregoing evidence demonstrates that the trial court's decision to terminate Appellant's parental rights is supported by clear and convincing evidence and that such decision was in the best interest of the child.

Appellant additionally challenges the trial court's ruling on the ground that the court made no finding of her unfitness as a

parent. Appellant relies on *Quilloin v. Walcott*, 434 U.S. 246 (1978), in support of her assertion that there must be a showing of a parent's unfitness before the parental rights may be terminated on the basis of what is in the best interest of the child. While we agree with Appellant that a proceeding to terminate parental rights is a two-step process, requiring the trial court to find (1) the parent unfit and (2) that termination of the parent's rights is in the best interest of the child, we do not agree with her contention that the trial court here did not make a finding that Appellant was unfit. Although the trial court did not actually use the word "unfit," the court clearly made a finding that Appellant was unable to be the type of parent that T.T. needs and that she is not able to learn how to be that parent. We conclude that such a determination by the trial court is a sufficient finding of Appellant's unfitness, and that such finding is supported by clear and convincing evidence.

Americans with Disabilities Act

For her next point for reversal, Appellant makes two arguments involving the Americans with Disabilities Act ("ADA"). Appellant first argues that she was denied visitation with T.T. on the basis of her mental disability and that reasonable accommodations should have been made by DHS to provide visitation services to her, pursuant to section 9-27-341(b)(2)(E) and the ADA. She next argues that it was error for Dr. Nita Brown to have denied her access to T.T. on the ground that she posed a threat to the child or Ms. Chaumont without first having conducted an individualized assessment of the severity and duration of any risk posed by her. She contends this was also done in violation of the ADA.

The trial court found that DHS had not violated the provisions of the ADA because any denial of visitation was not based on the fact that Appellant had a mental disability, but rather, on the mental and emotional state of T.T. The court stated that Appellant's mental disability was a factor considered by the court, but only to the extent that the disability affected the child in a detrimental way. The court noted that it had in the past issued similar restrictions on visitation in cases where the parents had no identi-

fiable disability, and also, that there had been cases when such restrictions were not necessary and where the parental rights were not terminated even though the parent had a disability such as mental illness.

Appellant has presented no direct authority to support her contention that DHS discriminated against her or failed to provide any services to her or make reasonable accommodations for her. Instead, Appellant merely relies on section 9-27-341(b)(2)(E)(ii), which provides that DHS will make "reasonable accommodations" in accordance with the ADA in order to allow meaningful access to reunification and family preservation services. For the reasons outlined below, we affirm the trial court's ruling.

The ADA provides in pertinent part that, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1994). Whether an individual has been denied the services of a public entity by reason of the individual's disability is an issue of first impression in this court. We thus look to decisions from other jurisdictions for guidance.

In *In re Torrance P.*, 522 N.W.2d 243 (Wis. Ct. App. 1994), the Wisconsin Court of Appeals determined that the inquiry of whether the father's rights under the ADA had been violated was separate from and unrelated to the issue of whether the trial court erred in terminating the father's parental rights. The court explained that Congress enacted the ADA to eliminate discrimination against persons with disabilities and to create causes of action for those persons, but Congress did not intend to change the obligations imposed by unrelated statutes, such as the Wisconsin statute requiring DHS to make a "diligent effort" to provide court-ordered services to persons involved in an action for termination of parental rights. The court stated that while the father's developmental disability "must be considered in determining the reasonableness of the County's efforts, neither his disability nor the ADA changes the inquiry or the County's burden of proof" under the relevant Wisconsin statute. *Id.* at 245-46. The court con-

cluded that any cause of action the father may have had under the ADA was pursuable under a separate cause of action, but that such a claim could not be the basis for an attack on an order terminating parental rights.

In *In re C.M.*, 526 N.W.2d 562 (Iowa Ct. App. 1994), the Iowa Court of Appeals passed over the issue of whether the ADA could be used as a ground for reversal of an order terminating parental rights. The court ultimately ruled that the issue was procedurally barred because it had not been raised below, although it did address the merits of the claim in the alternative by stating that reasonable accommodations had been made by DHS in that the mother had been provided with a lengthy list of services including those which accommodated her personality disorder.

More recently, in *Stone v. Daviess County Div. Child Servs.*, 656 N.E.2d 824 (Ind. Ct. App. 1995), the Indiana Court of Appeals addressed a situation more closely akin to that in the present case, in that both parents and the children displayed mental, emotional, and psychological problems. The court initially determined that because Indiana statutes did not require that services be provided to *any* parents in proceedings to terminate parental rights, the requirements of the ADA were not applicable. The court nonetheless addressed the merits of the parents' claim because the public entity had, in that case, elected to provide services. In its review of the claim, the court recognized that all that was required under the ADA was that the public entity reasonably accommodate a parent's disability. The court stated that, "[i]n the final analysis, the rights of the parents under the Fourteenth Amendment and the ADA must be subordinated to the protected rights of the children." *Id.* at 831. The court concluded that the services provided to the parents had been sufficiently tailored to meet their disabilities, but that the most significant factor that had not been remedied was the parents' denial that there had ever been any inadequacy in the care of their children. The court thus determined that any additional services would not have cured the parents' denial or their chronic parenting deficiencies.

[redacted] Section 9-27-341(b)(2)(A) requires a "meaningful effort" by DHS to rehabilitate the home and correct the condi-

tions which caused the removal of the child as dependent-neglected. Subsections (b)(2)(E)(i) & (ii) provide that in the event termination of parental rights is based upon factors which arose subsequent to the original dependency-neglect petition, DHS shall make "reasonable accommodations" in accordance with the ADA to parents with disabilities in order to allow them meaningful access to reunification and family preservation services.

Assuming *arguendo* that the trial court based its decision to terminate Appellant's parental rights on any such subsequent factors, the pertinent inquiry is whether DHS provided "reasonable accommodations" to Appellant to allow her a meaningful access to reunification services. Such accommodations were made in this case, in the form of providing Appellant with a mental evaluation, therapists, and prescribed medication for her mental illness, as well as access to family therapy, parenting classes, Alcoholics Anonymous sessions, transportation, and various casework services. Appellant was additionally provided general visitation with T.T., and was only denied that visitation when it became detrimental to the child. In that respect, we agree with the reasoning espoused by the Indiana Court of Appeals that the parent's rights under the ADA must be subordinated to the protected rights of the child. Such reasoning is consistent with the General Assembly's mandate that all juvenile court proceedings be viewed in terms of what is in the best interest of the child. *See* Ark. Code Ann. § 9-27-102 (Supp. 1995). We thus find no merit to this point.

Similarly, we find no merit to Appellant's second contention that it was error for Dr. Brown to deny her access to her daughter without making an individualized assessment of the risk posed by Appellant. In support of this contention, Appellant relies heavily on *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987). That case dealt with the issue of whether a teacher, who had been denied certification because she had tuberculosis, posed a threat to the general public if she were allowed to continue teaching. The Supreme Court held that in order to determine whether a person handicapped by a contagious disease is "otherwise qualified" to do the job, the trial court must conduct an individualized inquiry and make appropriate findings of fact based

upon medical knowledge about the nature, duration, and severity of the risk posed to the general public. The holding in that case is thus inapplicable here because Appellant is not handicapped by a contagious disease and it was not alleged that she posed a threat to the general public. The sole concern here was whether it was in T.T.'s best interest to have contact with her mother at that particular stage in the child's therapy.

We thus conclude that Appellant has failed to demonstrate that her rights pursuant to the ADA were violated by either DHS, Dr. Brown, or the trial court. Appellant was not denied any services on the basis of her mental disability; rather, the trial court's denial of visitation with T.T. was motivated solely by what the court deemed was in the best interest of the emotionally fragile child. We further conclude that even if DHS had failed to make reasonable accommodations for Appellant's disability, such failure would not negate the trial court's decision to terminate Appellant's parental rights.

Delegation of Judicial Authority

For her last point for reversal, Appellant argues that the trial court erred in allowing the therapists and the minor child to decide whether or not visitation or family therapy would occur. She asserts that the lack of regular visitation with her daughter and the failure to provide family therapy in a timely manner had "dire consequences" for her. Appellant does not attempt to explain what those particular consequences were, nor does she offer any convincing authority or argument in support of reversal on this point, which appears to be little more than an alternative attack on the trial court's decision to deny her visitation with her daughter.

For the reasons discussed in the preceding section, we conclude there was no unlawful delegation of judicial authority by the trial court, as the visitation was only denied during those periods of time that the court and the child's therapists determined such contact would be detrimental to the child. We are persuaded by the trial court's well-reasoned determination that therapists and caseworkers must be allowed some discretion in carrying out the orders of the court in cases where a child's emotional, mental, or

physical health is at stake. Furthermore, because we have determined there was clear and convincing evidence presented indicating that Appellant lacked the capacity or ability to care for T.T., the issue of whether Appellant was denied regular visitation with her daughter is moot.

Affirmed.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. As the majority acknowledges, there is a heavy burden placed upon the party seeking to terminate the parent-child relationship. *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984). As the United States Supreme Court stated when setting the "clear and convincing" standard of proof in *Santosky v. Kramer*, 455 U.S. 745 (1982), an allegation of parental unfitness must "adequately [convey] to the factfinder [a] level of subjective certainty about [the] factual conclusions . . . since the private interest affected is commanding and the threatened loss is permanent." I respectfully dissent because I do not find that DHS met this burden in showing that J.T. is unable to learn how to be the kind of parent her daughter needs.

The Supreme Court has emphasized that a showing of parental unfitness must be made before the best interest of the child is considered in a parental-termination hearing. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1978). As we pointed out in *Bush v. Dietz*, although the best interest of the child is a matter of primary concern in adoption proceedings, termination of the parental relationship is much more far reaching than a change of custody. Statutes permitting such termination are to be construed in light favoring continuation of rights of natural parents. *Id.* The proof falls short of the statutory and constitutional requirements articulated above. I cannot concur with the decision to uphold the trial court's order of termination under the facts of this case.

Here, the court found that appellant's mental illness was a factor that caused her daughter to enter foster care. The court found that appellant would need continued treatment for the rest of her life, and concluded that, though she had improved, she had not yet become the type of parent her daughter needed, and that

she was unable to become that type of parent. It is generally recognized that termination for mental illness requires that the mentally ill parent is unable to provide proper care for the child and that the inability is likely to continue for the foreseeable future. Ann M. Haralambie, *Handling Child Custody, Abuse, and Adoption Cases*, § 13.13 26 (2d ed. 1993); *State v. Habas*, 299 Or. 177, 700 P.2d 225 (1993); *In re J.N.M*, 655 P.2d 1032 (Okla. 1982); *In re Hime Y.*, 52 N.Y.S.2d 241, 418 N.E.2d 1305 (1981).

As the majority notes, testimony indicated that, even though appellant had done everything required of her, she was not *presently* able to be the type of mother her daughter needs. However, no specific findings were made that appellant's particular problems could not be cured or improved; there was only the bare statement of testimony that "no amount of training or classes would enable J.T. to meet the needs of T.T." As the Oklahoma Supreme Court held in *In re J.N.M.*, "the mere label of mental illness [should not be] allowed to replace an adequate investigation into the effect of the behavior . . . *and the length of time the parents would probably be incapacitated.*" *Id.* at 1036 (emphasis added).

The standard of clear and convincing evidence requires that there be specific proof of "the likelihood of correction or control of the condition" or that "the illness of [the parent] is of such a long term nature and has such a pathological effect on the children that termination is justified under constitutional standards." *Id.*; *see also In re Hime Y., supra.* I do not believe the evidence supports such a finding in this case, and in my view, that lack of evidence is reflected in the conclusion that "J.T. is unable to learn how to be the kind of parent her daughter needs." Here, parental counseling did not begin until after nineteen months of foster care, and the trial court reflected favorably on the improvements made in appellant's parenting skills. The countervailing evidence simply falls far short of the "clear and convincing" standard required by the constitution. *Santosky v. Kramer, supra.* I would reverse and remand.

Kevin Edward McELHANON *v.* STATE of Arkansas

CR 97-336 948 S.W.2d 89

Supreme Court of Arkansas
Opinion delivered June 30, 1997

Cross, Kearney & McKissic, by: *Jesse L. Kearney*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Kevin McElhanon was charged in municipal court with driving while intoxicated ("DWI") in violation of Ark. Code Ann. § 5-65-103 (Repl. 1993), but was convicted of driving under the influence ("DUI") in violation of Ark. Code Ann. § 5-65-303 (Repl. 1993). He appealed to circuit court where he was tried and convicted of DUI. Appellant filed a petition for review from a decision of the Arkansas Court of Appeals delivered on December 23, 1996, where a 3-3 vote affirmed the lower court decision. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2 (e) (as amended by *per curiam* July 15, 1996). When we grant review following a decision by the court of appeals, we review the case as though the appeal was originally filed with this court. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997). We reverse and remand.

Appellant asserts five points for reversal, including error of the trial court in failing to try him on the original charge of DWI from municipal court, and entering judgment on the different charge of DUI. Because we find merit in that point, we need not address the remaining points.

Appellant was charged with DWI in violation of section 5-65-103, but found guilty in municipal court of DUI under section 5-65-303. It is unclear whether the municipal court convicted Appellant of DUI on the mistaken conclusion that DUI is a lesser-included offense of DWI, or if the court elected to amend the charge to DUI. Upon *de novo* appellate review, the circuit court determined the charge on appeal to be that of DUI rather than DWI. Appellant was then convicted of DUI in circuit court. The court of appeals affirmed Appellant's conviction of DUI on the ground that by changing the charge from DWI to DUI, the nature of the original charge was not altered. We disagree with that analysis, because Appellant was prejudiced by the circuit court's unauthorized action in changing the charge from DWI to DUI when Appellant had never been formally charged with anything other than DWI. The nature of the charge of DWI differs significantly with that of DUI in that the minimum blood-alcohol level required to convict a person of DWI is 0.10% while that required to convict of DUI is 0.02%.

It is well established that a defendant may only be charged with committing a criminal offense by one of three ways: information, indictment, or citation. *See* Ark. Const. art. 2, § 8; Ark. Const. amend. 21, § 1; *Brewer v. State*, 286 Ark. 1, 688 S.W.2d 736 (1985). An information or other charging instrument is not defective if it sufficiently apprises the defendant of the specific crime with which he is charged to the extent necessary to enable him to prepare a defense. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996); *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991). An information is sufficient if the act or the omission charged as the offense is stated with a degree of certainty that enables the court to pronounce judgment on conviction. *Johnson v. State*, 55 Ark. App. 117, 932 S.W.2d 347 (1996). A variance between the wording of an indictment or information and the proof at trial does not warrant reversal unless the variance prejudices the substantial rights of the defendant. *Id.* An information may be amended during trial if the nature or degree of the crime is not changed and if the defendant is not prejudiced through surprise. *Id.* In this case, the only offense with which Appellant was charged was DWI. Appellant was prepared to

defend against the charge of DWI; he was thus prejudiced by the circuit court's decision to try him on the charge of DUI.

Contrary to what the municipal court may have determined, DUI is not a lesser-included offense of DWI. To find a lesser-included offense, there are three factors to consider: (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 distinction between the two must be based upon the degree of risk or injury to person or property or upon grades of intent or degrees of culpability. *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996); *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989). An offense is not a lesser-included offense of another if each crime requires a different element of proof. *Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996). An offense is not a lesser-included offense solely because a greater offense includes all the elements of the lesser offense. *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985).

Where the evidence is insufficient to convict for a certain crime, but where there is sufficient evidence to convict for a lesser-included offense of that crime, this court may "'reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally.'" *Dixon v. State*, 260 Ark. 857, 862, 545 S.W.2d 606, 609 (1977) (quoting *Clark v. State*, 246 Ark. 876, 440 S.W.2d 205 (1969)). Though charged with a greater offense, a defendant may be found guilty of a lesser-included offense, and on appeal, the conviction may be modified from the greater to the lesser offense and the court may fix punishment or remand the case. *Davidson v. State*, 305 Ark. 592, 810 S.W.2d 327 (1991).

Considering that DUI is not a lesser-included offense of DWI, in that DUI requires an additional element of proof of the defendant's age (less than twenty-one years) and a different level of intoxication (prohibiting 0.02% blood-alcohol content), the municipal court erred and prejudiced the Appellant when it

changed the charge from DWI to DUI on its own motion. Thus, because the municipal court erred in changing the offense, the circuit court likewise erred in trying and convicting Appellant of the uncharged offense of DUI.

In addition, Ark. Code Ann. § 5-65-107 (Repl. 1993) provides that persons charged with violating section 5-65-103 "shall be tried on those charges or plead to such charges, and no such charges shall be reduced." This language applies to the reduction of the offense, not to the number of prior offenses as in *State v. Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984), where this court established that section 5-65-107 did not apply to the change to a lesser quantity of the same offense such as DWI fourth offense to DWI first offense. The charge in this case was erroneously changed to a separate offense, not a lesser-included offense, or an offense of lesser quantity, and this change was done in violation of section 5-65-107. Moreover, although appeals from municipal court to circuit court are tried *de novo*, *Bussey v. State*, 315 Ark. 292, 867 S.W.2d 433 (1993), the circuit court can render no judgment that the lower court is not authorized to render. *See* Ark. Code Ann. § 16-19-1105 (Repl. 1994); *Townsend v. State*, 292 Ark. 157, 728 S.W.2d 516 (1987).

In this case, Appellant was charged with one offense (DWI), but found guilty of another (DUI). Appellant was entitled to be tried in circuit court on the same cause of action for which he was tried in the municipal court. The municipal court violated section 5-65-107, by altering the charge and, consequently, the circuit court was not authorized to change the charge on appeal. Appellant could not be found guilty of a lesser-included offense of DWI, because there is no such offense. Furthermore, because Appellant was charged with DWI in violation of section 5-65-103, he could not be tried or found guilty of any other charge, because that would be a violation of section 5-65-107. For the foregoing reasons, we reverse the decision of the circuit court and remand the case back to that court so that Appellant may be tried for the offense of DWI.

Reversed and remanded.

Glenda HANNON *v.* ARMOREL SCHOOL DISTRICT
9, aka Armorel Public Schools

96-1014 946 S.W.2d 950

Supreme Court of Arkansas
Opinion delivered June 30, 1997

Roachell Law Firm, by: *Travis N. Creed*, for appellant.

W. Paul Blume, for appellee.

ROBERT L. BROWN, Justice. Appellant Glenda Hannon raises three points on appeal in connection with her termination under her school contract for the 1992-93 school year and the circuit court's dismissal of her appeal: (1) the trial court erred in permitting appellee Armorel School District to use conduct under a prior contract to terminate her; (2) the General Assembly did not intend for termination procedures to be a "backup" to violation of the nonrenewal provisions; and (3) termination by the School District violated the strict compliance provision of the

Arkansas Teacher Fair Dismissal Act. We agree with Hannon, and we reverse and remand.

Hannon had worked in the School District for the 1990-91 and 1991-92 school years as an elementary school teacher. She taught a gifted-and-talented class and instructed students in music and reading. In April 1992, then Superintendent Jim Thomas recommended to the Armorel School Board that Hannon's contract not be renewed. The School Board accepted the recommendation and voted not to renew Hannon's contract. No notice was given to Hannon of these proceedings. On April 22, 1992, Hannon received a letter from Superintendent Thomas that concluded she had not performed adequately based on performance reports, complaints from parents of students, and the superintendent's own observations. Hannon then filed a complaint with the School District about its failure to give her a proper nonrenewal notice, and the School Board reversed itself and elected to grant her a new contract on July 27, 1992. Next, in a letter dated August 12, 1992, Superintendent Thomas informed Hannon that he was going to recommend her termination. In a follow-up letter dated August 17, 1992, Thomas informed Hannon that she was suspended with pay pending the School Board's decision. A termination hearing was held, and Hannon was terminated on September 24, 1992. For the 1992-93 school year, Hannon engaged in substitute teaching in another school district. In August 1993, she entered into a teaching contract with the Helena School District.

Hannon filed a notice of appeal to circuit court from her termination and sought reinstatement and back pay. After the School District answered, she moved for summary judgment on the same grounds raised in this appeal. A hearing was held in circuit court, and the court heard testimony about Hannon's performance in the 1991-92 school year from Superintendent Thomas, Tom Gothard (president of the Armorel School Board), Sydney Kennedy (high school principal), and Kathy Lee (elementary school principal). Kathy Lee in particular testified that she received complaints about Hannon from the parents of students, the students themselves, and teachers. The complaints from the teachers, according to Lee, included "unfair treatment in the class-

room, picking on other students, out of control, having other teachers handle discipline problems she should have handled in the classroom. It was forcing the other teachers to take their breaks and time off to handle the discipline problems that Ms. Hannon should have handled." Other complaints also prompted Lee to investigate claims of Hannon's poor performance. Lee testified that she personally observed Hannon in the classroom and that she worked out plans with Hannon to better her performance. For example, she assisted Hannon in attending reading classes at Arkansas State University to improve her teaching skills. Lee testified that she saw no significant improvement in Hannon's performance. Sydney Kennedy, on the other hand, also evaluated Hannon during the 1991-92 school year and gave her above average marks for her teaching acumen.

The trial court ruled from the bench. The court considered the testimony presented as well as the transcript of the prior hearing before the School Board. The court concluded that the board would have been justified in either a nonrenewal or a termination, that Hannon's due process rights were not violated, and that the School Board's action was not arbitrary or capricious. The court denied Hannon's motion for summary judgment and dismissed her appeal with prejudice.

We first feel compelled to discuss the order of dismissal by the trial court. The order was entered following a hearing on a motion for summary judgment in which the circuit court heard testimony. We recently had a similar situation in *Honeycutt v. City of Fort Smith*, 327 Ark. 530, 939 S.W.2d 306 (1997), where we concluded as follows:

> Although the order is styled Summary Judgment of Dismissal, the trial court received testimony from Honeycutt at the summary-judgment hearing, and by doing so, went beyond the pleadings, discovery, and affidavits in reaching its decision. *See* Ark. R. Civ. P. 56(c). Thus, the court converted the matter from a proceeding for summary judgment to a bench trial on the question of whether Honeycutt was afforded his procedural rights before the Commission. *See Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991). The trial court then entered judgment in favor of the appellees, though it was styled inconsistently as both

> a summary judgment and a dismissal. We have stated in the past that we will look to the wording of an order or a judgment to determine its essence. *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993); *Magness v. McIntire*, 305 Ark. 503, 808 S.W.2d 783 (1991). Here, the judgment was not an order of summary judgment for the reasons already stated. We conclude that the judgment followed a bench trial, though the appellees declined to offer testimony, and was dispositive of the issue of whether Honeycutt was denied a trial or hearing under state statutes or Commission rules. We will treat the judgment as such.

Honeycutt, 327 Ark. at 534, 939 S.W.2d at 308. Similarly, we will treat the order in this case as a judgment following a bench trial.

Hannon first contends that our case law prohibits the School District from considering a teacher's conduct under a prior contract when making a termination decision. Hannon further contends that despite the defective nonrenewal due to failure to notify her, the School District still had approximately a month after the May 1 deadline to correct any errors and to terminate Hannon lawfully, and it failed to do so. Hannon underscores the point that the School District conceded that there was no conduct under the new 1992-93 contract to justify termination.

The Teacher Fair Dismissal Act requires strict compliance with all its provisions; otherwise, a nonrenewal, termination, suspension or other disciplinary action by the School District is void. Ark. Code Ann. § 6-17-1503 (Repl. 1993); *Love v. Smackover Sch. Dist.*, 322 Ark. 1, 907 S.W.2d 136 (1995); *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994). With respect to nonrenewal specifically, if notice of nonrenewal is not given to the teacher before May 1 of the contract year, the teacher's contract is automatically renewed for the next school year. Ark. Code Ann. § 6-17-1506(a) (Repl. 1993). Requirements for termination are spelled out in the next section of the Act:

> (a) A teacher may be terminated during the term of any contract for any cause which is not arbitrary, capricious, or discriminatory.
>
> (b) The superintendent shall notify the teacher of the termination recommendation.

> (c) The notice shall include a simple but complete statement of the grounds for the recommendation of termination and shall be sent by registered or certified mail to the teacher at the teacher's residence address as reflected in the teacher's personnel file.

Ark. Code Ann. § 6-17-1507 (Repl. 1993). A cause for termination is arbitrary and capricious if it is not supported by any rational basis. *Lamar Sch. Dist. No. 39 v. Kinder,* 278 Ark. 1, 642 S.W.2d 885 (1982).

Hannon cites two cases to support her argument that conduct from a prior school year may not be used to support a termination in a subsequent school year. In *Allen v. Texarkana Pub. Sch.*, 303 Ark. 59, 794 S.W.2d 138 (1990), we reversed the circuit court's decision that the school district did not act arbitrarily in not renewing the contract. In that case, the notice of nonrenewal to the teacher contained one generic allegation for each of the years 1983, 1984, and 1987 with two generic complaints for 1988. In reaching our decision, this court looked to *Ottinger v. Sch. Dist. No. 25,* 157 Ark. 82, 247 S.W. 789 (1923), and the proposition stated in that decision that conduct under a teacher's prior contract cannot constitute grounds for avoidance of a subsequent contract.

In *Allen,* the school board met in 1988 and terminated the teacher's contract based on conduct that occurred in 1983 and 1984, but not based on conduct occurring in 1987 and 1988. We held this decision to be arbitrary and capricious. We further observed that the superintendent's reference to a pattern of conduct or compilation of repeated behavior was insufficient because the reasons for the charges were not specified in the notice of nonrenewal. We concluded:

> It is obvious to us that the nonrenewal of Allen's contract was based either on his conduct which occurred in 1983 and 1984 under previous contracts, or on charges which were not set out in the superintendent's statement for nonrenewal. Regardless of which reason, we find the actions of the board arbitrary and capricious.

Allen, 303 Ark. at 63, 794 S.W.2d at 140.

Our holding in *Allen* was clearly premised on the failure to specify reasons for nonrenewal, which presumably included unspecified conduct that occurred some five years previously. We do not question the rationale for that decision. But the facts in *Allen* differ from those before us today. In the instant case, the issue is whether conduct in the 1991-92 school year can be used *exclusively* to terminate a teacher at the commencement of the 1992-93 school year. We think not. Section 6-17-1507(a) refers to termination during the term of a contract for any cause. We construe this subsection to tie the questionable conduct to the current contract term. Here, by everyone's agreement, that was not done. Without a ground for termination in the 1992-93 school year, there was no basis for Hannon's termination. We hold that Hannon's termination by the School Board, which relied exclusively on past conduct, was arbitrary and capricious.

This is not to say that a pattern of conduct spanning several contract years may not be presented to a school board as the grounds for termination in addition to the conduct in the current school year. The specific conduct constituting the pattern, however, and the years when it transpired must be set out in the notice of termination to meet the requirements of § 6-17-1507.

We further agree with the policy argument made by Hannon that termination under § 6-17-1507, as it occurred in this case, was merely a subterfuge to enforce nonrenewal. To be sure, the School District had the remedies of nonrenewal and termination available to it in Hannon's case. However, it appears obvious to this court that termination was used in this case to effect a nonrenewal when the procedure for nonrenewal was void due to noncompliance with the statute. Thus, the School District impermissibly sought to do indirectly that which nonrenewal provisions did not permit it to do directly. *See Simmons v. Estate of Wilkinson*, 318 Ark. 371, 885 S.W.2d 673 (1994). Were termination to be approved in instances such as this, a defective nonrenewal could be easily circumvented in every case. We decline to issue an opinion that would have the effect of undermining the clear directive of the General Assembly and emasculating the standard of strict compliance with the nonrenewal provision.

In short, we view Hannon's contention that termination must not be used as merely a backup for a flawed nonrenewal as a point well taken. We reverse the trial court's order for this reason as well. Because we have already discussed strict compliance with the Arkansas Teacher Fair Dismissal Act, we need not address Hannon's third point.

The order of the circuit court is reversed, and we remand with instructions for the circuit court to determine damages for the 1992-93 school year. We decline, however, to order Hannon's reinstatement because we perceive that issue as being moot.

Reversed and remanded.

Alan MINOR, Individually, and d/b/a Minor Manufacturing, Inc. *v.* J.P. FAILLA, Individually and In His Capacity as Councilman for the City of Gould, Arkansas, and Robert Stephens, Individually and In His Capacity as Councilman for the City of Gould, Arkansas

96-1265 946 S.W.2d 954

Supreme Court of Arkansas
Opinion delivered June 30, 1997

[redacted]

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

Ralph C. Ohm, for appellees.

ROBERT L. BROWN, Justice. Appellant Alan Minor, individually, and d/b/a Minor Manufacturing, Inc. (Minor), appeals a directed verdict in favor of appellees J.P. Failla and Robert Stephens by the circuit court on his claim for defamation. The matter was tried by the court sitting without a jury.

The genesis for the litigation was a complaint for defamation filed by Minor against Failla and Stephens. The complaint alleged that Minor had filed a claim with the City of Gould seeking compensation for water damage and property loss to his necktie manufacturing plant. The matter was referred by City officials to the City's liability carrier, which investigated the claim, and after determining its validity, paid a reasonable sum on Minor's behalf for the losses. Minor alleged that after the claim was paid, Failla and Stephens made statements to third parties that Minor had obtained the insurance payment through "dishonest, fraudulent and/or criminal means." Minor further alleged that the councilmen made the statements to private citizens in Gould and caused the statements to be published in the *Arkansas Democrat-Gazette*. And, finally, he alleged that they caused a criminal complaint to be filed against him with both the Lincoln County Sheriff's Department and the Arkansas State Police. Minor prayed for substantial compensatory and punitive damages. Failla and Stephens answered that any statements made by them were true and that they were protected by a qualified immunity due to their official capacities.

At trial, numerous witnesses testified about rainfall, converging pipelines, the City's problem with sewerage, and whether the

water or sewerage damage was caused by blockage in the pipeline on Minor's property or the City's. Lincoln County Sheriff Loyd Phillips testified that he was contacted by Stephens, who asked him to determine whether a claim had been paid to Minor Manufacturing and, if so, in what amount. He stated that he was also asked to determine whether the claim was legitimate. He testified that he contacted Failla, who wanted him to find out whether the sewer had "backed up" on the City's property or on Minor's property. The Sheriff added that Failla and Stephens believed that the claim, if it was paid, was not legitimate. He testified that he took no action but referred the matter to Lloyd Franklin, an investigator with the Arkansas State Police.

State Police Investigator Lloyd Franklin testified that he received the complaint from Sheriff Phillips regarding the loss at Minor Manufacturing and treated it as a criminal charge. He stated that his goal was to investigate whether the City had authorized an improper insurance claim. He added that he investigated the matter as a theft-of-property violation because if the liability was not the City's, then unlawful deceit could be involved. He testified that at the completion of his investigation, he did not recommend a criminal charge to the prosecuting attorney, and none was filed.

Kay Perry, a senior claims adjuster for the City's liability carrier, testified that she became familiar with the file when Stephens called and asked for a copy. She released a copy of the file to him, who she said was upset because the claim had already been paid to Minor. She testified that Minor initially claimed $5,058 but that total benefits paid on his behalf were $10,369.15.

Joe Farmer also testified. He stated that while he was employed by the *Arkansas Democrat-Gazette*, he covered the Gould City Council because the town was suffering financial difficulties and a turnover in the mayor's office. He stated that Failla told him that there was an investigation occurring on an insurance payment made to Minor. He added that he did not believe that Failla thought Minor was guilty of any wrongdoing and specifically stated that he did not recall either Failla or Stephens indicating that Minor was engaged in wrongdoing.

Danny Snyder was called out of turn by the defense. Snyder testified that he was licensed as a master plumber and that he had found a significant number of tree roots in the line connecting Minor's manufacturing plant to the City's sewer system. He testified that prior to removing the roots, water was backed up to Minor's two buildings. After the roots were removed, the water flowed freely to the sewer system. Snyder testified that he went into both of Minor's buildings and found clear water, as opposed to sewer water, which caused him to believe that the flood problem was possibly caused by an overflowing commode. Snyder's opinion throughout was that Minor's building was flooded by clear water — not sewer water.

Failla and Stephens were then called by Minor as witnesses. Failla testified that he believed the City's insurance carrier would deny coverage once it saw Danny Snyder's report. He further stated that he had asked the City's mayor, A.B. Allen, for a status report on Minor's claim. After the claim was paid, he said he turned the matter over to Sheriff Phillips because he did not know what else to do. He admitted that he was contacted by Joe Farmer with the *Arkansas Democrat-Gazette* on at least two occasions during October 1993. Farmer authored two articles for the newspaper: one dated October 21, 1993, entitled: "Open city books or face inquiry, Gould citizen group warns mayor"; and a second dated October 27, 1993, entitled: "State police investigate whether manufacturer actually got settlement." Failla agreed that his contributions to the October 27 article were accurately reflected by Farmer.

Stephens testified that when he learned of the damage to Minor's business, he understood that there was a possibility that the City was at fault. He stated that he and Failla waited for a report on the final action to be taken on the claim but never received one. He testified that, based largely on Danny Snyder's report, he did not believe the claim should have been paid. He also believed that there was a discrepancy in the amount paid because the payment was higher than that requested by Minor. Stephens testified that he then went to Sheriff Phillips with the insurance file because he believed that both the city council and the mayor should have been involved in the handling of the claim.

He maintained that the insurance company should not have paid the claim. He added that he spoke with reporter Joe Farmer two times. He stated that he gave him a copy of the insurance file so that if Farmer printed anything, he would print the truth. He agreed with the October 27, 1993 newspaper article, which quoted him as saying that he did not believe the accident was the City's fault.

Minor was the final witness to testify. He stated that after filing his claim for damage to his necktie manufacturing business, Mayor Allen and the city council agreed that the proper route to go was to submit a claim to the insurance carrier. Minor testified that he subsequently received two checks from the carrier totalling $3,638. He learned that money for damages to the buildings themselves would be paid directly to another company, Metro Builders & Restoration Specialists. After this payment, he said that he was approached by State Police Investigator Franklin, who told him that he had received information that he was trying to defraud the insurance company based on his receipt of over $10,000 on a claim that was worth approximately $3,000. He also testified that he spoke with reporter Joe Farmer on the same subject. To both men, he gave the same explanation for how payments were distributed. Nevertheless, he complained that Farmer's October 20 article referenced payment of $10,000 to Minor Manufacturing and the fact "city officials" believed the claim to be worth only $3,200. He stated that he confronted Stephens over whether he was the source for the story about the $10,000 check. He testified that Stephens did not deny that he made the statement but said only that he did not agree with the settlement. Minor claimed that because of these articles, his business had closed in February 1994.

At the conclusion of Minor's case, Failla and Stephens moved for a directed verdict on the basis that Minor had failed to prove that any statements made by them constituted slander. The trial court agreed. The court stated that Minor was caught in a "political crossfire" between the mayor and city council and that there were no false statements made by Failla and Stephens and no statements that reflected dishonest conduct on the part of Minor. The court further concluded that there was no showing of malice by

the councilmen and that in any case Failla and Stephens would be entitled to a qualified privilege based on their positions on the city council and the City's sewer committee. Judgment in favor of Failla and Stephens was entered accordingly.

The sole issue on appeal is whether the trial court erred in granting the councilmen's motion for directed verdict. In reviewing an order granting a motion for directed verdict, this court considers the evidence in the light most favorable to the party against whom the verdict was directed. *Lakeview Country Club, Inc. v. Superior Prods.*, 325 Ark. 218, 926 S.W.2d 428 (1996); *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 grant the directed-verdict motion. *Lakeview Country Club, Inc. v. Superior Prods., supra.*

Minor urges that the trial court erred in directing a verdict relating to the statements Failla and Stephens made to Sheriff Phillips because the statements constituted defamation *per se* in that they implicated Minor in criminal activity. A party must prove the following elements to establish a claim for defamation: (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages. *Mitchell v. Globe Int'l Pub., Inc.*, 773 F. Supp. 1235 (W.D. Ark. 1991). The case at bar involves asserted damages resulting from spoken words against non-media defendants and is appropriately termed one for slander. *See Braman v. Walthall*, 215 Ark. 582, 225 S.W.2d 342 (1949). *See also Parkman v. Hastings*, 259 Ark. 59, 531 S.W.2d 481 (1976).

We have explained the test for establishing defamation *per se* as follows:

> Where the natural consequence of the words is a damage, as if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in office, or to a person of a profession or trade, they are in them-

> selves actionable; in other cases, the party who brings an action for words, must show the damage which was received from them.

Ewing v. Cargill, Inc., 324 Ark. 217, 219, 919 S.W.2d 507, 508 (1996), *quoting Reese v. Haywood*, 235 Ark. 442, 443, 360 S.W.2d 488, 489 (1962); *Studdard v. Trucks*, 31 Ark. 726, 727 (1877). The benefit to a plaintiff in establishing defamation *per se* is that no evidence of damages in the form of actual losses is required. *Waymire v. DeHaven*, 313 Ark. 687, 858 S.W.2d 69 (1993); *Ransopher v. Chapman*, 302 Ark. 480, 791 S.W.2d 686 (1990).

Although Minor never points to any specific slanderous statements made by Failla and Stephens to Sheriff Phillips, it is apparent that his argument focuses on what the two men asked Sheriff Phillips to do. Minor asserts that Failla and Stephens effectively filed a criminal complaint based on facts known by them to be false. Failla and Stephens deny this and maintain that they just wanted to know whether the insurance claim was legitimate.

In this case, the words of Failla and Stephens were actionable if, taken together with the attendant circumstances, they implicated Minor in the commission of a crime. This is a question of fact for the jury. *Bland v. Verser*, 299 Ark. 490, 774 S.W.2d 124 (1989); *Dean v. Black & White Stores, Inc.*, 186 Ark. 667, 55 S.W.2d 500 (1932). Given the attendant circumstances, and viewing the evidence in the light most favorable to Minor, we conclude that there was substantial evidence that Failla and Stephens had accused Minor of committing a crime. Although they argue that they merely sought an investigation to determine whether the claim should have been paid, the critical fact is that they solicited the aid of law enforcement to determine the claim's legitimacy.

Nevertheless, the trial court determined that even if Failla's and Stephens's statements to Sheriff Phillips were slanderous, they were protected by a privilege. We agree. Determination of the existence of a privilege is a matter of law. *See, e.g., Pogue v. Cooper*, 284 Ark. 202, 680 S.W.2d 698 (1984). This court has stated that a publication may be conditionally privileged if the circumstances induce a correct or reasonable belief that (1) there is information that affects a sufficiently important interest of

the recipient or a third person; and (2) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct. *Dillard Dep't Stores, Inc. v. Felton*, 276 Ark. 304, 307, 634 S.W.2d 135, 136-37 (1982), *citing* RESTATEMENT (SECOND) OF TORTS § 595 (1981). This court has further clarified the conditions under which the qualified privilege may be invoked:

> A communication is held to be qualifiedly privileged when it is made in good faith upon any subject-matter in which the person making the communication has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty, although it contains matters which, without such privilege, would be actionable.

Navorro-Monzo v. Hughes, 297 Ark. 444, 451, 763 S.W.2d 635, 638 (1989), *quoting Bohlinger v. Germania Life Ins. Co.*, 100 Ark. 477, 482-83, 140 S.W. 257, 259 (1911).

[redacted] We have further held that the qualified privilege must be exercised in a reasonable manner and for a proper purpose and that the immunity does not extend to irrelevant defamatory statements that have no relation to the interest entitled to protection. *Navorro-Monzo v. Hughes, supra.* The qualified privilege is also lost if it is abused by excessive publication; if the statement is made with malice; and if the statement is made with a lack of grounds for belief in the truth of the statement. *Navorro-Monzo v. Hughes, supra; Ikani v. Bennett*, 284 Ark. 409, 682 S.W.2d 747 (1985). The question of whether a particular statement falls outside the scope of the qualified privilege for one of these reasons is a question of fact for the jury. *See Braman v. Walthall, supra.*

The case of *Baker v. Mann*, 276 Ark. 278, 634 S.W.2d 125 (1982), provides guidance on this point. In *Baker*, the mayor of Shannon Hills and five members of the city council signed a letter issued to the prosecuting attorney which contained allegations of missing public records, missing weapons that had been confiscated, lack of records showing the disposition of drugs and drug paraphernalia, and missing equipment, all of which implicated the

police department. The former police chief and three former part-time police officers filed suit and alleged that they had not been guilty of any wrongdoing but that the letter accused them of criminal activity. The trial court directed a verdict on the ground that the letter was protected by a qualified privilege.

On appeal, this court agreed with the determination of the trial court:

> In the present case the mayor and aldermen were discharging a public duty in asking the prosecuting attorney to initiate an investigation of former public employees' possible mishandling of public records, public property, and public funds.

Baker v. Mann, 276 Ark. at 281, 634 S.W.2d at 126. This court noted that there was an absence of proof on the issues of whether the letter was published with malice or with any knowledge that its contents were untrue.

In the instant case, Failla and Stephens both occupied positions on the City's council and sewer committee and spoke to another public official, Sheriff Phillips, about potential criminal activity in connection with their positions. We view this as nothing more than fulfillment of their official duties. Thus, we hold that the qualified privilege attached.

There are two additional points. There was some evidence presented of a perceived controversy between Failla and Minor with respect to Minor's decision as president of the Gould School Board to deny Failla's niece a transfer to another school district. We conclude this matter was not sufficiently developed and fails to rise to the level of substantial evidence of malice on Failla's part. Nor do we agree that substantial evidence was presented that Failla and Stephens falsely accused Minor of a crime. In sum, the trial court correctly directed a verdict in favor of the councilmen.

Minor in his complaint also complained of Failla's and Stephens's intentional publication of slander through the *Arkansas Democrat-Gazette* newspaper. In his brief on appeal, however, Minor makes only passing reference to the fact that Failla and Stephens made slanderous comments to a news journalist, presumably

Joe Farmer, but he does not develop this point in his argument. Rather, the thrust of his brief concerns the referral of the criminal matter to Sheriff Phillips and Minor's contention that there was no qualified immunity. We will not speculate on which statements made to Farmer and published in the newspaper Minor claims to be slanderous. It is incumbent on the appellant to develop an issue for purposes of appeal. *See, e.g., Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997); *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997); *Granquist v. Randolph*, 326 Ark. 809, 934 S.W.2d 224 (1996).

Affirmed.

SEXTON LAW FIRM, P.A., and Sam Sexton, Jr.
v. Phillip J. MILLIGAN

97-52 948 S.W.2d 388

Supreme Court of Arkansas
Opinion delivered June 30, 1997

[redacted]

Matthew Horan, for appellants.

John Everett, for appellee.

ROBERT L. BROWN, Justice. Appellants Sexton Law Firm, P.A., and Sam Sexton, Jr. (Sexton), appeal a judgment in favor of appellee Phillip J. Milligan on Sexton's claim of breach of contract, claiming error by the trial court in excluding certain evidence. Sexton further claims that the trial court erred in directing a verdict in favor of Milligan on his claims of fraud and breach of fiduciary duty. We agree that the trial court erred in excluding evidence of the Firm Handbook as well as evidence of the arrangements with other attorneys associated with the Sexton Law Firm. We further agree that the trial court erred in directing a verdict on the fraud and breach-of-fiduciary-duty counts. We reverse the trial court on these points and remand the matter for further proceedings.

This litigation arose out of the arrangement struck between Sexton and Milligan relating to Milligan's practice of law between April 1, 1992, and November 1, 1995. Certain facets of that arrangement are not in dispute. Sexton was to provide Milligan with office space, utilities, telephone services, advertising, library facilities, stationery, clerical and secretarial services, and other expenses necessary to the practice of law. Milligan would receive 50 percent of all attorney fees generated by cases assigned to him minus expenses incurred in the preparation and trial of such cases. For cases that were either dismissed or unsuccessfully tried, Milligan and Sexton would equally divide the costs incurred during representation. Milligan would be assigned cases based on a rotation system set up by Sexton for all attorneys working at the law firm with similar arrangements.

On Saturday night, November 1, 1995, Sam Sexton was advised that Milligan was loading case files from the law firm into

his Ford Explorer. Sexton called Milligan and was assured that he was merely moving closed files that were taking up space in his office to storage. The following Monday Sexton learned that Milligan had cleared out his office and had removed multiple closed and open case files from the law firm premises. Milligan does not deny taking the files but has contended throughout that the clients involved were his clients — not Sexton's.

On February 27, 1996, Sam Sexton and the professional association of which he was sole shareholder filed an amended complaint against Milligan and alleged that Milligan, an independent contractor, had breached his agreement with the law firm. Sexton further alleged that commencing in February 1995, Milligan devised a scheme where Sexton would incur substantial expense for the preparation of certain cases assigned to Milligan only to have Milligan leave and open his own law firm with the intent to keep all fees generated. Sexton sought an accounting for moneys owed and injunctive relief to prevent the destruction of files taken and to require their return based on claims of breach of fiduciary duty and interference with contractual relations. He also asserted a claim for fraud and deceit and asked for both compensatory and punitive damages.

Milligan answered and admitted that he entered into an oral contract with Sexton that established his relationship as an independent contractor. He denied that the agreement encompassed the terms of the law firm's handbook on procedure ("Firm Handbook"). He asserted that his relationship with the law firm was one of independent contractor and that he had formed a professional association known as "Phillip J. Milligan, Inc."

Sexton moved for a jury trial on the fraud count. He urged that the chancery court decide the issues of equitable relief (the accounting and the restraining order) but empanel a jury and accept its recommendation for the claims for compensatory and punitive damages. Both sides agreed to this, and the trial court approved submission of the breach of fiduciary duty and fraud counts for a binding verdict. Sexton then filed a second amended complaint that added a claim for breach of contract, which was also agreed to be submitted to the jury.

At trial, Milligan was called by Sexton as a witness and testified about his arrangement with Sexton, as already described. He testified that this arrangement remained the same throughout his experience with Sexton, and that the agreement was the same as that for the other attorneys who were with the firm when he joined. Because Milligan was new to the practice of law and had yet to achieve a client base, part of the agreement included a six-month probationary period, where Sexton agreed to advance Milligan $2,000 per month for living expenses. According to Milligan, the agreement was waived after three months because 50 percent of the fees he had generated at that time exceeded the $2,000 per month advance. He testified that he received assistance from members of the firm on cases and offered assistance to other attorneys in return. He testified about occasional meetings of attorneys headed by Sexton for the discussion of cases and admitted that on at least one occasion attorneys were required to submit a memorandum on the number of open cases and possible fees to be recovered. He testified about several forms used in the firm and particularly about the attorney-client form, which listed individual attorneys like Milligan as well as "Sexton Law Firm, P.A."

Three case files taken by Milligan were focal points in this litigation. First, there was the *Watson* case. Milligan testified that he met John Watson on March 1, 1993, in the firm's offices and represented him on an IRS matter. During the course of this representation, Watson and his wife were involved in an automobile accident and suffered serious physical injury. Milligan testified that, per Watson's request, he entered into an attorney-client agreement naming himself individually as the attorney on the personal-injury claim and reduced his contingency fee from 33 1/3 percent, which was the customary amount at the Sexton Law Firm, to 25 percent. He admitted that he did not inform Sexton that he signed the attorney-client agreement in his individual name because he did not believe it was necessary to do so. Milligan testified that, at the time he entered into the agreement, he was still bound to share 50 percent of his fees with the Sexton Law Firm. He testified, however, that if his client received a recovery after he left the firm, the law firm had no claim to a share of his fees. Milligan admitted that he started making plans to leave the

Sexton Law Firm in the late summer or early fall of 1995. He settled the *Watson* case in July 1996 for $1,314,000.

Milligan also discussed the *Mary Jane Wood* case, which was assigned to him by Sexton after the departure of another attorney from the law firm. He admitted that on September 19, 1995, while he was still associated with the firm, he caused a letter to be sent to opposing counsel offering a settlement for $150,000 that was written on the letterhead of "Milligan Law Offices." That letterhead contained the address of a Fort Smith post-office box. On October 5, 1995, Milligan sent a letter recognizing a $140,000 settlement of the case, which stated: "PLEASE TAKE NOTE OF MY NEW ADDRESS AND FIRM NAME." Subsequently, the settlement payment was sent to Milligan's post-office box address. Both the September 19 and October 5, 1995 letters were prepared by a secretary provided by the Sexton Law Firm, with the use of firm stationery and postage. Milligan agreed that the *Mary Jane Wood* settlement sheet, dated November 9, 1995, reflected that he received attorney fees in the amount of $46,666.20 but disagreed that the Sexton Law Firm had any entitlement to 50 percent of that amount. The funds from the settlement were distributed eight days after his departure from the firm.

Milligan settled another case involving Bonnie Scandrett. Using his personal letterhead, a settlement was effected during his association with the Sexton Law Firm. The *Scandrett* settlement sheet, dated November 15, 1995, reflected an attorney fee of $18,750. Milligan acknowledged that the Sexton Law Firm paid some of the expenses associated with the case but admitted that none of these funds were paid to the law firm. Milligan admitted that the settlements from the *Mary Jane Wood* and *Scandrett* cases allowed him to spend approximately $30,000 in expenses associated with the *Watson* case.

Milligan testified that he departed from the Sexton Law Firm at approximately 10:00 p.m. on Saturday night, November 1, 1995, with the files and told Sam Sexton that he was moving closed files. He did not inform Sexton at that time that he was leaving the firm. Eventually, Milligan removed all of his files and

ordered his secretary to download associated information from the firm's computer onto floppy disks.

On cross-examination by his own counsel, Milligan stated that he believed his status with the Sexton Law Firm to have been that of an independent contractor. He pointed to the allegations in Sexton's own complaint and to the fact that Sexton treated him as an independent contractor for income-tax purposes. He denied that his oral contract was governed by the Firm Handbook but admitted that other attorneys, who joined the firm after he did, signed a written contract and were likely subject to the handbook's provisions.

Milligan also believed that Sexton was not performing pursuant to contractual obligations. At the time he left the firm, he had only been reimbursed for $800 of the $2,000 worth of expenses he had incurred during his work on the *Watson* case. He also explained that he was not receiving his equal share of cases under the firm's rotation system.

He testified that although he received the *Mary Jane Wood* case from an attorney in the firm, he was the attorney responsible for effecting the settlement. As to the *Scandrett* case, he stated that he was the only attorney who worked on the file. With respect to the *Watson* case, he explained that the bulk of the work performed which resulted in the settlement occurred after his departure. He testified that in the months leading up to the July 1996 settlement, he devoted 50 to 75 percent of his private practice to the case.

Sam Sexton testified that Milligan joined the firm under the same conditions as did all other attorneys that he had associated with the law firm. Sexton testified that he regularly met with attorneys in the firm to review the status of open cases and that he established policies for attorneys to follow while associated with the firm. He testified that on April 9, 1993, he sent a 41-page memorandum, or handbook on procedure, to all attorneys and that Milligan acknowledged receipt of the Firm Handbook. Sexton also testified that he was not aware of unpaid expenses to Milligan because they were not properly requested pursuant to the firm's billing system.

Sexton stated that he had no idea Milligan was leaving the law firm on Saturday night, November 1, 1995. When he spoke to Milligan that evening, Milligan told him that he was moving a number of closed files to storage because they were taking up space in his office. Sexton then learned the following Monday that Milligan had cleared out his entire office and left with over 260 closed and 69 open files. He testified that he relied on Milligan's representation that he was not absconding with the files and said he suffered because he was unable to take an inventory of the files before Milligan's departure. He testified that he would have prevented Milligan from taking the files of long-standing clients and that he would have retained certain files as evidence had he known that Milligan had already effected settlements without intending to share 50 percent of the fees received.

Sexton stated that he had two meetings with Milligan during the week following his departure. He further stated that he presented Milligan that week with three separate audits of funds Milligan owed the firm for expenses incurred during litigation. The first audit represented a sum due in the amount of $30,432.26; the second reflected $23,902.11; and the third was for the sum of $22,258.12. Sexton testified that repayment of the expenses was due at that time, rather than at the time the cases were ultimately settled, because the firm was not going to finance him at his new location. Sexton asserted that he made no demand for fees received from the *Mary Jane Wood* and *Scandrett* cases, again because he did not know that they had already been settled from his office.

Sexton testified that Milligan owed the firm $198,332 in fees collected on open files that Milligan eventually settled, including fees on the *Mary Jane Wood*, *Scandrett*, and *Watson* cases. He further stated that Milligan owed $18,129.29 for expenses on cases that he had taken with him and for cases that he had lost while he was at the firm. After Sexton's case-in-chief, Milligan moved for a directed verdict on the claim for breach of fiduciary duty and on the fraud count. The trial court granted both motions.

The jury returned a verdict for Milligan on the contract claim, and judgment was entered accordingly.

I. Contract Claim

Sexton raises several points for reversal, but we first address his claim that the trial court erred in excluding the Firm Handbook. At trial, Sam Sexton testified at length about the agreement he struck with Milligan and how Milligan's conduct, as well as the conduct of all attorneys at the firm, was to be governed in part by the Firm Handbook. He specifically testified that on April 9, 1993, he circulated the handbook to all attorneys in the firm and testified that Milligan acknowledged its receipt. The trial court excluded the handbook because Milligan did not specifically testify that his agreement was subject to change by a handbook and because the change by the handbook was not supported by consideration.

The case of *Crain Industries, Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991), is instructive on this point. In that case, this court cited with approval the following language from the Supreme Court of Minnesota's decision in *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983):

> If the handbook language [is sufficiently definite to constitute] an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability. In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer. [Footnotes omitted.]

Crain Industries v. Cass, Inc., 305 Ark. at 573, 810 S.W.2d at 914. *See also Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995) (a party's manifestation of assent to a contract is judged objectively and may be proved by circumstantial evidence).

[redacted] We conclude that in the present case Sexton laid a foundation that Milligan, whether deemed an employee or independent contractor, received the handbook in April 1993 and remained on the job and continued to retain the benefits of his association with the law firm until November 1, 1995. Using the rationale of our holding in *Crain Industries, Inc. v. Cass, supra*, we hold that the trial court erred in excluding the handbook from evidence and that Sexton is entitled to a new trial on the breach-of-contract claim.

Also at trial, Sexton attempted to introduce the testimony of former and present attorneys at the Sexton Law Firm regarding their agreements with the law firm. The point was to establish that these attorneys were required to remit 50 percent of the fees they achieved from open files that they took with them, as Milligan was also required to do. At one point during trial, Milligan admitted that he had the same arrangement with Sexton as did those attorneys who were at the law firm when he joined.

[redacted] Milligan correctly contends that *Morrow v. McCaa Chevrolet Co.*, 231 Ark. 497, 330 S.W.2d 722 (1960), stands for the proposition that a trial court may act within its discretion in excluding cumulative evidence. *See also Hicks v. State*, 327 Ark. 727, 940 S.W.2d 855 (1997); *Elk Corp. of Arkansas v. Jackson*, 291 Ark. 448, 725 S.W.2d 829 (1987), *reh'g denied*, 291 Ark. 458-A, 727 S.W.2d 856 (1987). Nevertheless, in this case, the testimony of the other attorneys would have been highly probative of Milligan's agreement with Sexton; without the testimony, the jury was left to determine only whether to believe the testimony of Sexton or Milligan. We fail to agree that the testimony would have been merely cumulative. *Cf. Childs v. Motor Wheel Corp.*, 164 Ark. 149, 261 S.W. 28 (1924) (reversing trial court's decision to exclude the terms of a written contract to prove the terms of a subsequent oral contract embodying the same agreement). We conclude that the attorney contracts were admissible and that the trial court abused its discretion in excluding them.

II. Breach of Fiduciary Duty and Fraud

Sexton also claims that the trial court erred in directing a verdict on his counts for breach of fiduciary duty and fraud.

In reviewing an order granting a motion for directed verdict, this court views the evidence in the light most favorable to the party against whom the verdict was directed. *Lakeview Country Club, Inc. v. Superior Prods.*, 325 Ark. 218, 926 S.W.2d 428 (1996); *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 grant the motion for directed verdict. *Lakeview Country Club, Inc. v. Superior Prods., supra.*

When the trial court granted a directed verdict on Sexton's claim for breach of fiduciary duty, it stated as follows:

> Well, there [have] been allegations of a breach of a fiduciary duty. And I've explained to both of you my feelings on that. *Certainly both parties owed a fiduciary duty to each other.* And they owed fiduciary [duties] to their clients. I don't see, though, a separate cause of action for breach of fiduciary duty for this reason. If, in fact, Mr. Milligan did breach his contract, then that included breaching fiduciary duty, I think, to the Sexton Law Firm. (Emphasis added.)

The trial court apparently ruled that Milligan owed a fiduciary duty to Sexton, and we have held that that determination is a matter of law. *See Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (1996). The court's ruling was not challenged by Milligan on cross-appeal. Accordingly, we do not decide the issue of whether a fiduciary duty was owed by Milligan under these circumstances but accept the unchallenged ruling of the trial court for purposes of this discussion.

After deciding that a fiduciary duty was owed, the trial court went forward and refused to submit the claim to the jury on the basis that the claim for breach of fiduciary duty was included within Sexton's claim for breach of contract. This was error. First, Sexton was entitled to have the two claims of breach of contract and breach of fiduciary duty considered by the jury if both

were supported by substantial evidence. While the doctrine of election of remedies bars more than one recovery on inconsistent remedies, the doctrine does not limit the number of causes of action asserted by a plaintiff to be submitted to the jury. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993); *Westark Specialties v. Stouffer Family Ltd.*, 310 Ark. 225, 836 S.W.2d 354 (1992).

Additionally, claims for breach of fiduciary duty and breach of contract are not identical causes of action. A person may be liable for breach of contract if the complaining party can prove the existence of an agreement, breach of the agreement, and resulting damages. *See Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). But a person standing in a fiduciary relationship may be held liable for any conduct that breaches a duty imposed by the fiduciary relationship. *Long v. Lampton, supra.* It follows that, regardless of the express terms of an agreement, a fiduciary may be held liable for conduct that does not meet the requisite standards of fair dealing, good faith, honesty, and loyalty. *See Berry v. Saline Memorial Hosp.*, 322 Ark. 182, 907 S.W.2d 736 (1995); *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 282 Ark. 268, 668 S.W.2d 16 (1984); *Yahraus v. Continental Oil Co.*, 218 Ark. 872, 239 S.W.2d 594 (1951). The guiding principle of the fiduciary relationship is that self-dealing, absent the consent of the other party to the relationship, is strictly proscribed. *See Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995).

Sexton testified that Milligan engaged in self-dealing to the law firm's detriment. Sexton further testified that without knowledge and consent, Milligan used firm resources to achieve settlements and attorney fees in the *Mary Jane Wood* and *Scandrett* cases. According to Sexton, these fees then provided Milligan with the resources to finance a settlement in the *Watson* case, which resulted in substantial legal fees to the exclusion of the Sexton Law Firm. The evidence is buttressed by proof that Milligan misrepresented the removal of open and closed files to Sexton on the night of Saturday, November 1, 1995. Under these unique circumstances, and, again, without deciding the issue of whether a fiduciary duty was owed by Milligan to Sexton, we hold that the trial court erred in granting Milligan's motion for directed verdict on Sexton's claim for breach of fiduciary duty.

The trial court also granted a directed verdict on the fraud count because clients have "an absolute right to pick the lawyer they want, and an absolute right to get their material." Unquestionably, the client owns his file. However, as this case makes clear, attorneys have an interest in files in connection with potential fees, and Sexton claims that Milligan defrauded him of his share of those fees. Particularly, Sexton claims that Milligan, as part of a larger scheme, intentionally misrepresented to him on the night of November 1, 1995, that he was taking files to storage as opposed to relocating them to his new practice. Sexton contends that the truth would have caused him to take action to prevent settlement checks on the *Mary Jane Wood* and *Scandrett* cases from being sent to Milligan's address. Essentially, Sexton asserts that Milligan's misconduct eliminated the possibility that he could stop the resulting damage.

[redacted] Under Arkansas law, the following elements must be established by a preponderance of the evidence in order to establish a claim for fraud: (1) a false representation, usually of material fact; (2) knowledge or belief by the defendant that the representation is false; (3) intent to induce reliance on the part of the plaintiff; (4) justifiable reliance by the plaintiff; and (5) resulting damage to the plaintiff. *Calandro v. Parkerson*, 327 Ark. 131, 936 S.W.2d 755 (1997); *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

[redacted] Viewing the evidence in the light most favorable to Sexton, as we must do, Sexton had acquired a 50 percent interest in any attorney fees acquired from the open files taken by Milligan. Sexton testified that on November 1, 1995, Milligan misrepresented his actions with the intent that they be relied upon by Sexton for the purpose of acquiring a 100 percent interest in attorney fees that would soon thereafter be achieved. Sexton further testified that he relied on that misrepresentation and was severely damaged. We conclude that there was substantial evidence that Milligan's conduct was the type of misfeasance that constituted fraud and that the issue should have gone to the jury. *See Westark Specialties v. Stouffer Family Ltd.*, 310 Ark. 225, 836 S.W.2d 354 (1992); *L.L. Cole & Sons, Inc. v. Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984).

III. Remaining Issues

Because we remand this matter for further proceedings, we will address two issues likely to arise on retrial.

a. Customs and Practices of the Legal Profession.

Prior to trial, Milligan moved *in limine* to preclude Sexton from introducing the testimony of Howard Brill, a professor at the University of Arkansas School of Law, on the ground that the application of the Model Rules of Professional Conduct had no relevance to the litigation. At trial, Sexton attempted to elicit testimony from Brill on what is customarily done in the legal profession by an attorney when he plans to leave a law firm. The trial court excluded Brill's testimony for the reason that custom and usage was simply not relevant and stated that it believed you could find law firms that had agreements "both ways."

The trial court was correct. In this case, there were two interpretations of the agreement between Milligan and Sexton. Milligan asserted that he was absolutely not required to share fees that were received after his departure from the firm, while Sexton contended that Milligan did, in fact, bind himself to the payment of such fees. According to Sexton himself, the contract was neither ambiguous nor silent on the relevant terms. The decision of whether to allow expert testimony is a matter within the trial court's discretion, and the trial court will not be reversed absent an abuse of that discretion. *Williams v. Ingram*. 320 Ark. 615, 899 S.W.2d 454 (1995); *Sims v. Safeway Trails, Inc.*, 297 Ark. 588, 764 S.W.2d 427 (1989). What is customary or usual within the legal profession has no bearing when the parties are at loggerheads over whether Milligan had agreed to pay 50 percent of fees after leaving the firm. The trial court correctly excluded the testimony of Professor Brill.

b. Evidence of Expense Audits.

The record reflects that before trial, Sexton moved *in limine* to preclude evidence of the three expense audits or accountings issued to Milligan during the week following his departure in the

amounts of $30,432.26, $23,902.11, and $22,258.12, respectively. Sexton characterized this correspondence as having occurred during the course of settlement negotiations and sought their exclusion based on considerations of relevancy.

Rule 408 of the Arkansas Rules of Evidence provides:

> Evidence of (1) furnishing, offering, or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Id. The first question becomes whether Sam Sexton by sending the expense audits was "furnishing, offering, or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount[.]"

This court has made it clear that Rule 408 does not provide a blanket protection against the admission of all evidence concerning offers of compromise. For example, the rule does not prohibit evidence when it is offered for reasons other than proving "liability for, invalidity of, or amount of the claim or any other claim." *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 234, 937 S.W.2d 175, 178 (1997), *quoting McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 332-33, 749 S.W.2d 653, 657 (1988). The decision on whether the probative value of admitting the correspondence is substantially outweighed by its prejudicial effect is left to the sound discretion of the trial court, and absent a manifest abuse of that discretion, the trial court's decision will not be disturbed. *Ozark Auto Transp., Inc. v. Starkey, supra*; *Swindle v. Lumbermens Mut. Cas. Co.*, 315 Ark. 415, 869 S.W.2d 681 (1993); *McKenzie v. Tom Gibson Ford, Inc., supra.*

Milligan asserts that the trial court properly admitted the correspondence because it was relevant to Sam Sexton's credi-

bility because he made no demand at that time for 50 percent of the attorney fees Milligan was to receive from files he took. We hold that Milligan's contention presents another purpose under Rule 408 for admitting the expense audits into evidence. There was no abuse of discretion by the trial court in receiving them.

Reversed and remanded.

ACW, INC.; Phillips Development Corporation; and United Wholesale Florists, Inc., On Behalf of Themselves and All Others Similarly Situated *v.* Richard WEISS, Director of Department of Finance & Administration, and John Theis

96-894 947 S.W.2d 770

Supreme Court of Arkansas
Opinion delivered June 30, 1997

[Appellants' petition for rehearing denied September 11, 1997*; appellees' petition for rehearing denied September 11, 1997.]

* GLAZE, J., would grant.

[redacted]

Timothy Davis Fox, *Richard E. Holiman*, and *Gregory M. Hopkins*, for appellants.

Beth Briscoe Carson, Chief Counsel, for appellees Richard A. Weiss and John H. Theis.

RAY THORNTON, Justice. Appellants are the named plaintiffs in a certified class of approximately 3,100 corporations seeking a refund of corporate income taxes levied by Act 1052 of 1991. Each of the named plaintiffs, ACW, Inc.; Phillips Development Corporation; and United Wholesale Florists, Inc., filed Arkansas state income-tax returns reporting Arkansas net taxable income in excess of $100,000. Each paid corporate income tax at the flat rate of 6½% on their entire net income. After seeking refunds individually, the named plaintiffs filed a verified claim for repayment of overpayment of taxes on their first $100,000 of net taxable income, on behalf of themselves and others similarly situated. They contended that the proper assessment would be a graduated rate on the first $100,000, as is applied to corporations with net taxable income of $100,000 or less.

After exhausting their administrative remedies, appellants filed a complaint in chancery court, which alleged: (1) Act 1052 violates the provisions of Ark. Const. art. V, § 38; (2) the Act requires application of graduated rates on the first $100,000 of income, or in the alternative, that it is ambiguous; (3) if the Act unambiguously levies a 6½% flat rate on the first $100,000 of income, it violates equal protection; (4) the Act results in a confiscatory tax. They requested class certification pursuant to Ark. R. Civ. P. 23 and Ark. Const. art. XVI, § 13, and asked for refunds, injunctive relief, and the establishment of a common fund.

The trial court granted class certification, but affirmed the decision of the Commissioner imposing the flat rate and denied the requested relief. It found that the Act was subject to the provisions of Ark. Const. art. V, § 38, which requires that the passage of the Act be a response to an emergency allowing the imposition of such a tax by a three-fourths vote of each House of the General Assembly, and that an emergency had been stated. Regarding the ambiguity argument, the trial court acknowledged that the language of the statute could be read to reach three divergent results, but concluded that the interpretation offered by appellees, the Department of Finance and Administration and the Commissioner of Revenues, should prevail. Finally, the court found that the statute did not violate equal protection.

On appeal, appellants contend that (1) there was not an emergency allowing the passage of the tax as provided by Ark. Const. art. V, § 38; (2) the statute is ambiguous and should be resolved in favor of the taxpayer; and (3) the Department's interpretation of the Act results in a confiscatory tax and violates equal protection. We agree with the trial court's finding that the requirements under the Arkansas Constitution for adoption of the statute had been met, and affirm on this point.

While we agree with the trial court's finding that the statute could be read to reach divergent results, we disagree with its ruling that the Department's interpretation should prevail; and we reverse on this point.

Finally, we consider appellees' cross-appeal, contending that the doctrine of sovereign immunity invalidates the certification of

a class of taxpayers seeking refunds in this case. On the basis of our recent decisions in *State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996), and *State v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996) (substituted opinion granting rehearing), we agree with appellees that no class certification should have been ordered, and reverse the certification.

The Existence of an Emergency

We first address the trial court's determination of the existence of an emergency. Appellants argue that the tax imposed by Act 1052 of 1991 must fail because it was not a response to an emergency allowing passage of the tax by the votes of three-fourths of the members of each house of the General Assembly. We agree with the trial court that the emergency clause did state an emergency sufficient to meet the requirements of the Arkansas Constitution under art. V, § 38. Section 9 of Act 1052, the emergency clause of the Act, provided the following:

> It is hereby found and determined by the General Assembly that additional funds are necessary to provide higher quality educational programs which are accessible by all segments of the population in the state; that recent studies have shown that in the year 2000, workers must have a minimum of fourteen (14) years of education to function in the work force; that the state is in desperate need of training, retraining and upgrading the work force; that this act will provide the funding necessary to provide every citizen with an opportunity to participate in vocational-technical training or college transfer programs; and that it is necessary for this act to become effective immediately to provide the funding needed for these programs as soon as possible. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval.

For a thorough understanding of the provisions and requirements of Ark. Const. art. V, § 38, a brief review of its historical background is required. At the time the article was adopted as Amendment 19 in 1933, Arkansas was in the throes of financial emergency. More than 165 million dollars of highway and road improvement bonds were in default, and checks drawn on the

state treasury were nearly worthless. The regular session of the General Assembly of 1933 cut state spending in half, established a sinking fund to pay off checks, and proposed a constitutional amendment limiting the issuance of bonds or other evidence of indebtedness. That amendment, together with Amendment 19, were proposed by the legislature, and adopted by overwhelming majorities at the general election on November 6, 1934.

Among its other provisions, and with a notable exception for paying the just debts of the state, Confederate pensions, and expenditures for educational and highway purposes, Amendment 19 prohibited expenditures exceeding two and one-half million dollars during any biennial period "unless approved by the votes of three-fourths of the members elected to each House of the General Assembly."

Amendment 19 also provided that:

> None of the rates for property, excise, privilege or personal taxes, now levied shall be increased by the General Assembly except after the approval of the qualified electors voting thereon at an election, or in case of emergency, by the votes of three-fourths of the members elected to each House of the General Assembly.

We observe that this amendment does not require either an emergency or an extraordinary vote to adopt new classes of taxes. The limitations of the amendment apply only to increased rates for property, excise, privilege, or personal taxes in existence at the time the amendment was adopted. Other taxes, such as sales and use taxes, or other means of increasing revenues, such as the repeal of deductions applicable to the computation of tax liabilities on income taxes, may be adopted without any declaration of emergency, and without an extraordinary majority vote. For example, while we have decided that higher rates of income taxes are included in the class of taxes requiring an extraordinary three-fourths majority for adoption under Amendment 19, *Hardin v. Fort Smith Couch & Bedding Co.*, 202 Ark. 814, 152 S.W.2d 1015 (1941), we have also determined that a three-fourths vote is not necessary to repeal a deduction or an exemption from federal taxes

used in computing state income taxes, *Morley v. Remmel*, 215 Ark. 434, 221 S.W.2d 51 (1949).

The selective targeting of certain specific classes of tax increases by Amendment 19 may perhaps express a preference for other means of raising revenues, but does not establish a public policy opposed to raising revenues for significant and appropriate public purposes, such as education, highways, and the payment of public debts. To the contrary, the public policy of our state clearly favors sustaining public schools and defraying necessary expenses of government. For example, as long ago as 1927, we held that the maintenance of institutions of higher education was a necessary expense of government that did not require an extraordinary majority vote from both houses of the General Assembly. *Hudson v. Higgins*, 175 Ark 585, 299 S.W. 1000 (1927).

In a long line of cases interpreting emergency clauses adopted in accordance with Amendment 7's provision on initiative and referendum matters, we have given great deference to legislative determination whether an emergency exists. Such emergency clauses must state not only a grave problem, but because the effect of the clause is to allow an act to become effective upon passage, there must also be a showing of a need to promptly begin a response to the circumstances that have generated the emergency. However, it is not essential that the emergency be suddenly discovered or that the remedy be immediately effective. In *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995), we pointed out that the revision of our state's Constitution was properly described as an emergency, even though the problems were not recently discovered, and the remedies would not bring immediate results. The following reasoning articulated by U.S. District Court of Oregon in *Daugherty Lumber Co. v. United States*, 141 F.Supp. 576 (1956), is useful for our consideration:

> Legislative emergencies are those situations where the common good or public interest is legislatively declared to be paramount to individual interests. Common knowledge tells us that legislative action effective immediately, has on legion occasions been adopted to correct an adverse public interest of long standing.

Id. at 581.

Emergency legislation is enacted for the purpose of alleviating grave conditions. Norman J. Singer, *Sutherland Statutory Construction* § 71.06, at 282. If legislation shows a remedial purpose, it will be given generous construction. *Id.* As another court stated, the *facts* must show a necessity for immediate action. *Osage Outdoor Advertising v. State Highway Comm'n*, 687 S.W.2d 566 (Mo. App. 1984).

Statutes are presumed constitutional, and the burden of proving otherwise is upon the challenger of the statute. *Ports Petroleum Co. v. Tucker*, 323 Ark. 680, 916 S.W.2d 749 (1996). Here appellants bear the burden of proving that there was no emergency.

We recognize that it may require many years of inadequate support of education before there is a legislative realization of an emergency that has resulted from the economic and societal impact of that inadequate education. We also observe that educational problems cannot be corrected immediately. As expressed by the emergency clause in Act 1052, the goal is to provide access to all segments of the population so that fourteen years of education is available by the year 2000. We note that the length of time required to address the problem is in itself a strong and rational basis for getting started toward a solution.

In light of the history of Ark. Const. art. V, § 38, and the expressed public policy of our state, we hold that an emergency existed, enabling the General Assembly to pass the Act by the extraordinary vote of three-fourths of the entire membership of each house of the General Assembly.

We have also considered appellants' argument that the measure must fail because 3% of the revenues will be allocated to the Constitutional Officers Fund and the State Central Services Fund. The application of revenues to be derived from this tax is subject to review and legislative action during the years in which the revenues are realized. Some overhead costs can be expected, and as pointed out by the trial court, once the threshold question of the existence of an emergency is resolved, the trial court lacked the authority to substitute its priorities for those expressed in the statute.

Finally, it should be emphasized that the adoption of an emergency clause does not deprive the people of their rights to refer any measure to a popular vote. *Jumper v. McCollum*, 179 Ark. 837, 18 S.W.2d 359 (1929).

Statutory Interpretation

Appellants next urge that even if the passage of Act 1052 met the requirements of art. V, § 38, its application by appellees either reflects a misinterpretation of the language of the Act, or in the alternative, results in an unconstitutional levy of a confiscatory tax, as well as the imposition of arbitrarily unequal taxation in violation of state and federal equal protection guarantees.

Each appellant filed Arkansas state income-tax returns reporting Arkansas net taxable income tax in the excess of $100,000.00 per year. Each paid corporate income tax at the flat rate on their entire net income. Each sought refunds, contending that the correct tax liability should be based on a graduated tax rate of 1% up to 6% on the first $100,000.00 of net income, identical with that applied to corporations having a net income of $100,000.00 or less; and that the final bracket of 6½% should apply, "on net income exceeding $100,000.00. . . ." Appellees contend that the statute creates two distinct classes of taxpayers, those making $100,000.00 or less, and those making $100,000.50 or more, and that those in the second group are required to pay more taxes on their first $100,000.00 of income than required of those in the first group.

Act 1052 of 1991, codified at Ark. Code Ann. § 26-51-205 (Repl. 1992), provides as follows:

> (a) Every corporation organized under the laws of this state shall pay annually an income tax with respect to carrying on or doing business on the entire net income of the corporation,. . .received by the corporation during the income year, on the following basis:
>
> (1) On the first $3,000 of net income or any part thereof 1%
> On the second $3,000 net income or any part thereof . . 2%
> On the next $5,000 of net income or any part thereof . . 3%
> On the next $14,000 of net income or any part thereof . 5%

On the next $75,000 of net income or any part thereof, but not exceeding $100,000 ..... 6%

(2) On net income exceeding $100,000, a flat rate of six and one-half (6½ %) percent shall be applied to the entire net income.

Similar language in subsection (b) applies to foreign corporations.

We agree with the trial court's statement that "the language set fourth in the subsection (a)(2) . . . when read in conjunction with sections (a)(1) . . . can be read to reach any of the three results set forth in the plaintiff's exhibit no. 35."

There is absolutely no language in section (a)(1) to indicate that any corporation shall pay any tax on the first $100,000 of net income other than the graduated taxes provided by that section. To the contrary, the statute provides the following: "Every corporation. . .shall pay. . .on the following basis:" and then sets out the graduated schedule that clearly applies to all corporations. Without any reference to the clear and unambiguous schedule of (a)(1), the first phrase of the next sentence reads as follows: "(2) On the net income exceeding $100,000, a flat rate of . . . 6½% shall be applied. . . ."

We note that until this point in the statute, the interpretation remains unambiguous, but the next five words render the statute ambiguous. Those words are ". . .to the entire net income." We are next told by appellees that those words take precedence over the language of (a)(1) and repeal the graduated scale of taxes contained in that section, with the effect that the taxpayer is charged with a 6½% tax applied "to the entire net income. . . ." However, this interpretation becomes even more strained when the same words in the section dealing with foreign corporations must be interpreted as meaning something other than "the entire net income."

We have determined that a statute is ambiguous where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. *City of Little Rock v. Arkansas Corp. Comm'n*, 209 Ark. 18, 189 S.W.2d 382 (1945). We hold that the statute before us is internally inconsistent and ambiguous.

When a statute is ambiguous, we must give effect to the legislative intent. *Omega Tube & Conduit Corp. v. Maples*, 312 Ark. 489, 850 S.W.2d 317 (1993). Therefore, our review now turns to an examination of the whole Act, reconciling provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Id.* at 493, 850 S.W.2d at 319. To determine legislative intent, this court looks to such appropriate matters as the legislative history, the language, and the subject matter involved. *Id.* at 495, 850 S.W.2d at 320. The manner in which a statute has been interpreted by executive and administrative officers may also be considered, and will not be disregarded unless clearly wrong. *Id.*

Following the adoption of Act 1052, the official Arkansas Legislative Tax Handbook prepared by the Legislative Council of the Arkansas General Assembly for the years 1992-93 and 1994 set out the corporate income taxes as enacted by the Act 1052, as follows:

On the first $3,000 of net income	1%
On the second $3,000 of net income	2%
On the next $5,000 of net income	3%
On the next $14,000 of net income	5%
On the next $75,000 of net income but not exceeding $100,000	6%
On all net income in excess of $100,000	6.5%

In a further reference to the effect of Act 1052 of 1991, the handbook contained the following: " Act 1052 of 1991 — the 6.5% applies to the entire net income over $100,000."

We note with interest that the 1991-1993 Official Biennial Budget of the State of Arkansas, prepared by the director of appellee, Department of Finance and Administration, as abstracted at page 9, contains the following summary on page 16: " Act 1052 - Increases the corporate income tax on corporations with net income exceeding $100,000. The new tax is a flat 6.5% on the net taxable income that exceeds $100,000."

The above official documents suggest that the legislative intent was to impose a flat tax of 6½% only on income in excess of $100,000. Notwithstanding these earlier interpretations of the

Act, the Department finally decided that the 6½% tax rate repealed the graduated schedule for the first $100,000 of net income and replaced it with the higher 6½% levy. The result is that like the statute itself, the executive and administrative interpretations show that reasonable minds could differ and that the statute is clearly ambiguous.

[redacted] We have often stated that a tax cannot be imposed except by express words indicating that purpose, and that any ambiguity or doubts must be resolved in favor of the taxpayer. *Leathers v. Active Realty Inc.*, 317 Ark. 214, 876 S.W.2d 583 (1994). Based upon our review of the legislative intent and consistent with our own decisions relating to the interpretation of tax measures, we find that the statute imposes a graduated tax applying to all corporations for the first $100,000 of net income, and a flat tax of 6½% on the entire net income above $100,000. The uniform application of tax rates on all corporations resolves the issues of confiscatory taxation and alleged violations of equal protection guarantees.

Class Certification

Appellees argue on cross-appeal that because there was no waiver of sovereign immunity, the chancellor lacked authority to certify the members of the class that did not file refund claims. We agree, and reverse the order granting class certification.

[redacted] Our constitution prohibits suits against the state, Ark. Const. art. V, § 20; however, this sovereign immunity may be waived in certain limited circumstances. *State v. Staton*, 325 Ark. at 344, 942 S.W.2d at 805. The legislature allows a taxpayer to sue the state for an improperly collected tax only after that taxpayer has requested a refund and that request has been denied. Ark. Code Ann. § 26-18-507(e)(2)(A) (Repl. 1992). In *State v. Tedder*, 326 Ark. at 496, 932 S.W.2d at 756, we determined that only the taxpayer who has requested and has been denied a refund under this statutory provision has obtained a waiver of sovereign immunity. "A trial court acquires no jurisdiction where the suit is one against the State and there is no waiver of sovereign immunity." *State v. Staton*, 325 Ark. at 344, 942 S.W.2d at 805.

In the instant case, only the named plaintiffs have followed the procedure outlined in Ark. Code Ann. § 26-18-507(e)(2)(A) by applying for a refund. Under our prior holdings, the named plaintiffs are the only persons for whom sovereign immunity has been waived. Therefore, the order granting class certification must be reversed.

Conclusion

In sum, we hold that Act 1052 of 1991 meets the requirements of art. V, § 38 of the Arkansas Constitution. We observe that its ambiguous language can be reconciled into a consistent, harmonious, and sensible interpretation that provides the same graduated tax rates upon the income of all corporations, both foreign and domestic. We hold that the statute, so interpreted, does not violate constitutional provisions of equal protection; and finally, we hold that the doctrine of sovereign immunity bars the certification of a class of taxpayers to seek refunds of taxes.

We affirm in part, and reverse and remand in part for further proceedings consistent with this opinion.

NEWBERN and GLAZE, JJ., dissent.

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

ROBERT L. BROWN, Justice, concurring in part and dissenting in part. I agree with the majority's opinion on direct appeal, but I would affirm the cross-appeal.

The court's decision with respect to the cross-appeal gives the plaintiffs in this case a hollow victory and repeats the mistake that was made in the substituted opinion in *State v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996). My dissent in that case foretold that this precedent would work to deny taxpayers who had been assessed an illegal tax the only viable remedy to reclaim those taxes. As an example, it is estimated in this case that individual corporations have $1,060 at risk in this litigation. It would be cost-prohibitive for a corporation to take on the expense of filing the administrative claim, and then upon denial of that claim, to pursue relief through the trial court and on appeal. The bottom line is that the State has every motivation to take the most aggres-

sive stance on a given tax statute, for it is now a virtual certainty that even the most extreme interpretation will reap the bounty of illegal tax revenue.

Our decision in *Staton* hinged on the notion that sovereign immunity protects the State from the consequences of its illegal actions and also on the porous premise that class actions will bankrupt the State. As I stated in my dissent in *Staton*, sovereign immunity was sufficiently waived by the General Assembly by its enactment of Ark. Code Ann. § 26-18-507 (Repl. 1992); hence, the voluntary payment rule is of no consequence in light of this refund statute. Moreover, the State will not be pushed toward bankruptcy with these class actions. Individual taxpayers still would have to prove their claims should the tax interpretation be decided in their favor.

A class action is the only practical way to remedy many illegal taxes like the one before the court today, because 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 death of *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), has left the taxpaying families and companies of this State subject to the will of the Department of Finance and Administration without a remedy. I would permit the class action to proceed.

TOM GLAZE, Justice, dissenting. I must dissent. In my view, the majority decision is disturbing precedent and bodes trouble for Arkansas taxpayers. In short, I submit that Act 1052 of 1991 is unconstitutional because it was enacted contrary to Article 5, Section 38, of the Arkansas Constitution, as amended by Amendment 19.

First, it must be kept in mind that the Arkansas Constitution is a limitation upon and not a grant of power to the legislature. *Erxleben v. Horton Printing Co.*, 283 Ark. 272, 675 S.W.2d 638 (1984). As previously mentioned, this court is called on to interpret Amendment 19, and in relevant simple terms, that provision *prohibits* the General Assembly from *increasing personal taxes except* after the *voters approve the increase, or in case of emergency, the General Assembly approves the increase by a three-fourths vote.*

Here, the voters have not approved an increase in personal taxes, so the issue is, did an *emergency* exist that would authorize the General Assembly under Amendment 19 to enact a measure by a three-fourths vote to increase such taxes? In determining what is meant by the limiting language of Amendment 19, this court should look to the history and state of things existing when the constitution was framed and adopted. *Glover v. Hot Springs Kennel Club*, 230 Ark. 544, 323 S.W.2d 902 (1959); *Lybrand v. Wafford*, 174 Ark. 298, 296 S.W.2d 729 (1927). With this principle in mind, this court must look to the situation confronting the Arkansas people when they adopted Constitutional Amendment 19 in 1934, and when it does so, the conclusion is obvious — Arkansas and all states were fighting a depression. Unquestionably, Arkansas voters passed Amendment 19 to prohibit the increase in taxes except (1) when the people approved them, or (2) in *emergencies*, when the General Assembly enacted an increase by a three-fourths vote.

The majority opinion mistakenly relies on cases from other jurisdictions that lend no light on Amendment 19's history, but instead espouse general principles largely concerning statutory construction. Here, the reader must keep in mind that this court is asked to expound on the Arkansas Constitution.

The majority opinion also looks to Arkansas's Initiative and Referendum Amendment 7 to define the meaning of emergency and in support cites to a plurality opinion, *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995). However, this court's decision in *Burroughs v. Ingram*, 319 Ark. 530, 893 S.W.2d 319 (1995), appears to be the prevailing law and, in *Burroughs*, this court held the word "emergency," in its most accepted usage, means some sudden or unexpected happening that creates a need for immediate action.

Act 1052 reveals no "sudden or unexpected happening," which required its passage by the General Assembly. To the contrary, § 9 of Act 1052 merely recites that the General Assembly studied the State's higher quality education programs and its studies showed that, in the year 2000, workers will need more education and the State is in desperate need of training, retraining, and

upgrading the work force. The Act further reads that the Act "will provide the funding necessary to provide every citizen with an opportunity to participate in vocational-technical training or college transfer programs, and that it is necessary for this Act to become effective immediately to provide the funding needed for these programs as soon as possible."

In sum, while I am the first to concede that Act 1052's objective is a lofty one, the fact remains that it cannot fairly or reasonably be said that the establishment of a program to train all citizens to function in the workplace by 2000 is a concept or goal that resulted from a "sudden" or "unexpected" event.

In conclusion, I must respond to the majority opinion's final suggestion that this court's holding that Act 1052 is an emergency measure does not deprive the people of their rights to refer any measure to a popular vote. First, I note the obvious that it is much too late now for citizens to refer Act 1052's tax increase to the vote of the people. *See* Amendment 7 to the Arkansas Constitution. Second, and more important, the majority's suggestion cryptically underscores that, under today's decision, the Arkansas people now have the burden to remain watchful for tax-increase measures like Act 1052 in the future, and be organized, well-funded and otherwise prepared to initiate referendums on such measures.

It is difficult, if not impossible, for me to believe that, when the voters of Arkansas passed Amendment 19, they intended an emergency could be so easily declared so as to authorize the General Assembly to approve a tax increase without a vote of the people. Nor did they intend to establish a situation or procedure whereby Arkansas voters would be forced to refer tax-increase measures in order to ensure their right to vote on such taxes. The majority opinion's interpretation of Amendment 19 and its term "emergencies" is much too broad, and in my view, is error.

For the above reasons, I would reverse and dismiss.

NEWBERN, J., joins this dissent.

Patricia Louise FINCH *v.* STATE of Arkansas

CR 97-306 947 S.W.2d 11

Supreme Court of Arkansas
Opinion delivered June 30, 1997

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

No response.

PER CURIAM. Appellant, Patricia Louise Finch, filed a motion to supplement the record in the above case. Appellant has filed a partial transcript, but seeks to supplement the record with affidavits of the deputy prosecuting attorney and appellant's attorney. Appellant states that these affidavits show that a motion to exclude the attorney, whose assistance was at issue in the Rule 37 hearing, from court during appellant's testimony was made in chambers; and appellant's attorney concedes error in his affidavit regarding the failure to renew this motion for the record when the hearing began.

We remand the matter back to the trial court to settle the record in accordance with Ark. R. App. P.—Civ. 6(d), made applicable to criminal proceedings pursuant to Ark. R. App. P.—Crim. 5(a). *West v. State*, 322 Ark. 114, 907 S.W.2d 133 (1995)

(*per curiam*). We direct that the record, as settled, be filed with this court's clerk within thirty-five days.

Christine JONES *v.* Jerry A. JONES

97-212 947 S.W.2d 6

Supreme Court of Arkansas
Opinion delivered June 30, 1997

[redacted]

[redacted]

McNutt Law Firm, by: *Mona J. McNutt*, for petitioner.

Lueken Law Firm, by: *Patty Lueken* and *Helen Rice Grinder*, for respondent.

PER CURIAM. We have considered this custody case on four prior occasions before invoking Rule 11 of Appellate Procedure—Civil. *See Jones v. Jones*, 328 Ark. 684, 944 S.W.2d 121 (1997) (*Jones V*). In *Jones v. Jones*, 328 Ark. 97, 940 S.W.2d 881 (1997) (*Jones IV*), this court went into detail to clarify that it had substantively decided the parties' custody issue in *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996) (*Jones I*). Nonetheless, the actions taken by Dr. Jones and counsel reflect a refusal on their part to accept our earlier admonitions and decision that, if they continued to seek custody of the parties' son, they should do so only by showing material changes in circumstances, since the last custody order entered on December 13, 1996. *See Jones IV*, 328 Ark. at 101. Instead, as late as April 23, 1997 and June 6, 1997, they have expressed an unwillingness to accept this court's express decision in *Jones IV* that it had substantively ruled that custody of the parties' son should be reinstated to Ms. Jones. In fact, in reviewing their response filed in this Rule 11 matter on June 6, 1997, Jones and his counsel continue their argument that the chancellor should have all evidence, both prior to and after December 13, 1996, when considering Dr. Jones's most recent petition for custody now pending in the Faulkner County Chancery Court.

Dr. Jones's and counsel's Rule 11 response sets out three reasons for dismissing the court's order to show cause:

(1) They believe they have sufficient facts for the trial court to find a change in circumstances since the initial trial in February

of 1994, and will be amending Dr. Jones's petition as soon as this (Rule 11) proceeding is completed.

(2) Since December of 1996 and the award of custody being given to Ms. Jones, the child's physical and emotional status has deteriorated.

(3) They had relied on the concurring opinion in *Jones IV* in believing their continuing custody argument was not frivolous or without a legal basis.

The first point set out by Dr. Jones and counsel reflects, once more, that they intend, in future custody hearings, to introduce changes in circumstances that had occurred prior to December 13, 1996 — the date custody of the parties' son was reinstated with Ms. Jones. Dr. Jones's and his counsel's second point also fails to support their Rule 11 dismissal request since, while a change in the child's physical and emotional status may be relevant in a future custody proceeding, that factor in no way explains their prior actions of ignoring this court's earlier decisions and directives. In fact, such information is not a part of this record and should not have been set out in the response filed in this matter.

Finally, Jones and his counsel attempt to establish a good-faith argument based upon the concurring opinion filed in *Jones IV*. Such an attempt is a not-so-artful, if not contemptuous, effort to evade the majority court's decision. In this respect, we first point out that Jones and his counsel continue to rely on a reference in the *Jones IV* concurring opinion that this court in *Jones I* never reached the parties' child's emotional-needs issue when reinstating custody to Ms. Jones. In doing so, they ignore the language in *Jones IV* where this court specifically referred to and disagreed with the concurring opinion by stating, "the court thoroughly dealt with this child's emotional-needs issue in its original opinion (*Jones I*) under the caption 'Cameron's emotional needs.'" In *Jones IV*, we further reiterated the following pertinent parts of our *Jones I* opinion showing this court decided the parties' custody issue:

> Simply put, this court held the chancellor was clearly wrong in ruling Dr. Jones had proven that a material change of circumstances existed, and a transfer in custody was warranted.
>
> * * *
>
> In deciding the (custody) modification question (which Dr. Jones filed after *Jones IV* and is presently pending), we emphasize that the chancellor should only consider facts arising since the last custody order (in *Jones I*), or evidence that has not been previously presented to the chancellor.

Although this court has plainly stated Dr. Jones is prohibited from using the same evidence presented in the *Jones I* trial in his future (now pending) custody modification proceedings against Ms. Jones, Dr. Jones and his counsel continue their efforts to do so, offering an argument void of legal citation, that three new justices, who joined the court after *Jones I* was decided, could not possibly know the basis for this court's decision in *Jones I.* Dr. Jones's and his counsel's willful reluctance to follow the court's earlier directives is best understood by a verbatim reading of their written argument to this court. That argument, as set out in Dr. Jones's petition for rehearing in *Jones IV*, reads as follows:

> A. The ruling in the March 7, 1997 *per curiam* order indicating that the emotional needs issue was decided on it merits, and not on procedural grounds, could not be accurately determined with the current court.
>
> The Court erred in proclaiming that the November 22, 1996, mandate (*Jones I*) was decided on its merits, rather than on procedural grounds for three reasons. First, Justice Brown, who was a sitting Justice at the time that the Arkansas Supreme Court reinstated custody of the minor child to Ms. Jones (in *Jones I*) on November 22, 1996, indicated in his concurring opinion that the case was reversed and remanded on procedural grounds, not on its merits. At the time of the original hearing, Chief Justice Jesson, Associate Justice Roaf, and Associate Justice Dudley were sitting on the Court. When the Writ of Prohibition was decided, Chief Justice Jesson, who actually wrote the opinion,

> and Associate Justices Roaf and Dudley were no longer on the Court. At this time, it would be difficult to determine whether the November 22, 1996 Court (*Jones I*) reversed the trial court and the Arkansas Court of Appeals on procedural or substantive grounds as only four Justices that comprised the November 22, 1996 (*Jones I*) Court remain on the Supreme Court. Of those four, only three Justices were of the opinion that the case was reversed on substantive grounds. Three Justices do not comprise a majority the (*Jones I*) Court of November 22, 1996. Without the participation of Chief Justice Jesson and Associate Justices Roaf and Dudley, it would be impossible to know the basis for his or her ruling (in *Jones I*) on November 22, 1996.

In conclusion, we note, in fairness, Dr. Jones's and his counsel's response, which includes their apologies to the court, if the court believes respondents' advocacy has "overstepped the line." However, the issue here is whether respondents' petitions and argument are frivolous and without reasonable or factual basis as described in Rule 11(a) and (b). Because respondents' arguments made in *Jones IV,* and particularly in their response in *Jones V*, fail in this respect, we are compelled to impose sanctions.

Because we find Christine Jones has been unnecessarily compelled to seek relief in response to Dr. Jones's and his counsel's most recent petition and response filed in *Jones IV* and *Jones V*, we order them to pay Ms. Jones the costs of the last proceeding conducted before this court in the amount of $462.00, and award attorney's fees to Ms. Jones in the amount of $1,500.00 to be paid each by Dr. Jones and counsel in the respective amounts of $500.00.

After we considered and decided this appellate Rule 11 matter, Christine Jones filed with this court a motion for sanctions, alleging that, on June 20, 1997, Dr. Jones and his counsel filed an amended petition for change of custody in the Faulkner County Chancery Court. Among other things, she asserts Dr. Jones's pleadings continue to include allegations pertaining to the same "emotional needs" issue previously decided in *Jones I.* Ms.

Jones submits that Dr. Jones's present actions belie his apologies to this court and his representation that he intended no appearances of disrespect or disregard of this court's authority or decisions. Ms. Jones's allegations are ones that must be filed with and addressed by the trial court, which can impose sanctions, if any, under ARCP Rule 11. Under Rule 11 of Appellate Procedure—Civil, this court may consider sanctions regarding papers filed in this court, as we have just done in this cause. Thus, we dismiss Ms. Jones's motion for sanctions.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. This *per curiam* represents a landmark opinion, and attorneys engaged in appellate practice would do well to take note. For the first time, we are sanctioning attorneys and their client for violation of the new Rule 11 of the Rules of Civil Appellate Procedure which became effective March 1, 1997. Our decision will affect all future petitions for rehearing, where the decision rendered by a majority is this clear and unmistakable.

Appellate Rule 11 provides in pertinent part:

> The filing of a brief, motion or other paper in the Supreme Court or the Court of Appeals constitutes a certification of the party or attorney that, to the best of his knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact; is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and is not filed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party or an attorney who files a paper in violation of this rule, or party on whose behalf the paper is filed, is subject to a sanction in accordance with this rule.

Ark. R. App. P.—Civ. 11(a). The authority is clear — this court or the court of appeals may, upon its own motion or upon the motion of a party or attorney, impose sanctions based on appeals

or proceedings initiated with no reasonable legal or factual basis. *See* Ark. R. App. P.—Civ. 11(b).

The purpose of a petition for rehearing is to call this court's attention to specific errors of law or fact that the opinion is believed to contain. *See* Ark. S. Ct. R. 2-3(g). It is not for reargument, which this court has said time and again, and which our rule clearly states. *Id.* As the *per curiam* in the instant case points out, the pleading filed by Dr. Jones entitled "PETITION FOR REHEARING AND CLARIFICATION OF ORDER OF APRIL 7, 1997" reiterated almost entirely an argument put forth in my concurring opinion in *Jones v. Jones*, 328 Ark. 97, 940 S.W.2d 881 (1997)(*Jones IV*)(Brown, J., concurring). While I believe my concurrence to be correct, the approach advocated by me in the concurring opinion was given due consideration by the full court, and six justices joined the language of *Jones IV*, which held unequivocally that the issue concerning Cameron's emotional needs was decided in *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996)(*Jones I*). The petition at issue did nothing more than repeat an argument that had been unmistakably rejected by a clear majority of this court.

With the advent of Rule 11 and this *per curiam*, attorneys must be wary of the trap of using a petition for rehearing to try to sway the court yet once more to the legitimacy of their position, even though a minority of the court's members may agree with them. Such petitions that merely reiterate arguments that have been rejected by this court will run afoul of Rule 11.

Carmen Anthony FLEETWOOD *v.* STATE of Arkansas

97-210 947 S.W.2d 387

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Robert T. Rogers, II, Carroll County Public Defender, for appellant.

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

W.H."DUB" ARNOLD, Chief Justice. Appellant, Carmen Anthony Fleetwood, appeals the order of the Carroll County Circuit Court denying transfer of his case to juvenile court. The interlocutory appeal is proper pursuant to Ark. Code Ann. § 9-27-318(h)(Supp. 1995). Jurisdiction is properly in this Court pursuant to Ark. Sup. Ct. R. 1-2(a)(11). We find no error and affirm.

Fleetwood was charged with second-degree murder for the January 3, 1996, killing of Christopher Klein. Fleetwood called the police on January 3, 1996, and informed them that he had shot a man in self-defense. When the police arrived, Fleetwood indicated that he was asleep on a sofa in his grandmother's house and was awakened by Klein standing over him masturbating. He claimed that Klein had ejaculated on his face and that he had wiped the decedent's semen from his face with his shirt. He said that the decedent moved toward him and that he fled the room and went into his grandmother's bedroom. He claims that the decedent followed him into the room and cornered him, so he then took a 410 shotgun from the closet and shot Klein.

The initial DNA test on Fleetwood's shirt showed no evidence of the decedent's semen; however, a semen stain of the defendant's was later detected. A second DNA test indicated a

small stain of semen on the sleeve of the shirt; the DNA of this semen was consistent with the decedent's. An autopsy report indicated that Klein died of a gunshot wound to the head.

After a nine month investigation, Fleetwood was charged with second-degree murder. Charges were brought in the Circuit Court of Carroll County. Fleetwood entered a motion to transfer the matter to juvenile court based upon the fact that he was a minor when the act occurred. Fleetwood was seventeen years old on January 3, 1996, when the shooting occurred. On March 3, 1996, he turned eighteen. At the omnibus hearing on December 18, 1996, the trial court denied the motion to transfer to juvenile court.

At the hearing, the trial court heard testimony from Sue Campbell, Deputy Juvenile Officer of the 44th Judicial Court in Wright, County, Missouri. She testified that Fleetwood was on probation for a year from November 1993 until December 1994 and that he violated probation when he engaged in a fight with a fellow classmate.

Chief Earl Hyatt of the Eureka Springs Police Department testified. He stated that he investigated the murder of Klein and that Fleetwood admitted to shooting the decedent. He also testified that there was no indication that the decedent was armed when he cornered Fleetwood in the bedroom.

Testifying on Fleetwood's behalf was Margie Anderson, Commissioner for Eureka Springs Park and Recreation Department where Fleetwood was employed. She indicated that Fleetwood had been issued an award for saving a child's life. She also stated that Fleetwood had not been the cause of trouble in the community of Lake Leatherwood during the time that he had lived there with his grandmother.

After hearing all of the evidence, the trial court denied the motion to transfer. Fleetwood challenges that ruling as an abuse of discretion.

Ark. Code Ann. § 9-27-318(e)(Supp. 1995) sets forth statutory factors that a trial court must evaluate when ruling upon a motion to transfer a matter to juvenile court. Specifically, § 9-27-318 provides:

> (e) In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors:
> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.
> (f) Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect.

In ruling upon a motion to transfer, a court is not required to give equal weight to each of the factors enunciated in Ark. Code Ann. § 9-27-318(e). *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996); *Sebastian v. State*, 318 Ark. 494, 885 S.W.2d 882 (1994). According to Ark. Code Ann. § 9-27-318(f) (Supp. 1995), a trial court decision to try a juvenile as an adult must be supported by clear and convincing evidence. A trial court decision will not be overturned unless it is clearly erroneous. *Booker v. State, supra; Davis v. State*, 319 Ark. 613, 893 S.W.2d 768 (1995).

According to *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996), it is the movant's burden to prove the transfer to juvenile court was warranted. *See also, Williams v. State*, 313 Ark. 451, 856 S.W.2d 4 (1993); *Pennington v. State*, 305 Ark. 312, 807 S.W.2d 660 (1991). This is a burden appellant has not met.

The defense conceded that the offense was both serious and violent but claims that the denial of the motion to transfer was improper because of the affirmative defense of self-defense. The statutory scheme for determining whether a case should be transferred to juvenile court is not dependant upon affirmative defenses. A trial court must evaluate the specific offense and the individual defendent to determine whether a transfer is warranted. It is obvious that Fleetwood was allowed to offer evidence to support his motion, and we have often held that a trial court is in the best position to weigh such evidence. We will not question such a ruling absent evidence that the trial court was clearly erroneous.

In addition to the offense being of a serious and violent nature, the State additionally submitted that Fleetwood had turned eighteen years of age and, therefore, was not eligible for juvenile rehabilitative programs. In two recent cases, *Smith v. State*, 328 Ark. 736, 946 S.W.2d 667 (1997); *Oglesby v. State*, 329 Ark. 127, 946 S.W.2d 693 (1997), we held that the age of the juvenile is a permissible factor to evaluate when determining whether a transfer is proper. *See also, Maddox v. State*, 326 Ark. 515, 931 S.w.2d 438 (1996); *Brooks v. State, supra; Hansen v. State*, 323 Ark. 407, 914 S.W.2d 737 (1996).

Based upon the serious and violent nature of second-degree murder and the fact that Fleetwood is now nineteen years old, we cannot say that the denial of transfer was clearly erroneous. We therefore affirm.

Affirmed.

NATIONAL ENTERPRISES, INC. and Arkansas No. 1 LLC
v. Charles REA and Mickie Rea, His Wife

97-274 947 S.W.2d 378

Supreme Court of Arkansas
Opinion delivered July 7, 1997
[Petition for rehearing denied September 11, 1997.]

Joel Taylor, for appellants.

Skokos, Bequette & Billingsley, P.A., by; *Jay Bequette* and *Keith I. Billingsley* and *Wood, Smith, Schnipper & Clay*, by: *Don M. Schnipper*, for appellees.

DONALD L. CORBIN, Justice. Appellants National Enterprises, Inc. ("NEI"), and Arkansas No. 1 LLC appeal the judgment of the Garland County Chancery Court permitting Appellees Charles P. Rea and Mickie Rea to equitably rescind their contract of purchase and deed of conveyance of a time-share unit located in the now-defunct Lakeshore Resort & Yacht Club in Hot Springs. Appellants raise four points for reversal, one of which requires an interpretation of Ark. Code Ann. § 18-14-601 (1987). Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(a)(17)(vi) (as amended by *per curiam* July 15, 1996). We cannot reach the merits of the appeal, however, due to a flagrantly deficient abstract. Accordingly, we affirm pursuant to Ark. Sup. Ct. R. 4-2(a)(6).

From the sparse abstract provided to us, it appears that Appellees purchased a time-share condominium from Hansen, Hooper & Hayes, Inc., the developer of the Lakeshore project. Appellant NEI purchased the note and mortgage on the condominiums from the Resolution Trust Corporation ("RTC") and subsequently foreclosed on the property. Appellees filed suit against NEI for rescission of the contract, alleging that NEI had failed to provide them with utilities, parking, and access to the facilities of the adjacent hotel, as promised by the original developer. Sometime after Appellees had filed suit, NEI transferred 100% of its right, title, and interest to Arkansas No. 1 LLC. The chancellor ruled in favor of Appellees on a theory of constructive fraud and this appeal followed.

The points argued on appeal comprise two issues: (1) Whether Appellants were the proper party defendants as the successors-in-interest to the developer, and (2) whether there was sufficient evidence of constructive fraud. We are unable to reach the merits of either of these points due to the fact that Appellants have failed to abstract the following essential documents: (1) The note and mortgage on the Lakeshore property purchased by NEI from the RTC; (2) the original contract for the purchase of the time-share unit entered into by Appellees and the developers; (3) the foreclosure action executed by NEI on the Lakeshore time-share project; (4) a letter written by an ex-employee of NEI on December 3, 1993, advising time-share purchasers that the services and amenities previously provided by the hotel had been terminated; and (5) the master deed and by-laws of the time-share development.

Additionally, Appellants have failed to sufficiently abstract the relevant parts of the chancellor's letter order, which actually comprised some seven pages[1], but is summarized in one paragraph as follows:

> Defendants['] status as successor in interest to Hanson [sic], Hooper & Hayes cannot be seriously questioned. In order to rescind a contract, actual fraud is not necessary, and constructive fraud is sufficient. Plaintiffs did not prove actual fraud, but the Court finds constructive fraud. Plaintiffs are entitled to rescission. The provision in the By-Laws which require the developer to relinquish its right and duty to administer the regime no later than three years following the first sale of the unit week was not supported by testimony that the counsel of co-owners was established. Plaintiff's [sic] resitutionary [sic] damages should be reduced pro rata, based upon the amount of use they had in their time-share.

[redacted] It is fundamental that the record on appeal is confined to that which is abstracted and cannot be contradicted or supplemented by statements made in the argument portions of the briefs. *In the Estate of Brumley*, 323 Ark. 431, 914 S.W.2d 735 (1996).

[1] We only know that the actual letter order comprised at least seven pages because Appellants have quoted from page seven of the order in the argument portion of their brief.

Appellants are required to abstract such material parts of the pleadings, proceedings, facts, documents, exhibits, and other matters in the record as are necessary to an understanding of each issue presented to this court for review. *Kingsbury v. Robertson*, 325 Ark. 12, 923 S.W.2d 273 (1996); *Brumley*, 323 Ark. 431, 914 S.W.2d 735. The judgment or decree appealed from, including relevant factual findings, is an essential part of the abstract. *Pulaski County Child Supp. Enforcement Unit v. Norem*, 328 Ark. 546, 944 S.W.2d 846 (1997). Failure to abstract a critical document precludes this court from considering any issues concerning it. *Brumley*, 323 Ark. 431, 914 S.W.2d 735. Similarly, when those exhibits necessary for a clear understanding of the issues are not included in the abstract, we will summarily affirm the decision of the trial court. *Kingsbury*, 325 Ark. 12, 923 S.W.2d 273. We have stated on occasions too numerous to count that it is impractical to require all seven members of this court to examine one transcript in order to decide an issue. *See, e.g., Duque v. Oshman's Sporting Goods Servs., Inc.*, 327 Ark. 224, 937 S.W.2d 179 (1997); *Kingsbury*, 325 Ark. 12, 923 S.W.2d 273.

From the abstract provided, we cannot discern what services, if any, Appellants were obligated to provide to Appellees and other time-share owners or what the original developer was obligated to provide. Without a copy of the note and mortgage purchased by NEI from the RTC, we cannot address Appellants' argument that Appellees' time-share unit was specifically excluded from the mortgage. Moreover, without a copy of the master deed and bylaws, we cannot address Appellants' argument that the developer's obligations ceased after three years from the date of the sale of the first time-share week. Furthermore, without being able to examine the letter written by the ex-employee of NEI, we cannot address Appellants' argument that the trial court erred in finding that statements made in the letter were authorized by Appellants and were binding upon them as admissions. Though there are scant references to these documents contained in the abstracted testimony and in the argument portion of Appellants' briefs, as well as references to some of the documents as trial exhibits, such references do not comply with this court's abstracting requirements set out in Ark. Sup. Ct. R. 4-2(a)(6).

Correspondingly, from Appellants' summary of the chancellor's order, we are left to guess as to the specific factual findings made by the trial court and her reasons for ruling as she did. It is further unclear from the abstracted order that the chancellor ever ruled on Appellants' argument concerning the application of section 18-14-601 to the facts of this case. Without the benefit of knowing the specific findings and conclusions made by the trial court, it is well nigh impossible for this court to conduct a meaningful review of Appellants' allegations of error. Accordingly, we affirm the order of the chancery court.

The TRAVELERS INSURANCE COMPANY and Dan Ray
v. Honorable Kim M. SMITH and Anna F. Smith

97-415 947 S.W.2d 382

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Davis, Cox & Wright PLC, by: *Don A. Taylor* and *David L. McCune*, for petitioners.

Jeff Slaton, for respondents.

ROBERT L. BROWN, Justice. This is a petition for a writ of prohibition filed by petitioners The Travelers Insurance Company, the workers' compensation insurance carrier for Gerald Johnson Trucking Company, and Dan Ray, who is employed by Travelers as a claims adjuster. The respondents are circuit judge Kim M.

Smith and the claimant's widow, Anna F. Smith.[1] We deny the petition.

On September 30, 1996, respondent Anna F. Smith filed an amended complaint against Travelers Insurance and Dan Ray seeking damages for misrepresentation and the tort of outrage. Anna Smith alleged that her husband, Alva Smith, was killed in a one-vehicle trucking accident in Washington County in the course of his employment with Gerald Johnson Trucking Company. After Alva Smith's death, Anna Smith authorized Charles Farmer, Jr., a representative of the Sisco Funeral Chapel, to arrange her husband's funeral and handle matters with Travelers Insurance.

The complaint alleged that although the Washington County Coroner and the Arkansas State Police had determined that the cause of Alva Smith's death was massive head trauma, Dan Ray represented to Farmer that no workers' compensation benefits would be paid until an autopsy had been performed. It was further alleged that Ray stated to Farmer that Travelers Insurance first had to determine whether the true cause of Alva Smith's death was a heart attack or other pre-existing condition. Ray, according to the allegations, never took steps to have the autopsy performed and failed to authorize the embalming of Alva Smith's body. Anna Smith claimed that Ray made the following misrepresentations to her: (1) that an autopsy was required; (2) that if Alva Smith had suffered from a heart attack or other pre-existing condition immediately prior to the accident, his death would not be compensable; and (3) that he (Ray) was making efforts to obtain an autopsy. Anna Smith alleged that the misrepresentations were made for the purpose of inducing her to refrain from embalming her husband's body and proceeding with the funeral. As a result, Anna Smith incurred refrigeration costs, and, due to the delay in embalming, was unable to have an open-casket funeral. She claims that she experienced severe and extreme mental anguish,

[1] The proper party as respondent to a petition for writ of prohibition is the circuit court and not the individual judge or the claimant's representative. *See Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997).

which Ray knew would naturally and probably result from his conduct.

Travelers Insurance and Ray answered and asserted affirmatively that Anna Smith's claim was barred by the exclusive-remedy provision of the Workers' Compensation Act or, alternatively, by the fact that she accepted workers' compensation benefits paid by Travelers Insurance on behalf of Gerald Johnson Trucking Company and, thus, had elected her remedy. The petitioners next filed a "Motion to Dismiss and for Summary Judgment," claiming again that Anna Smith's exclusive remedy lay under the Workers' Compensation Act and that she had elected her remedy by accepting death benefits in the amount of $32,910.

The trial court denied the motion to dismiss and for summary judgment. In a letter opinion, the trial court reasoned that Anna Smith was not seeking damages on the account of the death of her husband and that the injuries she allegedly suffered did not arise from Alva Smith's employment. The court further noted that the Workers' Compensation Act did not provide a remedy for her alleged wrong and that her action was therefore not barred by the exclusive-remedy provision. The court also denied summary judgment and, in doing so, ruled that genuine issues of material fact existed as to the claims of misrepresentation and outrage. Travelers Insurance and Ray filed a "Motion for Additional Findings and for Reconsideration," which was dismissed by the trial court. This petition for writ of prohibition followed.

I. Exclusive Remedy

Petitioners' first ground in support of prohibition is that Anna Smith's lawsuit is at odds with the exclusive-remedy provision of the Workers' Compensation Act. *See* Ark. Code Ann. § 11-9-105(a) (Repl. 1996).

We begin by addressing our standard of review. A writ of prohibition is an extraordinary writ that is appropriate only when the lower court is wholly without jurisdiction. *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996); *West Memphis Sch. Dist. No. 4 v. Circuit Court*, 316 Ark. 290, 871 S.W.2d 368 (1994). When considering the propriety of issuing

the writ, this court's review of jurisdiction is limited to the pleadings. *Western Waste Indus. v. Purifoy*, 326 Ark. 256, 930 S.W.2d 348 (1996); *Nucor Holding Corp. v. Rinkines, supra.* Where the encroachment on workers' compensation jurisdiction is clear, a writ of prohibition is warranted. *Western Waste Indus. v. Purifoy, supra*; *Nucor Holding Corp. v. Rinkines, supra.*

In asserting that the circuit court is wholly without jurisdiction to hear Anna Smith's claim, Travelers Insurance and Ray rely primarily on three cases — *Johnson v. Houston General Ins. Co.*, 259 Ark. 724, 536 S.W.2d 121 (1976); *Cain v. National Union Life Ins. Co.*, 290 Ark. 240, 718 S.W.2d 444 (1986); and *Liberty Mut. Ins. Co. v. Coleman*, 313 Ark. 212, 852 S.W.2d 816 (1993). In *Johnson v. Houston General Ins. Co., supra*, the claimant suffered a compensable injury and was awarded benefits to be paid in one lump sum. When the payment was not forthcoming, the claimant filed a complaint against his employer's workers' compensation insurance carrier and alleged that payment was being withheld for harassment purposes, which resulted in substantial mental anguish. We affirmed a dismissal of the complaint on grounds of exclusivity of the workers' compensation remedy. We noted that, in addition to having the remedy of a 20% penalty and interest for late payment, the claimant could have petitioned the Commission to require his employer to post a bond as security for the award. We also noted that the claimant had the option of filing a certified copy of the award with the circuit clerk and enforcing the judgment. In other words, the claimant had remedies under the Act.

The holding in *Johnson* was subsequently applied in *Cain v. National Union Life Ins. Co., supra.* In *Cain*, the claimant filed a complaint against the workers' compensation insurance carrier and pled that the insurer stipulated that it was liable for all medical expenses but then failed to make payment. The claimant claimed that this failure caused him emotional distress. The trial court dismissed the complaint, and this court affirmed the dismissal, citing *Johnson v. Houston General Ins. Co., supra.*

Our holdings in *Cain* and *Johnson* were the foundation for this court's opinion in *Liberty Mut. Ins. Co. v. Coleman, supra.* In *Coleman*, claimant suffered an injury to his right hand and arm for

which his employer's workers' compensation carrier partially acknowledged coverage and paid some benefits. The claimant then sought therapy from a pain clinic based on an orthopedic surgeon's recommendation that therapy was necessary if the claimant hoped to regain the use of his hand and arm. The doctor's recommendation was initially denied by the carrier but later accepted. The claimant's right arm had to be amputated below the elbow, and the claimant filed an action against the carrier, alleging that its intentional refusal to authorize the treatment and to pay his medical expenses constituted bad faith and outrage and resulted in the amputation of his arm. The carrier unsuccessfully moved for dismissal on grounds of exclusivity in the trial court.

The carrier next petitioned this court for a writ of prohibition, which was granted. We held that the result was controlled by our holdings in the *Johnson* and *Cain* decisions. We reasoned that the claimant's tort action arose from the nonpayment of benefits because it was clear that the decision not to authorize treatment at the pain clinic initially was based on financial considerations. Therefore, claimant was limited to remedies provided by the Workers' Compensation Act. Specifically, we determined that the claimant should have petitioned the Commission and presented proof that the pain-clinic expenses were reasonable and necessary given the extent of his injury.

Travelers Insurance and Ray now contend that Anna Smith's tort action falls directly within the holding of *Liberty Mut. Ins. Co. v. Coleman, supra,* because she is asserting the intentional torts of outrage and misrepresentation arising out of the nonpayment of benefits. They claim that, as in *Coleman,* Ray's conduct occurred while in the course of determining whether Alva Smith's injury was compensable and whether certain benefits should be paid and that respondent should be limited to the statutory penalties provided in Ark. Code Ann. § 11-9-802 (Repl. 1996). Petitioners also assert that public policy favors a holding of exclusivity because the alternative is that many claimants could subvert remedies under the Workers' Compensation Act in favor of tort actions simply by alleging outrageous conduct in connection with the nonpayment of benefits.

We agree with the respondents, however, that the *Johnson*, *Cain*, and *Coleman* decisions are inapposite to the instant case for two reasons: (1) this case does not involve an improper delay in payment of benefits; and (2) the Workers' Compensation Act does not provide a remedy for the claim of Anna Smith. As to the first point, Anna Smith properly argues that her claim did not arise from the failure to pay benefits promptly. Indeed, her complaint does not reference the issue of failure to pay benefits. Furthermore, the validity of the *Johnson*, *Cain*, and *Coleman* decisions clearly rests on the premise that the claimants were provided with an exclusive remedy under the Workers' Compensation Act which they sought either to forego or to supplement with their tort actions.

In the instant case, we cannot construe Anna Smith's claims of misrepresentation and extreme mental anguish to be an aggravation of an initial, compensable injury suffered by her husband. Furthermore, the Workers' Compensation Act does not provide a remedy for Anna Smith's alleged injury. The Act defines "compensable injury" as follows:

> (i) An accidental injury *causing internal or external physical harm* to the body . . .;
>
> (ii) An injury *causing internal or external physical harm* to the body and arising out of and in the course of employment . . .:
>
> . . . .
>
> (iii) *Mental illness as set out in § 11-9-113* . . . .

Ark. Code Ann. 11-9-102(5)(A) (Repl. 1996) (emphasis added). In turn, Ark. Code Ann. § 11-9-113(a)(1) (Repl. 1996), provides that a mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body. Clearly, these statutes set out a requirement that a physical injury precede and cause the mental injury in order for the mental injury to be compensable under the Workers' Compensation Act. *See generally* John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?*, 47 ARK. L. REV. 1, 16-19 (1994). We conclude that under the Workers' Compensation Act, there is no remedy for Anna Smith's extreme mental anguish.

The question then becomes whether the lack of a remedy answers the jurisdictional question. Professor Larson has this to say about the issue:

> If . . . the exclusiveness defense is a "part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance," it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employee's point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place.

6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 65.40, at 12-55 (1997) (footnotes omitted). *See also Lowman v. Piedmont Exec. Shirt Mfg. Co.*, 547 So.2d 90, 93 (Ala. 1989)("[A]n employer is protected from tort liability only as to injuries expressly covered by the language of the [Workers' Compensation] Act."); *Scott v. Wolf Creek Nuclear Operating Corp.*, 928 P.2d 109 (Kan. App. 1996)(exclusivity applies only when a plaintiff's claim is compensable under the Kansas Workers' Compensation Act); *S.B. Foot Tanning Co. v. Piotrowski*, 554 N.W.2d 413, 419 (Minn. App. 1996)("[W]here an employee's injuries are within the workers' compensation statute, the rights and remedies afforded the employee, employer, and others who may have any right of action on account of the employee's injury are governed exclusively by the workers' compensation statute to the exclusion of all other remedies."); *Stratemeyer v. Lincoln County*, 915 P.2d 175 (Mont. 1996)(allowing a tort action for emotional-distress injuries because such injuries did not fall within the scope of the Montana Workers' Compensation Act); *Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544, 548 (Or. 1995)("By providing for an employer's freedom from 'other' liability, it may be inferred from the exclusivity provision that there must exist, as a predicate for that freedom, some actual liability under the Workers' Compensation Law before the exclusivity provision may protect the employer from 'all other liability.'").

[redacted] Permitting Anna Smith's claims for misrepresentation and outrage in circuit court is entirely consistent with Professor

Larson's theory on the allowance of claims for the intentional infliction of emotional distress:

> If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred. But if the essence of the action is for recovery for physical injury or death, . . . the action should be barred even if it can be cast in the form of a normally non-physical tort.

6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 68.34(a), at 13-180 to 13-190 (1997) (footnote omitted). Because Anna Smith's action is one manifestly premised on a nonphysical injury, and because her injury is not compensable and beyond the scope of coverage of the Workers' Compensation Act, we hold that it is not barred by the exclusive-remedy provision of the Act.

II. Election of Remedies

Travelers Insurance and Ray next urge that the writ should be granted since Anna Smith received workers' compensation benefits and, therefore, elected her remedy. This court has described the election-of-remedies doctrine as follows:

> [T]he general rule as to election of remedies is that, where a party has a right to choose one of two or more appropriate but inconsistent remedies, and with full knowledge of all the facts and of his rights makes a deliberate choice of one, then he is bound by his election and cannot resort to the other remedy.

Lively v. Libbey Memorial Physical Medical Ctr., 317 Ark. 5, 9, 875 S.W.2d 507, 509 (1994), *citing Gentry v. Jett*, 235 Ark. 20, 365 S.W.2d 736 (1962). In the context of this case, an election of remedies would bar the instant litigation if it is shown that Anna Smith either received or could have received compensation for her injury under the Workers' Compensation Act. *Lively v. Libbey Memorial Physical Medical Ctr., supra; Riverside Furniture Co. v. Rodgers*, 295 Ark. 452, 749 S.W.2d 664 (1988).

Because Anna Smith had no remedy under the Workers' Compensation Act, her claim cannot be thwarted for elec-

tion-of-remedy reasons. We deem this ground for granting the writ to be without merit.

Writ denied.

Jimmy GREEN *v.* COCA-COLA BOTTLING COMPANY

96-1059 948 S.W.2d 92

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Searcy Wood Harrell, for appellant.

Michael J. Dennis, for appellee.

ANNABELLE CLINTON IMBER, Justice. This is a workers' compensation case that we initially agreed to review upon Coca-Cola Bottling Company's petition. Upon further examination, we conclude that the petition for review was improvidently granted. Accordingly, the petition is denied, and the Court of Appeal's decision in *Green v. Coca-Cola Bottling Co.*, CA95-1117 (Ark. Ct. App. Aug. 21, 1996), remains the binding ruling in this case.

The underlying facts of this case are undisputed because the parties presented the case to the Workers' Compensation Commission on a stipulated record. On July 1, 1992, Jimmy Green sustained a compensable injury while working for the Coca-Cola Bottling Company ("Coca-Cola"). On March 23, 1993, Green traveled to his doctor's office in Pine Bluff for an appointment regarding his earlier injury. When Green was approximately eight miles outside of Pine Bluff, he observed an elderly woman experiencing car trouble on the side of the highway. Because Green was early for his appointment, he decided to turn around in a

private driveway so that he could assist the stranded motorist. While attempting to turn into the driveway, Green was struck from behind and injured.

Green applied for workers' compensation benefits for the injuries he sustained while traveling to the doctor's office. The Workers' Compensation Commission applied the "quasi-course of employment" doctrine, which the Court of Appeals has previously adopted and summarized as follows:

> activities undertaken by the employee following upon his or her injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury.

Preway, Inc. v. Davis, 22 Ark. App. 132, 736 S.W.2d 21 (1987); *Wolfe v. City of El Dorado*, 33 Ark. App. 25, 799 S.W.2d 812 (1990); *Eagle Safe Corp. v. Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992) (citing ARTHUR LARSON & LEX L. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 13.11(d) (1997)). The Commission found that Green's journey to the doctor's office fell under the "quasi-course of employment" doctrine because the trip was a reasonable and necessary activity relating to the prior compensable injury. The Commission, however, concluded that Green deviated from his otherwise compensable journey when he attempted to assist the stranded motorist. Because Green's deviation did not advance the employer's interest and was not causally related to a risk reasonably incident to the employment, the Commission held that Green's injuries were not compensable.

On appeal, the Court of Appeals agreed with the Commission that Green's journey to the doctor's office fell under the "quasi-course of employment" doctrine. However, the Court of Appeals applied a different standard from that used by the Commission to determine whether Green's attempt to assist the stranded motorist was an impermissible deviation from an otherwise compensable journey. Specifically, the Court of Appeals applied Larson's "prohibited-conduct" test which declares that:

> When the injury following the initial compensable injury arises out of a quasi-course activity, such as a trip to the doctor's office, the chain of causation should not be deemed broken by mere negligence in the performance of the activity, but only by intentional conduct which may be regarded as expressly or impliedly prohibited by the employer.

Id. (citing LARSON, *supra*, § 13.11(d)). Because there was no proof that Green's attempt to assist the stranded motorist was prohibited by Coca-Cola, the Court of Appeals held that Green's injuries were compensable. Accordingly, the Court of Appeals reversed the Commission's ruling and remanded the case for further proceedings.

We granted Coca-Cola's petition for review pursuant to Ark. Sup. Ct. R. 1-2(e) (as amended by *per curiam* July 15, 1996). In their briefs and during oral arguments, both Coca-Cola and Green assume that the "quasi-course of employment" doctrine is the appropriate standard to apply in this case. Although the Court of Appeals has previously recognized this doctrine, this court has never adopted Larson's "quasi-course of employment" doctrine nor have we been asked to do so in this case.

Moreover, we have never determined the appropriate test for ascertaining whether a claimant has deviated from a "quasi-course of employment" journey. Although the parties have offered no guidance in this area, our research reveals that courts have applied a variety of tests to resolve the deviation inquiry. In this case, the Court of Appeals applied Larson's prohibited- conduct test. Other jurisdictions, however, have focused upon the temporal and geographic extent of the deviation. Cheryl M. Bailey, *Workers Compensation: Compensability of Injuries Incurred Traveling To or From Medical Treatment of Earlier Compensable Injuries*, 83 A.L.R.4th 110, § 14 (1991). Some courts have applied the "positional risk doctrine" which states that the injury is compensable if the conditions of employment place the claimant in a position which requires him by ordinary standards of humanity to undertake the rescue. *D.L. Cullifer & Son, Inc. v. Martinez*, 572 So.2d 1360 (Fla. 1990); LARSON, *supra*, § 28.00. Other courts have focused on whether the deviation is insubstantial, and whether the "good-samaritan"

act promoted good will toward the claimant's employer. *Bunny Bread et al. v. Shipman*, 267 Ark. 927, 591 S.W.2d 692 (1980); LARSON, *supra*, §§ 19.00 and 27.22.

In sum, there are several ways to analyze the fact pattern presented by this case. The parties, however, have failed to argue which standard should be adopted by this court. We are hesitant to resolve such an important issue of first impression without a specific request to do so and without adequate legal argument upon which to base our decision.

For these reasons, we find that the petition for review was improvidently granted. Accordingly, we decline Coca-Cola's request to review the decision of the Court of Appeals in *Green v. Coca-Cola Bottling Co.*, CA95-1117 (Ark. Ct. App. Aug. 21, 1996). *See Hamilton v. Jeffrey Stone, Co.*, 297 Ark. 24, 759 S.W.2d 792 (1988) (refusing to review a decision from the Court of Appeals after the petition was initially granted by this court).

Review denied.

BROWN, J., dissents.

BROWN, J., dissenting. I dissent and would address the issue of substantial evidence.

Albert SIMS *v.* STATE of Arkansas

CR 97-157 947 S.W.2d 376

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Montgomery, Adams & Wyatt, PLC, by: *James W. Wyatt*, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. This is an interlocutory appeal of the circuit court's order denying the transfer of an aggravated robbery charge to juvenile court. We affirm the trial court's denial of the motion to transfer.

The appellant, Albert Sims, was charged with aggravated robbery, residential burglary, and theft of property in Pulaski County circuit court. At the time of the alleged offenses, Sims was fourteen years of age. Sims subsequently filed a motion to transfer the case to juvenile court.

At the transfer hearing, Cynthia Yvonne Mahomes, Sims's juvenile court probation officer, testified on behalf of Sims. She testified that on February 13, 1996, Sims was placed on a one-year period of probation for burglary and theft of property. Prior to Sims's involvement in juvenile court, he had lived in a shelter due to his mother's inability to provide housing for him. While at the shelter, Sims was respectful and cooperative. Mahomes added that Sims did not receive recommended rehabilitative services due to the fact that he was arrested again only weeks after his placement on probation. Mahomes testified that Sims was not a bad kid, and that he would benefit from rehabilitative therapy and services. She concluded that Sims would not have much chance for rehabilitation if he was convicted and sent to prison.

The State called Little Rock police officer Jeffery Norman as a witness. Norman investigated the robbery of Mary O'Donald, which occurred on March 6, 1996. O'Donald was sitting in her kitchen when three individuals entered her residence wielding large knives. The intruders demanded money, and O'Donald gave them approximately $100. The robbers also searched a bedroom and stole a watch belonging to O'Donald's husband. Afterwards, they taped O'Donald's hands behind her back, one told her "not to try anything funny," and then left the residence.

Norman testified that on March 26, other officers were investigating the presence of suspicious persons in a neighborhood when they encountered Sims. The officers questioned Sims, who said that he was there with an individual named Michael Johnson. Both Sims and Johnson were brought to the police station and questioned by a Detective Tribble. While Tribble questioned

Johnson about several burglaries that had occurred in the area, Johnson admitted his involvement in the March 6 robbery. Norman testified, without objection, that Johnson informed Tribble that Sims was one of two others who participated in the robbery. Norman testified that Sims ultimately confessed to his participation in the robbery to Detective Bob Wortham.[1]

Following the hearing, the trial court transferred the residential burglary and theft-of-property charges to juvenile court, but declined to transfer the aggravated robbery charge. Sims brings this interlocutory appeal pursuant to Ark. Code Ann. § 9-27-318(h) (Supp. 1995), arguing that the trial court erred in denying the motion to transfer the aggravated robbery charge to juvenile court.

We have often stated the factors the trial court must evaluate in deciding a motion to transfer, and our standard of review on an appeal of such a decision. Arkansas Code Annotated § 9-27-318(e) requires the trial court to consider the following in deciding a transfer motion:

> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and

[1] Following Norman's testimony regarding Sims's confession to the robbery, defense counsel announced "I'm going to object or at least have a chance to voir dire [Norman] before we go into [Sims's] statement." On voir dire, defense counsel ascertained that Norman was not actually present when Sims made any statements to the police. Defense counsel ultimately "object[ed] to [Norman's] testimony if he wasn't there and doesn't have any first-hand knowledge of it." However, Sims never obtained a ruling on this objection. Moreover, while Sims points out that Norman had no personal knowledge of the statements, on appeal he does not make the separate legal argument that the trial court erroneously considered inadmissible testimony. At any rate, we have held that hearsay admitted without objection may constitute substantial evidence to support a ruling in a juvenile-transfer case. *See Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996).

> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

If the trial court decides to try the juvenile as an adult, its decision must be supported by clear and convincing evidence. Ark. Code Ann. § 9-27-318(f). However, in making its determination, the trial court does not have to give equal weight to the statutory factors. *Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996); *Booker v. State*, 324 Ark. 468, 922 S.W.2d 337 (1996). This court has often said that the serious and violent nature of an offense is a sufficient basis for denying a motion to transfer. *See, e.g., McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997); *Cole v. State*, 323 Ark. 136, 913 S.W.2d 779 (1996). We will not overturn the trial court's determination unless it is clearly erroneous. *Ring v. State*, 320 Ark. 128, 894 S.W.2d 944 (1995); *Davis v. State*, 319 Ark. 613, 893 S.W.2d 768 (1995).

In the present case, the record reflects that the trial court evaluated all three of the statutory factors in denying the transfer motion. In its findings, the trial court recognized that Sims had been on probation for less than a month at the time the alleged aggravated robbery occurred. Moreover, Sims was placed on probation for serious offenses — burglary and theft. The trial court also considered the testimony from Norman that all of the intruders were armed with knives, and that the victim was left "incapacitated" when the perpetrators left.

Based on the serious and violent nature of the aggravated robbery charge, a Class Y felony, and the State's evidence tending to link Sims with the crime, we cannot say that the trial court was clearly erroneous in denying the motion to transfer the aggravated robbery charge to juvenile court.

Affirmed.

Rebecca WHEELER *v.* PHILLIPS DEVELOPMENT CORPORATION and Evergreen Four Limited Partnership

97-187 947 S.W.2d 380

Supreme Court of Arkansas
Opinion delivered July 7, 1997

W. Christopher Paul, for appellant.

Snellgrove, Laser, Langley, Lovett & Culpepper, by: *P. Sanders Huckabee*, for appellees.

RAY THORNTON, Justice. Appellant Rebecca Wheeler was injured when she stepped on a rock that was on the sidewalk of her apartment community, which is owned by appellees Phillips Development Corporation and Evergreen Four Limited Partnership. Freda Morris Hulen, the apartment manager, was operating a weedeater in the vicinity at the time. Appellant, who is a diabetic and legally blind, filed a complaint alleging that appellees had a duty of care to keep the premises safe because it is occupied primarily by elderly, handicapped, and disabled persons. She alleged that Ms. Hulen knew or should have known that the rock was on the sidewalk and that appellees, through their agent, breached their duty of care to her in failing to keep the sidewalk clear of dangerous objects.

Appellees moved for summary judgment, denying that they owed her a higher duty of care than that of a landlord to a tenant, and arguing that appellant had failed to present a genuine issue of material fact on the allegation of negligence. An affidavit by Ms. Hulen accompanied the motion, stating that she had not caused a rock to be on the sidewalk, and that she was unaware of any rocks on the sidewalk.

In her response to the motion, appellant argued that Ms. Hulen's statement that it was her duty to manage the apartments and maintain the lawn, stating further that "I mow, weedeat, and then clean off the sidewalk" created a genuine issue of material fact as to whether appellees had assumed a duty to keep the area

safe. Appellant offered in support of her motion an affidavit from Leo Roger Cox, who stated that he saw Ms. Hulen operating the weedeater ten to fifteen feet from the sidewalk where appellant was injured, that Ms. Hulen knew or should have known that the rock was there, and that Ms. Hulen was the only person he saw in the area. Appellant also stated in her own affidavit that Ms. Hulen knew or should have known that the rock was there. However, appellant did not offer any lease agreement, ground rules, or any other document or evidence to reflect that appellees had assumed a higher standard of care for their tenants than applicable to a normal landlord-tenant relationship. The evidence offered in response to appellee's motion for summary judgment failed to raise a genuine issue of material fact as to whether appellees assumed a duty to keep the common areas safe, and we agree with the ruling of the trial court.

It is appropriate to sustain a grant of summary judgment if the record before the trial court "shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Tullock v. Eck*, 301 Ark. 564, 567, 785 S.W.2d 31, 46 (1993); Ark. R. Civ. P. 56(c). Appellees, as movant for summary judgment, bear the burden of showing that there is no issue of material fact. *Gleghorn v. Ford Motor Credit Co.*, 293 Ark. 289, 737 S.W.2d 451 (1987). All evidence must be viewed in light most favorable to appellant, as she is the party resisting the motion, and she is also entitled to have all doubts and inferences resolved in her favor. *Tullock, supra.* However, she may not rest upon the mere allegation of her pleadings, but her response by affidavits or other evidence as provided by Ark. R. Civ. P. 56 must show specifically that there is a genuinely disputed issue of material fact. *Guthrie v. Kemp*, 303 Ark. 74, 793 S.W.2d 782 (1990).

Appellant argued to the trial court, as she does on appeal, that appellees owed a duty to her as an invitee to use ordinary care to keep the common sidewalk safe. This is an incorrect statement. A tenant is not an invitee on her landlord's premises but has a right equal to that of the landlord to exclusive possession of the property. *Glasgow v. Century Property Fund XIX*, 299 Ark. 221, 772 S.W.2d 438 (1989). Since 1969, when we decided

Kilbury v. McConnell, 246 Ark. 528, 438 S.W.2d 692 (1969), we have adhered to what is known as the Massachusetts rule; that is, that a landlord has no duty to a tenant to remove hazards from common areas *unless such terms are spelled out in the lease. Id.*; *see also Bartley v. Sweetser*, 319 Ark. 117, 890 S.W.2d 574 (1994). When there is no evidence of an agreement or assumption of duty that removes a landlord from the general rule, we will sustain a grant of summary judgment for the landlord. *Hall v. Rental Management, Inc.*, 323 Ark. 143, 913 S.W.2d 293 (1996). Further, the question of whether a duty is owed is always a question of law and never one for the jury. *65th Center, Inc. v. Copeland*, 308 Ark. 456, 825 S.W.2d 574 (1992). Appellant offered no evidence of such an agreement, she has merely shown that appellees were maintaining the grounds. We do not agree with her argument that such measures reflect an assumption of a duty to keep the common areas safe. We hold that the trial court was correct in granting appellees' motion for summary judgment, and affirm.

Affirmed.

BRISTOL-MEYERS SQUIBB COMPANY, et al.
v. SALINE COUNTY CIRCUIT COURT

97-558 947 S.W.2d 12

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Shook, Hardy & Bacon, by: *David Brooks* and *Deborah Moeller*; *Baxter, Wallace & Jensen*, by: *Ray Baxter*; *Wright, Lindsey & Jennings*, by: *M. Samuel Jones III* and *Claire Shows Hancock*, for petitioners Bristol-Meyers Squibb Company and Medical Engineering Corporation.

Friday, Eldredge & Clark, by: *Donald H. Bacon*, for petitioner HCA Health Services of Midwest, Inc.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Mark N. Nalbert*, for petitioner Physician's Surgery Center of Arkansas, Inc.

Friday, Eldredge & Clark, by: *Tonia P. Jones*, for petitioner Baptist Health Center d/b/a Baptist Medical Center; St. Joseph's Regional Health Center.

Clevenger, Angel & Miller, by: *Richard L. Angel*, for petitioners James Billie, M.D.; James D. Billie, M.D., P.A.; Norton Allen Pope, M.D.; John H. Brunner, M.D.; and Hot Springs Medical Group, P.A. d/b/a Burton Eisele Clinic.

Laser, Wilson, Bufford & Watts, P.A., by: *David M. Donovan*, for petitioners John Edward Allen, Jr., M.D., Individually, and Arkansas Surgery Clinic, P.A.

Mitchell, Williams, Selig, Gates & Woodyard, by: *R.T. Beard*, for petitioners James S. Beckman, Jr., M.D., Individually, and Fayetteville Plastic Surgey Clinic; John D. McCracken, M.D., Individually; Robert Grandt Vogel, M.D.; Thomas H. Allen, M.D., Individually, and Arkansas Plastic Surgery Association, Ltd.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Mike Huckabay*, for petitioner St. Vincent Infirmary.

Boswell, Tucker, Brewster & Hicks, by: *Robert A. Ginnaven III*, for respondents.

PER CURIAM. This is a petition for writ of prohibition filed by the defendants in a case that involves what are alleged to be faulty breast implants. Complaints have been filed by 19 plaintiffs against both Bristol-Meyers Squibb Company (Bristol-Meyers) and Medical Engineering Corporation (MEC) for (1) strict liability in tort for supplying a defective and unreasonably dangerous product, (2) negligence in the design and manufacture of the product, and (3) fraud in the marketing and distribution of the product. The 19 plaintiffs also assert claims for strict liability in tort based on supplying a defective product against defendant doctors and medical facilities residing and located in Washington County, Garland County, and Pulaski County. Of the 19 plaintiffs, only one, Brenda Davis, resides in Saline County, where the action was filed.

Plaintiffs claim that venue is proper in Saline County because they have brought an action for fraud, and pursuant to Ark. Code

Ann. § 16-60-113(b) (1987), venue is proper in any county where any one plaintiff resides. Defendants respond that the real character of the action is one for personal injury, which, pursuant to Ark. Code Ann. § 16-60-112(a) (1987), requires that the action be brought either in the county where the accident occurred or in the county where the plaintiff resided at the time of the injury. Defendants petition this court for a writ of prohibition to the Saline County Circuit Court to dismiss the claims of those 18 plaintiffs, other than Brenda Davis, who did not reside in Saline County at the time of their alleged injury. We agree with the defendants and grant the writ.

In *Coca-Cola Bottling Co. v. Kincannon, Judge*, 202 Ark. 235, 150 S.W.2d 193 (1941), this court discussed the applicability of Act 314 of 1939, now codified at § 16-60-112(a):

> This act is—as it professes to be—a venue statute, and localizes actions for personal injury by requiring that such actions shall be brought (a) in the county where the accident occurred which caused the injury or death, or (b) in the county where the person injured or killed resided at the time of the injury[.]

Coca-Cola Bottling Co. v. Kincannon, Judge, 202 Ark. at 237-38, 150 S.W.2d at 194. The term "accident" has been defined as the "incident" or "wrongful act" that caused the injury. *Coca-Cola Bottling Co. v. Kincannon, Judge*, 202 Ark. at 239, 150 S.W.2d at 194. Furthermore, the "injury" complained of must be corporeal or physical in nature. *See, e.g., Belin v. West*, 315 Ark. 61, 864 S.W.2d 838 (1993); *Tilmon v. Perkins*, 292 Ark. 553, 731 S.W.2d 212 (1987). The application of this venue provision to cases involving recovery for personal injury is mandatory. *Forrest City Machine Works v. Colvin*, 257 Ark. 889, 521 S.W.2d 206 (1975).

In their second amended complaint, plaintiffs asserted claims against Bristol-Meyers and MEC for fraud and negligence and a claim against all defendants for strict liability in tort. Although numerous causes of action are pled, this court has long held that venue is controlled by the provisions of the Arkansas Code rather than the characterization of a claim given by a plaintiff. *See, e.g., Arkansas Bank & Trust Co. v. Erwin*, 300 Ark. 599, 781 S.W.2d 21 (1989)(holding that personal-injury statute

applied to a claim for negligent entrustment that resulted in death); *Evans Laboratories v. Roberts, Judge*, 243 Ark. 987, 423 S.W.2d 271 (1968)(holding that personal-injury statute controlled even though plaintiff asserted a claim for breach of implied warranty that resulted in physical injury). Furthermore, when two or more actions are pled that lie in different venues, venue is determined by the real character of the action and the principal right being asserted. *See Fraser Bros. v. Darrah Co.*, 316 Ark. 297, 871 S.W.2d 367 (1994); *Frank A. Rogers & Co. v. Whitmore, Judge*, 275 Ark. 324, 629 S.W.2d 293 (1982); *Atkins Pickle v. Burrough-Uerling-Brasuell*, 275 Ark. 135, 628 S.W.2d 9 (1982).

Based on the review mandated by our case law, we conclude that plaintiffs' primary purpose is to recover damages for personal injury suffered due to the use of the implants during their breast-augmentation procedures. As a result, the mandatory provisions of § 16-60-112(a) must be applied. *See Forrest City Machine Works v. Colvin, supra.* Undoubtedly, plaintiffs have stated facts sufficient to support an action for fraud against Bristol-Meyers and MEC that, under other circumstances, would provide an appropriate venue for *all* plaintiffs against Bristol-Meyers and MEC in Saline County. *See* Ark. Code Ann. § 16-60-113(b). *See also Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995). However, viewing the complaint as a whole in order to determine the real character of the action, it is clear that plaintiffs seek a recovery that would otherwise require each to proceed either in the county where the accident occurred or where each resided at the time of the injury. *See* Ark. Code Ann. § 16-60-112(a). *See, e.g., Goodwin v. Harrison*, 300 Ark. 474, 780 S.W.2d 518 (1989). Saline County is an improper venue as to the 18 plaintiffs whose accident occurred in either Washington County, Garland County, or Pulaski County, and who did not reside in Saline County at the time of the injury.

Based on our review of the pleadings, we determine that the writ should issue to the Saline County Circuit Court with instructions to dismiss the claims of those plaintiffs other than Brenda Davis.

Writ granted.

GLAZE and THORNTON, JJ., not participating.

Keith Dzhon HILLS *v.* STATE of Arkansas

CR 97-540 947 S.W.2d 14

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Ed Webb, for appellant.

No response.

PER CURIAM. Appellant, Keith Dzhon Hills, has filed this Motion for Belated Appeal through his attorney, Ed Webb. On March 8, 1996, Mr. Hills's probation was revoked, and he was sentenced to serve three years in the department of correction. He filed an untimely notice of appeal on February 7, 1997. In his motion, Mr. Webb admits that the notice of appeal was filed untimely due to an error 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 per curiam order dated February 5, 1979. *In re: Belated Appeals in Criminal Cases*, 265 Ark. 964; *Terry v. State*, 272 Ark. 243, 613 S.W.2d 90 (1981).

A copy of this opinion will be forwarded to the Committee on Professional Conduct. *Harkness v. State*, 264 Ark. 561, 572 S.W.2d 835 (1978).

Raymond SANDERS *v.* STATE of Arkansas

CR 97-679 952 S.W.2d 133

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Petitioner, pro se.

No response.

PER CURIAM. Raymond Sanders was found guilty of capital felony murder in the death of Frederick LaSalle and sentenced to life imprisonment without parole. We affirmed the judgment. *Sanders v. State*, 310 Ark. 510, 838 S.W.2d 359 (1992). The mandate was issued October 23, 1992.

On December 4, 1992, Tona M. DeMers, counsel for Sanders, filed in the trial court a petition pursuant to Criminal Procedure Rule 37 challenging the judgment. On October 1, 1996, Sanders filed a *pro se* amended petition under Rule 37. There is no order in the record relieving DeMers as counsel and nothing which explains why the original petition remained pending for nearly four years. The trial court entered an order on October 10, 1996, declaring the Rule 37 petition to be untimely and dismissing it. A timely *pro se* notice of appeal was filed by Sanders on November 8, 1996. The record was not tendered to this court within ninety days as required by Rule 5(a) of the Rules of Appellate Procedure, and Sanders, by his attorney Jeff Rosenzweig who is representing him *pro bono*, now seeks a rule on clerk to have the record lodged belatedly.

The sole issue before us at this juncture is whether petitioner Sanders has established good cause for the failure to lodge the record in a timely manner. If petitioner had been proceeding *pro se* throughout the Rule 37 proceeding, or if the record reflected that the attorney who filed the original Rule 37 petition had been relieved as counsel, we would not hesitate to find that petitioner had failed to exercise diligence in pursuing the appeal. He was, however, not proceeding *pro se* orginally, and his attorney, Tona M. DeMers, was obligated to obtain a ruling on the Rule 37 petition and remain as petitioner's attorney until relieved by the trial court or this court. Rule 16 of the Rules of Appellate Procedure—Criminal provides that counsel, whether retained or court-appointed, shall continue to represent a convicted defendant

throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or this court to withdraw. The rule applies to appeals of orders denying postconviction relief. *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989). Even though petitioner Sanders filed an *pro se* amended petition and a *pro se* notice of appeal, his attorney had not been relieved and was thus obligated to continue representing him, which included lodging the Rule 37 record here.

Because attorney Jeff Rosenzweig has undertaken to represent Sanders *pro bono*, we will accept his appearance as counsel and relieve Ms. DeMers. The motion for rule on clerk is granted.

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

Motion granted.

Earl SKILES *v.* STATE of Arkansas

CR 97-515 947 S.W.2d 14

Supreme Court of Arkansas
Opinion delivered July 7, 1997

Keith Watkins, for appellant.

No response.

PER CURIAM. Earl Skiles, by his attorney, has filed a motion for a rule on the clerk which we treat as a motion for belated appeal.

His attorney, Keith Watkins, admits in his motion that the notice of appeal was filed before the judgment 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.

NETTLETON SCHOOL DISTRICT *v.* Pam OWENS

96-1083 948 S.W.2d 94

Supreme Court of Arkansas
Opinion delivered July 14, 1997

Womack, Landis, Phelps, McNeill & McDaniel, by: *Lucinda McDaniel* and *Jeffrey W. Puryear*, for appellant.

Henry, Walden, Halsey & Mixon, by: *Barbara Halsey*, for appellee.

W.H."DUB" ARNOLD, Chief Justice. This case involves the interpretation of the Teacher Fair Dismissal Act, codified at Ark. Code Ann. § § 6-17-1501 to -1510 (Repl. 1993). The trial court found that appellant Nettleton School District failed to strictly comply with the Act when it terminated appellee and cross-appellant Pam Owens's contract for the 1993-94 school year. Both parties appeal the trial court's order. We affirm the trial court's ruling that the termination of Ms. Owens's contract was void.

Ms. Owens entered into a contract with the district to serve as a counselor at University Heights Elementary School for the 1993-1994 academic year. At approximately 8:00 p.m. on January 11, 1994, Ms. Owens, accompanied by her three children, went to her classroom. According to Ms. Owens, prior to going to the school, she had consumed one glass of wine and had taken one tablet of prescription medication for anxiety and stress. She became drowsy while in the classroom and put her head down on her desk. When the children could not awaken her, they called their father, whom Ms. Owens had served with a divorce complaint the previous day. Mr. Owens contacted principal Kay Darby, who in turn contacted administrator Michael Johnson. The three proceeded to Ms. Owens's classroom. According to Ms. Owens, she became upset and began crying when her husband entered her classroom.

According to principal Darby, she found Ms. Owens asleep on the floor of the classroom on the night in question. It was Ms. Darby's opinion that Ms. Owens was intoxicated, as she could smell alcohol on her breath. Mr. Johnson also observed that Ms. Owens had been drinking. Ms. Darby and Mr. Johnson helped Ms. Owens to her car, and Mr. Owens drove the children home.

When Ms. Owens reported to work the following morning, principal Darby asked her to take some time off work. Thereafter, Ms. Owens checked herself into Green Leaf Hospital for treatment for chemical dependency and anxiety. On January 21, superintendent John Sawyer hand delivered a letter to Ms. Owens notifying her that she was suspended. In the letter, Mr. Sawyer stated that, because she had been under the influence of alcohol in her classroom on January 11, he would recommend to the school

board that she be terminated due to her violation of the district's Drug Free Work Policy.

The school board conducted a hearing on February 24, 1994, at which superintendent Sawyer distributed to each board member three documents, which, according to him, led to Ms. Owens's suspension: 1) a memo from principal Darby to Mr. Sawyer dated January 19, 1994, which included not only a summary of the January 11 incident, but reports that Ms. Owens had been suspected of drinking at school activities on May 14, 1993, and September 21, 1993; 2) a letter written by Mr. Johnson dated January 12, 1994, in which he related that Ms. Owens had previously appeared on campus in an intoxicated condition; and 3) Mr. Sawyer's January 21, 1994, notification letter to Ms. Owens. Ms. Owens and her treating physician at Green Leaf, Dr. David Silas, testified at the hearing. According to Dr. Silas, while Ms. Owens had developed a dependency on alcohol, she was not a chronic alcoholic. Ms. Darby and Mr. Johnson also testified at the hearing. The board inquired about the January 11, 1994, incident, as well as the 1993 incidents. At the conclusion of the hearing, the board went into executive session for approximately two hours, after which superintendent Sawyer recommended in an open session that Ms. Owens be terminated. The board voted unanimously to accept Sawyer's recommendation. No other vote was taken.

On March 3, 1994, Ms. Owens received a letter from board president Lennie Hogan. According to Mr. Hogan, the board unanimously concluded that the following were the true reasons for her termination: 1) she violated the district's Drug Free Work Place Policy; 2) she violated the district's personnel policy; 3) she failed to meet the expectations of an elementary counselor; and 4) her termination was in the best interests of the students.

Ms. Owens filed suit in Craighead County Circuit Court, alleging that the board's action was arbitrary and capricious. The trial court conducted a hearing, at which Ms. Owens testified on her own behalf. Following her testimony, the district moved for directed verdict. The trial court denied the motion, after which the district presented the testimony of Ms. Darby, Mr. Johnson,

Mr. Hogan, and board member Richard Carvell. At the conclusion of the hearing, the trial court ruled that Ms. Owens's termination was void due to the district's failure to conduct a separate vote on whether the reasons in support of superintendent Sawyer's recommendation for termination were true. On March 12, 1996, the trial court entered an order awarding Ms. Owens the balance of her contract for the 1993-94 school year, but denying her request for attorney's fees for representation at the board hearing and before the Arkansas Employment Security Division. On April 4, 1996, the trial court entered an order denying Ms. Owens's claim for attorney's fees for representation in the circuit court action.

On direct appeal, the district claims that the trial court erred in failing to grant its motion for directed verdict at the close of Ms. Owens's case. Because the district waived any reliance on its motion when it chose to go forward and put on its own case, its contention is meritless. *See Willson Safety Prods. v. Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990).

The district further challenges the trial court's ruling that it failed to strictly comply with the Act when it terminated Ms. Owens's contract without conducting a separate vote on the truth of each reason given in support of the recommended termination. The provision in question, § 6-17-1510(c), provides as follows:

> Subsequent to any hearing granted a teacher by this subchapter, the board, by majority vote, shall make specific written conclusions with regard to the truth of each reason given the teacher in support of the recommended termination or nonrenewal.

The trial court ruled that the termination of Ms. Owens's contract was void because the district, while voting unanimously to accept superintendent Sawyer's recommendation of termination, failed to conduct a separate vote on the reasons or the truth of the reasons in support of the termination. The district argues that § 6-17-1510(c) does not require a separate vote. Describing the termination of Ms. Owens as "unique," the district contends that the board's vote on the recommended termination and the vote on the reasons given in support of the recommendation were simulta-

neous and thus were in compliance with the Act. In support of its argument, the district refers to board president Hogan's March 3, 1995, letter to Ms. Owens, in which he related the board's unanimous conclusion that there were four true reasons for her termination: 1) violation of the district's Drug Free Work Place Policy; 2) violation of the district's personnel policy; 3) failure to meet the expectations of an elementary counselor; and 4) that Ms. Owens's termination was in the best interests of the students. While the plain language of the statute does not speak in terms of a "separate" vote, § 6-17-1510(c) plainly requires a majority vote on the truth of each reason given the teacher in support of the recommended termination. The board must make specific written conclusions with regard to each of these reasons. Board member Richard Carvell testified that the only vote taken by the board was to accept Mr. Sawyer's recommendation:

> MR. HOGAN: We are in open session to the press. Mr. Sawyer, do you have a recommendation?
>
> MR. SAWYER: Mr. President, my recommendation is that Pam Owens be terminated from Nettleton Schools as of February 25, 1994, and that would begin tomorrow.
>
> MOTION: Ed Wilson, to accept the recommendation of the Superintendent.
>
> SECOND: Richard Carvell
>
> ACTION: 5-0
>
> MOTION: Ed Wilson, to adjourn at 9:00 p.m.
>
> SECOND: Richard Carvell
>
> ACTION: 5-0

Regarding Mr. Hogan's March 5 letter, he admitted at the hearing before the trial court that he did not write it, but merely signed it after it was presented to him by superintendent Sawyer. According to Mr. Carvell, the board did not vote to authorize Mr. Hogan to write the letter to Ms. Owens. Moreover, the parties stipulated that the board's vote to accept superintendent Sawyer's recommendation to terminate Ms. Sawyer's contract was the only vote taken at the hearing and that there was no separate vote on the four issues supporting the termination.

The trial court found that Ms. Owens's termination was void because the board failed to conduct a *separate* vote on the reasons or the truth of the reasons in support of the termination. We conclude that the district did not strictly comply with § 6-17-1510(c) when the board failed to obtain a *majority* vote with regard to the truth of each reason given Ms. Owens in support of the recommended termination. We will affirm the ruling of a trial court if it reached the right result, even though it may be for a different reason. *Summers Chevrolet, Inc. v. Yell County*, 310 Ark. 1, 832 S.W.2d 486 (1992). In this case, the trial court reached the correct result, even though we affirm that result for a reason other than the one stated.

The district's failure to obtain a majority vote with regard to the truth of reasons in support of the recommended termination becomes even more troublesome when considered together with Ms. Owens's point on cross-appeal that the district failed to give her notice that incidents in May 14, 1993, and September 21, 1993, would be considered at the hearing. At the conclusion of the hearing, the trial court addressed this issue as follows:

> [T]he incidents in May and September of 1993, they weren't part of the reasons the superintendent gave in his letter, but there was testimony related to those reasons. In fact, the board members asked questions in the transcript about those two instances, and if those incidents were a part of the reason for termination, then I couldn't uphold the termination because they weren't — The teacher wasn't given notice in the superintendent's letter that those were part of the grounds for termination. I don't know that those were part of the reasons.

The provision at issue, § 6-17-1507(c), provides that "[t]he notice (of termination recommendation) shall include a simple but complete statement of the grounds for the recommendation of termination . . ." Without information that the 1993 incidents would be considered, Ms. Owens's "preparation for a hearing was well nigh impossible." *Hamilton v. Pulaski County Special Sch. Dist.*, 321 Ark. 261, 900 S.W.2d 205 (1995). While Messrs. Carvell and Hogan testified that everyone on the board understood

that he or she was voting only on the four grounds cited in the superintendent's letter, their testimony contradicts the superintendent's opening address at the hearing:

> At this time Mr. President I would like to hand out to you three documents. One is a document . . . written by Kay Darby, the other is (by) Mike Johnson and the third is part of, it is the letter that was hand delivered by Kay Darby and myself to Pam Owens on approximately the twenty-first of January.
>
> Mr. President I know you've had the opportunity to, you and the board, to review the three documents that are in front of you. *Those documents led to the suspension that was issued* and in that suspension there was a recommendation for termination . . .

(Emphasis added.) As the trial court observed, there was testimony regarding both the May and September 1993 incidents at the hearing. The board members asked questions about both incidents. If, contrary to the superintendent's opening remarks, the 1993 incidents indeed were to have no bearing whatsoever on the board's decision to terminate, we question the purpose behind their presentation to the board. Because the notice of termination recommendation did not include the 1993 incidents, we must conclude that the district failed to comply with § 6-17-1507(c). When considering the violation of this provision together with the district's violation of § 6-17-1510(c), we hold that the district's decision to terminate Ms. Owens's contract was void.

Ms. Owens further contends that the district failed to engage in remedial or rehabilitative measures as mandated by § 6-17-1504(c). She also complains that the district did not strictly comply with § 6-17-1507(c), which requires that the superintendent send his notice of termination recommendation by registered or certified mail. Our holding that the termination of Ms. Owens's contract was void due to the district's failure to strictly comply with § § 6-17-1510(c) and 6-17-1507(c) renders moot any claims by Ms. Owens that the district failed to strictly comply with other provisions of the Act, as a district's termination of a teacher is void unless the district strictly complies with *all* provisions of the Act. *See* § 6-17-1503 (emphasis added). With limited

exceptions not applicable here, this court does not address moot issues. *Leonards v. E.A. Martin Machinery Co.*, 321 Ark. 239, 900 S.W.2d 546 (1995).

On cross-appeal, Ms. Owens claims that the trial court erred in refusing to award her attorney's fees. The trial court entered his judgment on Ms. Owens's appeal of her termination on March 12, 1996. In this order, the trial court denied Ms. Owens's request for attorney's fees for representation at the board hearing and before the Employment Security Division. Ms. Owens filed her notice of cross-appeal on April 22, 1996, which recited that she was appealing the trial court's March 12 judgment. On April 4, 1996, the trial court entered an order denying Ms. Owens's request for attorney's fees for representation in the circuit court action.

The district asserts that Ms. Owens's claim for attorney's fees for the circuit court representation is procedurally barred since she did not appeal the April 4 order. We agree, as we have held that the issue of attorney's fees is a collateral matter. *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996). Because no notice of appeal was filed from the April 4 fee order, we will not review this issue.

Regarding the attorney's fees issue pertaining to the board and Employment Security Division representation, neither was a civil action. *See Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995). Thus, the attorney's fees statute, Ark. Code Ann. § 16-22-308 (Repl. 1994), does not apply, and the trial court was correct in denying Ms. Owens's request in his March 12 order. Based on the foregoing, we affirm the decision of the trial court.

Affirmed on direct appeal; affirmed on cross-appeal.

BROWN, J., concurs.

CORBIN, J., dissents.

ROBERT L. BROWN, Justice, concurring. I agree with Justice Corbin that the majority of the court construes Ark. Code Ann. § 6-17-1510(c) erroneously; however, the majority, in my

view, was correct in determining that the school district had failed to comply strictly with Ark. Code Ann. § 6-17-1507(c) (Repl. 1993). For that reason, I concur in the judgment.

The court interprets § 6-17-1510(c) to require two separate votes. Section 6-17-1510(c), however, provides no such thing:

> (c) Subsequent to any hearing granted a teacher by this subchapter, the board, by majority vote, shall make specific written conclusions with regard to the truth of each reason given the teacher in support of the recommended termination or nonrenewal.

Ark. Code Ann. § 6-17-1510(c) (Repl. 1993). This language only mandates that written conclusions be made by majority vote. As counsel for Owens conceded during oral argument, it is not impermissible for one vote to cover both the termination and the conclusions supporting the termination so long as the requirements of the Act are satisfied. Counsel for Owens merely disputed that one vote here was meant for both purposes.

Both school board member Richard Carvell and school board president Lennie Hogan testified that everyone on the board understood what was being voted on in the single vote following their two-hour closed session. The single vote, according to Carvell and Hogan, was to resolve whether the four grounds cited in the notice of termination were true and whether Ms. Owens should be terminated. The parties then stipulated that the other board members' testimony would match that of Carvell and Hogan. Added to this evidence is the follow-up letter from board president Hogan to Ms. Owens informing her that she had been terminated. In the letter, Hogan reported that the school board had unanimously concluded that the four grounds were true.

The Hogan letter coupled with the testimony from board members Carvell and Hogan provide unmistakable proof that the school board, by majority vote, made specific written conclusions regarding the truthfulness of the reasons given for the recommendation of termination in strict compliance with the statute. Nothing else was required to satisfy the elements of Ark. Code Ann.

§ 6-17-1510(c), and the majority errs in saying that more was required.

Nevertheless, the judgment should be affirmed on direct appeal under *Allen v. Texarkana Pub. Sch.*, 303 Ark. 59, 794 S.W.2d 138 (1990), and *Murray v. Altheimer-Sherrill Pub. Sch.*, 294 Ark. 403, 743 S.W.2d 789 (1988). In those cases, we recognized that teachers are entitled to rely on the "simple but complete" statement of reasons for nonrenewal or termination. *See* Ark. Code Ann. § 6-17-1507(c) (Repl. 1993).

In *Allen* we held that the school district failed to make a simple and complete statement of reasons for nonrenewal when specific acts in issue before the board were not mentioned in the recommendation of nonrenewal. We said:

> To allow the superintendent and the board to delve into ad libbed charges renders meaningless the requirements of sections 16-17-1507(b) [sic] and 16-17-1507(c) [sic], and our language in *Murray* that teachers are entitled to rely on a simple and complete statement of reasons as to nonrenewal of their contracts.

Allen v. Texarkana Pub. Sch., 303 Ark. at 63, 791 S.W.2d at 140. This rationale applies equally well to the facts before us, and I agree that the Nettleton School District ran afoul of this principle when it presented two other reports of suspected drunkenness at school without providing proper notice to Owens.

DONALD L. CORBIN, Justice, dissenting. I dissent because I believe the majority's interpretation of Ark. Code Ann. § 6-17-1510 (Repl. 1993) is incorrect, especially given the facts presented in this case. During the hearing before the trial court, testimony was taken from board member Richard Carvell and board president Lennie Hogan. After hearing their testimony, the parties stipulated that the remaining board members would duplicate the statements of Carvell and Hogan; thus, their testimony was automatically received.

Both Carvell and Hogan testified that the board members understood that superintendent Sawyer's recommendation for Owens's termination was based upon the four reasons outlined in

the letter advising her of her suspension. Both members stated that they understood that the purpose of the special hearing was to consider the four issues listed in the letter of suspension. Both members stated that the board had discussed the four issues during executive session, and that when they had returned to the hearing on the record and Sawyer made his recommendation, they understood that they were voting on the four issues as discussed. Hogan testified further that he asked every board member if he understood what the board was voting on, and that everyone understood. Finally, when asked by the trial court what they would have done if they had not agreed with all four reasons for termination, both Carvell and Hogan indicated that had there been any doubt on any of the issues, they would have asked for an individual vote on each of the issues. There was no such doubt, as the board unanimously agreed to terminate Owens on the reasons presented. After the hearing, a letter reflecting the four grounds for termination was sent to Owens from Hogan.

In my opinion, the testimony by the board members indicates that the board complied with the statutory requirements set out in section 6-17-1510(c), which requires nothing more than a majority vote with written conclusions as to the truth of each reason given for termination. The majority's decision would require a separate majority vote on each of the four reasons given for termination. I interpret that section as requiring a majority vote to terminate with written conclusions on each separate reason given. Here, the school district complied with section 6-17-1510(c) in that the board unanimously voted to terminate Owens, after having discussed each of the four reasons for termination in executive session, and a follow-up letter reflecting each of the board's written conclusions was sent to Owens.

Notwithstanding the majority's conclusion that the district failed to give Owens proper notice of the two 1993 drinking incidents, I believe the majority's interpretation of section 6-17-1510(c) is unduly technical, and I respectfully dissent. Furthermore, I believe the fact that the district may not have given Owens notice as to the prior drinking incidents, does not warrant a determination by this court that the district acted arbitrarily or capriciously. To the contrary, any testimony concerning prior

incidents of Owens's intoxication on campus or at school activities was merely extraneous because the district based its determination to terminate Owens on the four grounds set out in the suspension letter.

In light of the trial court's finding that the school district had not acted arbitrarily, capriciously, or without a rational basis in terminating Owens from her employment, I would remand this case with instructions that the trial court enter an order in favor of the school district.

Roderick Leshun RANKIN *v.* STATE of Arkansas

CR 96-1025 948 S.W.2d 397

Supreme Court of Arkansas
Opinion delivered July 14, 1997
[Petition for rehearing denied September 11, 1997.]

[redacted]

Cross, Kearney & McKissic, by: *Gene E. McKissic*, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

DAVID NEWBERN, Justice. Roderick Leshun Rankin, the appellant, was sentenced to death for the capital murders of Zena Reynolds, her mother Ernestine Halford, and her stepfather Nathaniel Halford. Mr. Rankin raises six points on appeal. Most of Mr. Rankin's assignments of error are either meritless or procedurally barred from review. Mr. Rankin's argument concerning the admission of his incriminating custodial statements is, however, well taken. Mr. Rankin asserts that the Trial Court admitted his statements into evidence without first holding a hearing on his motion to suppress. As the record fails to reflect whether a hearing was held on the motion or whether a ruling was made, we reverse and remand. On remand, the Trial Court shall conduct a hearing *on the record* for the limited purpose of determining whether Mr. Rankin's statements were made after knowingly and intelligently waiving his right against self-incrimination.

At trial, the State introduced the testimony of Sonyae Reynolds, who was the sister of victim Zena Reynolds and the daughter of victim Ernestine Halford. Ms. Reynolds testified that she hid in a closet in the victims' home during the attack. She said that she believed the assailant was Mr. Rankin because she saw the assailant wearing clothes that she knew to be similar to Mr. Rankin's clothes. Ms. Reynolds admitted that she did not see the assailant's face and that she had previously told the police that the assailant was *not* Mr. Rankin because she thought the assailant had shorter legs than Mr. Rankin. The type of clothing described by Ms. Reynolds was later discovered at Mr. Rankin's home and admitted into evidence.

Ms. Reynolds's testimony established a motive for the murder. According to her testimony, Mr. Rankin had repeatedly threatened to kill Ms. Reynolds and her family if she left him. The testimony showed that Mr. Rankin and Ms. Reynolds were having "relationship problems" and that Mr. Rankin was often jealous of Ms. Reynolds's other male friends and had hit her on other occasions.

Sharon Carter, who lived next to the victims' home, testified that she saw someone fleeing after hearing the door being kicked open and then gunshots. She said that the person fleeing was tall. Her description of the clothes worn by this person was generally consistent with the description given by Ms. Reynolds and consistent with the type of clothes discovered at Mr. Rankin's home.

The scientific evidence established that a pistol found near the victims' home was used in the murder. That pistol, along with a VCR and some CDs, had been stolen from the home of Ernest R. Demmings, a local fireman. The evidence showed that the VCR and CDs were found at Mr. Rankin's home. The VCR in fact appeared to be hidden under dirty clothes. Although the evidence did not show that the pistol was ever seen at Mr. Rankin's home, the State argued that Mr. Rankin had come into possession of the murder weapon when he came into possession of the VCR and CDs.

Detective James Cooper of the Pine Bluff Police Department testified that he had been interrogating Mr. Rankin on the day of his arrest when he was told the murder weapon had been discovered. Detective Cooper testified that he relayed that information to Mr. Rankin. Another officer showed the pistol to Mr. Rankin, who responded, "You don't have to show me that because I'm going to talk to you." The police then began to record the interrogation. The jury received transcripts of the interrogation and heard the tape played in court.

In the interrogation, the police officers asked Mr. Rankin if he had kicked in the door to the victims' house and shot the victims. They asked Mr. Rankin if he had experienced problems with Sonyae Reynolds; whether such problems led him to commit the murders; whether he was wearing blue shoes on the morning

of the murders; and whether he had seen blood on the shoes. They asked him whether the gun that they had shown him was the murder weapon and whether he had placed it at the location where it was discovered. Mr. Rankin's response to each of these questions was a simple "Yes, sir."

The police also asked Mr. Rankin who he saw first when he entered the house. He answered that he first saw Zena Reynolds and her children on the couch. The officers asked Mr. Rankin what happened next, and he answered, "I don't know. It just—then everybody start running out and I—I guess I got scared." The officers asked him if he then started shooting, and he answered "Yes, sir." Mr. Rankin told the police that he shot Zena Reynolds, then Mrs. Halford, then Mr. Halford. He told the officers that he knew Sonyae Reynolds was also in the house but that he got scared and left. At the conclusion of the first interrogation, Mr. Rankin stated that "this is not what I meant to happen and I'm sorry, but I know that won't bring them back." In the second interrogation that occurred on the afternoon of Mr. Rankin's arrest, the police asked Mr. Rankin how he arrived at the victims' home. He answered, "I walked." Thereafter, Mr. Rankin reached for the tape recorder, turned it off, and indicated that he no longer wished to talk with the police.

1. *Sufficiency of the evidence*

Mr. Rankin argues that the evidence was insufficient to support his capital-murder convictions and that the Trial Court therefore erred in denying his motion for directed verdict. We must address this point before considering other assignments of trial error in order to preserve Mr. Rankin's right to freedom from double jeopardy. *Bradford v. State,* 325 Ark. 278, 283, 927 S.W.2d 329, 331 (1996). We conclude that Mr. Rankin has failed to preserve the question of the sufficiency of the evidence for review and thus affirm on this point without reaching the merits.

Arkansas Rule of Criminal Procedure 33.1 requires a defendant to renew his motion for directed verdict at the "close of the case" in order to preserve for review any question pertaining to the sufficiency of the evidence to support the jury verdict.

Even if a defendant renews his motion at the close of his case-in-chief, the requirement of the rule to renew the motion at the "close of the case" obligates the defendant to renew the motion again at the close of any rebuttal case that the State may present in order to preserve the sufficiency issue for appeal. *Heard v. State*, 322 Ark. 553, 557, 910 S.W.2d 663, 665 (1995); *Christian v. State*, 318 Ark. 813, 816, 889 S.W.2d 717, 719 (1994). The renewal of the motion for directed verdict must occur before the jury is charged. *Webb v. State*, 326 Ark. 878, 879, 935 S.W.2d 250, 251 (1996). An "attempt to renew a motion for directed verdict *after* the jury has been charged is not timely and is not in compliance with the rule." *Claiborne v. State,* 319 Ark. 602, 603, 892 S.W.2d 511, 512 (1995). *See Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994); *Thomas v. State,* 315 Ark. 504, 868 S.W.2d 483 (1994).

Counsel for Mr. Rankin moved for a directed verdict at the close of the State's case and renewed the motion at the close of Mr. Rankin's case-in-chief. The motions were denied. The State then presented its rebuttal case. The State rested, and defense counsel indicated that he had no "surrebuttal." The judge told the jury that the evidence-taking portion of the trial had concluded, and he read the jury instructions. The State made its closing arguments, and defense counsel made his closing arguments. After a recess, the State presented a rebuttal argument.

[redacted] Defense counsel did not attempt to renew the motion for directed verdict until after the State had completed its rebuttal argument. By that time, the jury had been charged, and closing arguments had been concluded. The attempt to renew the motion therefore was not timely. Because the motion was made after the jury had been charged, the motion was not renewed "at the close of the case," and thus the sufficiency argument was not preserved for review..

2. *Mistrial*

Mr. Rankin also argues that his conviction should be reversed because two of the State's witnesses, apparently in violation of an order of the Trial Court granting a motion *in limine,*

testified that blood or possible blood stains were found on Mr. Rankin's tennis shoe. Mr. Rankin contends that this testimony was prejudicial and required the Trial Court to order a mistrial. Prior to trial, Mr. Rankin moved *in limine* to exclude any laboratory reports or testimony showing that human blood had been found on Mr. Rankin's tennis shoe and blue jeans. The motion stated that the Arkansas State Crime Laboratory was unable to determine whether blood found on these items was related to the murders. The record does not contain a ruling from the Trial Court on Mr. Rankin's motion *in limine*.

During the State's case-in-chief, Cathy Ruhl, a forensic crime-scene technician with the Pine Bluff Police Department, testified that she received a pair of navy blue Reeboks and a pair of black-top tennis shoes that the police had taken from Mr. Rankin's home during a consensual search. Ms. Ruhl identified the Reeboks in court and testified without objection that they "were sent to the State Crime Lab to have serology done on them" because one of the shoes contained "possible blood stains." Ms. Ruhl testified without objection that the black-top tennis shoes were not sent to the Lab because "[t]here were no visible signs of stains on the shoes."

Detective Daniel Dykes of the Pine Bluff Police Department later testified that he participated in a consensual search of Mr. Rankin's home along with other officers on the morning of the murders. Detective Dykes stated that the police located one pair of tennis shoes by the couch on which Mr. Rankin had been sleeping and a second pair underneath the couch. Detective Dykes testified that "the tennis shoes had just a little bit of blood on them. Where I saw the blood was on the soles of the tennis shoes."

Defense counsel then objected to Detective Dykes's statement that he observed blood on the shoe and expressed his belief that the Trial Court had granted the motion *in limine* and "had instructed everyone to admonish their witnesses not to make any reference" to suspected blood stains found on Mr. Rankin's shoes. The judge indicated that defense counsel's characterization of his ruling was "correct." The judge recalled that, due to the incon-

clusive evidence linking any blood to Mr. Rankin or to the victims, he had ordered the State not to ask questions about blood stains found on Mr. Rankin's shoes and to admonish its witnesses "not to bring it up." The judge indicated that the testimony of Ms. Ruhl and Detective Dykes violated his order.

During an in-chambers conference concerning the objection, counsel for Mr. Rankin mentioned the need for either a strong admonition to the jury to disregard the references to blood on the clothing or a mistrial. During the discussion of those possibilities, the Trial Court twice asked counsel what he was being asked to do. No motion for a mistrial was offered by counsel whose final word on the subject was the following:

> Well, I'll put it in my words, your Honor. I would ask the Court to go out and admonish the jury to disregard the testimony regarding any existence of blood on Mr. Rankin's shoes and then further admonish the jury that, in fact, it is the understanding of the Court from the parties that there is no credible evidence of blood relating Mr. Rankin to the scene of this crime.

The judge and counsel agreed that a cautionary instruction would be necessary in light of the testimony given by Ms. Ruhl and Detective Dykes. At the conclusion of Mr. Rankin's case-in-chief, the judge indicated to counsel that he would give the instruction, and counsel responded, "That's all we want." Prior to the State's rebuttal case, the judge gave the following instruction:

> Ladies and gentlemen, before we go any further, I have been asked by the attorneys that—to tell you that in response to some testimony that actually inadvertently was brought out earlier in the trial the attorneys have assured me that there is no scientific evidence available to prove that any substance found on the defendant's tennis shoes was related to or came from the crime scene.

[redacted] Mr. Rankin now argues that the Trial Court erred by failing to grant a mistrial on account of the testimony given by Ms. Ruhl and Detective Dykes. Even if we assume that the testimony violated the Trial Court's order granting Mr. Rankin's motion *in limine*, we cannot say that the Trial Court erred by fail-

ing to order a mistrial in response to the violation in view of the ultimate failure of counsel to seek a mistrial and their agreement to the requested admonition. Generally speaking, a trial judge is under no duty to declare a mistrial *sua sponte*. *See, e.g., Lovelady v. State,* 326 Ark. 196, 199, 931 S.W.2d 430, 432 (1996). We typically decline to hold that a judge commits reversible error by failing to order a mistrial on his own motion when none was requested. *Edwards v. State,* 315 Ark. 126, 864 S.W.2d 866 (1993); *Meadows v. State,* 291 Ark. 105, 722 S.W.2d 584 (1987); *Floyd v. State,* 278 Ark. 86, 643 S.W.2d 555 (1982). Mr. Rankin "cannot complain on appeal because he received all of the relief he asked for at trial." *Stephens v. State,* 328 Ark. 81, 90, 941 S.W.2d 411, 416 (1997).

3. *Mental retardation*

Mr. Rankin further argues that the Trial Court erred by refusing to find that Mr. Rankin was mentally retarded at the time of the commission of the murders and was therefore ineligible for the death penalty under Ark. Code Ann. § 5-4-618 (Repl. 1993).

According to Ark. Code Ann. § 5-4-618(b), "[n]o defendant with mental retardation at the time of committing capital murder shall be sentenced to death." This provision was enacted by Act 420 of 1993. The statute provides that the defendant "has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence." § 5-4-618(c). A defendant is entitled to a rebuttable presumption of mental retardation if his intelligence quotient ("IQ") is 65 or below, § 5-4-618(a)(2), but the definition of "mental retardation" encompasses more than an IQ score. The statute defines mental retardation as follows:

> (A) Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age eighteen (18); and
>
> (B) Deficits in adaptive behavior.

§ 5-4-618(a)(1)(A)-(B).

A defendant who wishes to invoke this provision must do so by written motion prior to trial. § 5-4-618(d)(1). If such motion is filed, the trial court must determine prior to trial whether the defendant is in fact mentally retarded. § 5-4-618(d)(2).

A finding by the trial court that the defendant is mentally retarded prevents the jury from being "death qualified." If the mentally retarded defendant is convicted of capital murder, the jury is required to sentence him to life imprisonment without the possibility of parole. § 5-4-618(d)(2)(B).

If the trial court rejects the defendant's argument and finds that the defendant is not mentally retarded, then the defendant may take his case to the jury. Despite the trial court's adverse determination, "the defendant may raise the question of mental retardation to the jury for determination de novo during the sentencing phase of the trial." § 5-4-618(d)(2)(A). If the defendant proceeds under this provision, the jury shall receive a special verdict form on mental retardation when it retires to consider mitigating and aggravating circumstances. § 5-4-618(d)(2)(A)(i). If the jury unanimously finds that the defendant was mentally retarded at the time of the commission of the capital offense, he is automatically sentenced to life imprisonment without the possibility of parole. § 5-4-618(d)(2)(A)(ii).

In a pretrial motion, Mr. Rankin moved the Trial Court to find him mentally retarded pursuant to § 5-4-618(d)(1). The Trial Court held a hearing on the motion, heard testimony, and ultimately denied the motion. Mr. Rankin elected not to present the issue of mental retardation to the jury under § 5-4-618(d)(2)(A). Thus, he appeals only the Trial Court's determination that he was not mentally retarded under this statute.

[redacted] Although we have discussed this statute in past cases, *see Reams v. State,* 322 Ark. 336, 909 S.W.2d 324 (1995); *Fairchild v. Norris,* 317 Ark. 167, 876 S.W.2d 588 (1994); *Fairchild v. Norris,* 314 Ark. 221, 861 S.W.2d 111 (1993), we have not announced the standard by which we will review a trial court's ruling on the question of mental retardation under § 5-4-618. That issue is now before us. We analogize this case to those in which we have reviewed a trial court's determination of a defendant's fitness to

stand trial under Ark. Code Ann. § 5-2-302 (Repl. 1993). The standard there is whether the trial court's finding is supported by substantial evidence. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). We adopt the same standard for reviewing a trial court's determination under § 5-4-618. Thus, a trial court's finding that a defendant is not mentally retarded under § 5-4-618 will be affirmed if it is supported by substantial evidence.

The Trial Court's determination that Mr. Rankin was not mentally retarded at the time of the commission of the murders is supported by substantial evidence. At the hearing on Mr. Rankin's motion, the Trial Court received the testimony of David Nanak, a psychological examiner for the Southeast Arkansas Mental Health Center. Mr. Nanak testified that he administered the Wechsler Adult Intelligence Scale—Revised examination to Mr. Rankin in February 1995. As Mr. Nanak explained, this examination measures a person's IQ. Mr. Rankin scored a 66 on the February 1995 examination. According to Mr. Nanak, the test had a margin of error of 2.94 points.

Mr. Nanak testified that Mr. Rankin's IQ score of 66 placed him "in the mild range of mental retardation," which was from 50-69. Mr. Nanak explained that his conclusion was "based strictly on the numbers obtained through the intellectual testing. It is not a diagnosis. That was a classification he tested into."

However, Mr. Nanak testified that he reviewed the results of a second IQ test administered in September 1995 by Dr. Philip Murphy in Oklahoma City. Dr. Murphy's evaluation, done at the behest of defense counsel, showed that Mr. Rankin had an IQ of 72. Mr. Nanak testified that this reflected a six-point increase from his first score and that the standard variance between tests was three points. Mr. Nanak stated that this score removed Mr. Rankin from the "mild mental retardation" range. Mr. Nanak stated that it was his clinical impression that, based on the results of the September 1995 IQ test, Mr. Rankin was more accurately classified as "borderline intelligent," although it appears from the record that Dr. Murphy concluded that Mr. Rankin was "mildly to borderline mentally retarded." Mr. Nanak testified that Dr. Murphy's testing produced a "closer estimate of [Mr. Rankin's]

actual functioning level" than the February 1995 evaluation. Mr. Nanak testified that Dr. Murphy's "testing is probably more valid, more accurate than mine." Mr. Nanak stated that he endorsed the results obtained by Dr. Murphy's evaluation.

Mr. Nanak explained that the six-point difference in Mr. Rankin's two IQ scores was probably due in part to Mr. Rankin's adjustment to his incarceration. Mr. Nanak testified that he administered the February 1995 exam to Mr. Rankin in the county jail only a few months after his arrest. Mr. Nanak testified that Mr. Nanak probably had a high anxiety level at that point but that, by September 1995, he had probably adjusted. Mr. Nanak testified that he would expect Mr. Rankin to operate at a higher functioning level after having the opportunity to adjust to incarceration over the course of five or six months. Mr. Nanak conceded that a person who retakes an IQ test might achieve a higher score based simply on acquiring some degree of familiarity with the test, but he said that, in his experience, this would produce only a one- or two-point increase. Mr. Rankin achieved a six-point increase.

Mr. Nanak further testified that he administered the Wide Range Achievement test, an academic achievement test, and determined that Mr. Rankin was operating on fourth- or fifth-grade levels in reading and arithmetic. Mr. Nanak stated that Mr. Rankin told him that he had an eighth-grade education. He concluded that Mr. Rankin was functioning "somewhat behind" his education level.

Finally, Mr. Nanak testified that he conducted an interview with Mr. Rankin in which he found that Mr. Rankin was able to communicate, to understand what he is hearing, and to respond in a coherent manner. Mr. Nanak stated that he believed Mr. Rankin was concerned about his appearance and his place in public and that he was able to get along with others, function within a group, sustain relationships, and take care of his personal needs.

Dr. John Anderson, a psychologist with the forensic unit at the Arkansas State Hospital, testified that he had analyzed the evaluations performed by Mr. Nanak and Dr. Murphy and concluded that their reports were "reasonable assessments of [Mr. Rankin's]

functioning at the time he was evaluated." Dr. Anderson testified about the increase in Mr. Rankin's IQ score from a 66 to a 72. He explained that the five- to six-month interval between the two tests made it unlikely that the increase was due to any "test-retest effect." Dr. Anderson also indicated that the score on the portion of Mr. Rankin's IQ test that would have been most likely to increase on account of the "test-retest effect" did not increase. Finally, Dr. Anderson testified that he found Mr. Rankin to be polite but somewhat evasive, uncooperative, and malingering. Dr. Anderson stated that Mr. Rankin was able to understand what he was telling him and that he was "competent," "coherent," and was not suffering from a mental disease or defect at the time of the murders.

Mr. Rankin argues in his brief that the testimony introduced at the hearing established his entitlement to the rebuttable presumption of mental retardation under § 5-4-618(a)(2). We disagree. The testimony showed that Mr. Rankin scored a 66 on his first IQ test and a 72 on his second IQ test. These scores did not entitle Mr. Rankin to the presumption under § 618(a)(2). Under that provision, a defendant is entitled to the presumption only if his IQ is 65 or below. Mr. Rankin's scores do not fall within this range.

Moreover, Mr. Nanak testified that he believed the score of 72 was more accurate than the score of 66. He further indicated that he believed Mr. Rankin was "borderline intelligent" rather than "mildly mentally retarded." That testimony constitutes substantial evidence in support of the Trial Court's finding. We reject Mr. Rankin's suggestion that the Trial Court was obligated to accept the score of 66 over the score of 72 or to "reduce" these scores by the possible three-point margin of error or "average" them together in some way.

4. *Change of venue*

Mr. Rankin also argues on appeal that the Trial Court erred by denying his motion to change the venue for his trial from Jefferson County. We affirm on this point.

Mr. Rankin filed a pretrial motion seeking a change of venue pursuant to Ark. Code Ann. § 16-88-204 (1987), and Article 2, § 10, of the Arkansas Constitution. The motion alleged that it would be "impossible to select a fair and impartial jury from Jefferson County as a result of pre-trial publicity" and recited various instances of such publicity including a newspaper article that had reprinted Mr. Rankin's custodial statements and a radio announcement that urged listeners to attend the trial of "the man who killed" the victims. The motion asserted that there had been "much discussion" about the case throughout the city.

Attached to Mr. Rankin's motion were affidavits from six Pine Bluff citizens who asserted that Mr. Rankin would not be able to "receive a fair trial in Jefferson County, Arkansas" on account of the press coverage and the "frequent" and "general" discussions about the case that had occurred throughout the local community.

The Trial Court held a hearing on Mr. Rankin's venue motion. Mr. Rankin first introduced the testimony of James Gregory, a Pine Bluff resident who sells insurance and also works as a funeral director and mortician. Mr. Gregory testified that he had frequent contact with "the general public" through his work and heard the case "discussed in several different places." Mr. Gregory stated that the people that he had encountered were of the "general opinion" that Mr. Rankin was guilty. According to Mr. Gregory, the public was simply wondering whether Mr. Rankin would receive the death penalty or life imprisonment. Mr. Gregory admitted that he encountered this sentiment mostly in the course of talking with Pine Bluff citizens.

Mr. Rankin also introduced the testimony of James Claybon, the general manager of KYDE, the Pine Bluff radio station that aired the announcement mentioned above. Mr. Claybon estimated that the announcement had been "sporadically" aired some twenty-seven times over the course of two or three weeks. Mr. Claybon indicated that KYDE is a twenty-four-hour gospel station on the AM frequency. He conceded that the station's signal reaches only 68 percent of Jefferson County's physical area and misses entire areas of the county and the city of Pine Bluff. He

could not pinpoint how much of the county's roughly 90,000 population receives the signal, but he testified that the Arbitron company had estimated that the station had roughly 38,000 mostly African-American listeners over a multi-county area that included Jefferson County.

Finally, Mr. Rankin presented the testimony of Jessie Pearl Jackson, a Pine Bluff resident who owns her own beauty shop. Ms. Jackson testified that she caters to men and women customers of various races and ages, approximately 75 percent of whom are African-American. Ms. Jackson testified that she sees an average of 30 customers per week, many of whom are from Jefferson County. Ms. Jackson testified that there was a consensus among her customers that Mr. Rankin is guilty and that her customers wondered why the State had to waste money on a trial. She asserted that if there were any people in the county who could give Mr. Rankin a fair trial, "they are not coming to my salon."

Arkansas Code Ann. § 16-88-201 provides as follows:

> Any criminal cause pending in any circuit court may be removed by the order of the court, or by the judge thereof in vacation, to the circuit court of another county whenever it shall appear, in the manner provided in this subchapter, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had in that county.

The most important aspect of the issue concerning the effect of pretrial publicity upon the minds of the inhabitants of the county in which the case is to be tried is whether a fair jury can be selected. At the outset of Mr. Rankin's trial, the Trial Court mentioned that there had been some press coverage of the case. He asked the pool of potential jurors if they had independent knowledge of the case beyond the press accounts. Some answered yes; many said they had not formed an opinion about Mr. Rankin's guilt or innocence and would not be biased. Others mentioned that they would be biased, and they were excused. Defense counsel specifically asked if anyone had heard radio-station announcements, and none responded affirmatively. Many could not recall hearing any pretrial publicity. Those who could

recall hearing press coverage stated that they had formed no opinions as to Mr. Rankin's guilt or innocence and could be fair and impartial and decide the case based on what was presented to them. Then the judge asked what he called a "catch-all question":

> . . . ladies and gentlemen, is there anything that any of you know about your situation, your mind set, or whatever, that would keep you from listening to the testimony and the evidence and making a decision at the conclusion of this case based only on what you hear in this courtroom in the way of evidence and the law as the Court would instruct you?

There was no response, and the Trial Court responded, "All right."

[redacted] "There can be no error in the denial of a change of venue if an examination of the jury selection shows that an impartial jury was selected and that each juror stated he or she could give the defendant a fair trial and follow the instructions of the court." *Bell v. State,* 324 Ark. 258, 264, 920 S.W.2d 821, 824 (1996). Nor was Mr. Rankin entitled to jurors who were "totally ignorant of the facts surrounding the case, as long as they can set aside any impression they have formed and render a verdict solely on the evidence at trial." *Gardner v. State,* 296 Ark. 41, 52, 754 S.W.2d 518, 523 (1988).

[redacted] In addition, we note that Mr. Rankin used only eleven of the twelve peremptory challenges he was allowed during the selection of the jurors. His counsel attempted to use the twelfth challenge against a prospective alternate juror after the twelve regular jurors had been chosen, but they were not allowed to do so. That ruling was correct. *See* Ark. Code Ann. § 16-30-102(c) (Repl. 1994). Having failed to exhaust his peremptory challenges prior to the seating of the jury, Mr. Rankin is in no position to demonstrate prejudice from a ruling denying his venue motion. *Oliver v. State,* 322 Ark. 8, 907 S.W.2d 706 (1995).

[redacted] In light of the testimony introduced at the hearing which showed less-than-pervasive publicity, the failure of Mr. Rankin to demonstrate during *voir dire* that there were publicity-affected jurors, and the fact that he did not use all his peremptory

challenges, we cannot say that the Trial Court abused his discretion by denying Mr. Rankin's change-of-venue motion.

5. Death penalty

Mr. Rankin also argues that the Trial Court erred by denying his motion to declare the death-penalty statute unconstitutional. We also affirm on this point.

The State charged Mr. Rankin with three counts of capital murder pursuant to Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1993), which provides that "[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 . . . ." The information did not charge Mr. Rankin with any other offense, and Mr. Rankin did not object to the capital-murder instructions or request that instructions be given on any other offense.

In a pretrial motion, Mr. Rankin requested the Trial Court to quash the information on the ground that § 5-10-101(a)(4) is unconstitutional due to its "overlap" with the first-degree murder statute at § 5-10-102(a)(2). He asserted that first-degree murder is a "lesser-included offense" of capital murder and that the two offenses were "identical." He claimed that he would have a right to an instruction on any lesser-included offenses at trial and that due process required that the jury be able to consider, and convict on, any lesser-included offense. Mr. Rankin also claimed that our statutory scheme is unconstitutional because it fails to provide the jury with any standard by which to differentiate between the offenses of capital murder and first-degree murder. Mr. Rankin further contended that our statutory scheme is unconstitutionally void for vagueness and that it fails to guarantee equal protection of the laws because it provides for different punishments for the same conduct depending on whether the State charges the defendant with capital murder or first-degree murder.

[redacted] Mr. Rankin repeats most of these arguments on appeal. With respect to the argument that the jury was provided with no standard to differentiate between capital murder and first-degree murder, we point out that Mr. Rankin was not charged

with first-degree murder and that Mr. Rankin did not request an instruction on that offense. The only choice given to the jury was to convict on the capital-murder counts or to acquit. In any event, we have rejected Mr. Rankin's "overlap" and "vagueness" arguments in numerous cases. *See, e.g., Lee v. State,* 327 Ark. 692, 942 S.W.2d 231 (1997); *Nooner v. State,* 322 Ark. 87, 907 S.W.2d 677 (1995). We also have rejected the claim that our statutory scheme creates an arbitrary classification in violation of the Equal Protection Clause. *See, e.g., Miller v. State,* 273 Ark. 508, 621 S.W.2d 482 (1981). *See also Cannon v. State,* 286 Ark. 242, 690 S.W.2d 725 (1985); *Penn v. State,* 284 Ark. 234, 681 S.W.2d 307 (1984).

6. Suppression hearing

We finally address Mr. Rankin's assertion that the Trial Court erred by admitting into evidence his custodial statements without conducting a suppression hearing. We remand the case so that such a hearing may be conducted.

Mr. Rankin gave two incriminating statements to the police on the day of his arrest that are discussed in detail at the outset of this opinion. In a pretrial motion filed on September 12, 1995, Mr. Rankin moved to suppress the statements. In his motion, he claimed that he made the statements while suffering from mental disease or defect and that this condition rendered him incapable of knowingly and intelligently waiving his right against self-incrimination. Mr. Rankin asserted that he made the statements as a result of fatigue and confusion, his youth and lack of education, mild retardation, and his inability to understand the nature of the questioning. Mr. Rankin alleged that he did not realize he was confessing to the murder of three people and that he was only "agreeing" to the police's statements. Mr. Rankin further alleged that he did not realize that he was entitled to counsel before answering the detectives' questions. He claimed he had requested to see his mother and brother so that they could get him a lawyer, but he said that he was advised by the detectives that he did not need a lawyer. Mr. Rankin maintained that admitting the confession into evidence would violate his right against self-incrimina-

tion, and he specifically requested that the Trial Court hold a hearing on, and ultimately grant, his motion to suppress.

The record contains no account of any hearing that occurred in response to Mr. Rankin's suppression motion, and it contains no ruling by the Trial Court on the motion.

During the State's case-in-chief, the prosecutor was examining Detective James Cooper of the Pine Bluff Police Department about his interrogation of Mr. Rankin. The prosecutor asked Detective Cooper a question concerning statements made by Mr. Rankin that were not recorded. Defense counsel objected that such statements were not admissible because they were not recorded, and the Trial Court overruled the objection. Shortly thereafter, the prosecutor offered into evidence Mr. Rankin's inculpatory statements that were recorded, and they were received without objection.

According to Ark. Code Ann. § 16-89-107(b)(1) (1987),

> . . . the determination of fact concerning the admissibility of a confession shall be made by the court when the issue is raised by the defendant; the trial court shall hear the evidence concerning the admissibility and the voluntariness of the confession out of the presence of the jury, and it shall be the court's duty before admitting the confession into evidence to determine by a preponderance of the evidence that the confession has been made voluntarily.

Here, the admissibility of Mr. Rankin's custodial statements was clearly "raised by the defendant" by way of Mr. Rankin's pretrial motion to suppress. That motion asserted that the statements should be suppressed because they were not made following a knowing and intelligent waiver by Mr. Rankin of his right against self-incrimination. Despite the State's contention that Mr. Rankin "abandoned" his suppression effort by failing to object to the admissibility of the statements when they were introduced at trial, Mr. Rankin's pretrial suppression motion was all that was required by the statute to raise the issue to the Trial Court and trigger its obligation to hold a hearing and address Mr. Rankin's claims. *Moore v. State,* 303 Ark. 1, 791 S.W.2d 698 (1990); *Bucy v. State,* 271 Ark. 768, 610 S.W.2d 576 (1981). We

know of no authority, and the State cites none, that requires a defendant to raise the question of the admissibility of his incriminating custodial statements more than once.

[redacted] As the record contains no account of any hearing held by the Trial Court in response to Mr. Rankin's motion, caution requires that we remand this case with instructions to the Trial Court to conduct a hearing on the record for the limited purpose of determining whether Mr. Rankin made the statements to the police after knowingly and intelligently waiving his constitutional rights. *See Moore v. State, supra; Chenowith v. State,* 247 Ark. 472, 445 S.W.2d 889 (1969)(Fogleman, J., concurring); *Estep v. State,* 244 Ark. 843, 427 S.W.2d 535 (1968) (Fogleman, J., concurring).

[redacted] Section 16-89-107(b)(1) directs the trial court to "hear the evidence concerning the admissibility and the voluntariness" of the custodial statement and to determine, before admitting the statement into evidence, whether it has been made "voluntarily." We recognize that Mr. Rankin did not move to suppress his incriminating statements on the basis that they were involuntarily given. Rather, he based his motion on the assertion that he failed to make a knowing and intelligent waiver of his constitutional rights prior to making the statement. As we have noted, there is a difference between the concept of an involuntary statement and a statement made without a knowing and intelligent waiver of one's constitutional rights. *See Mauppin v. State,* 309 Ark. 235, 246-47, 831 S.W.2d 104, 109-110 (1992).

[redacted] The language of § 16-89-109(b)(1) appears to require the trial court to consider only whether the statement was "voluntary" when the admissibility of the statement has been raised by the defendant. Our cases, however, clearly require the trial court, if the defendant has alleged that his statement is inadmissible due to the lack of a waiver, to consider in a suppression hearing whether the statement was made after a knowing and intelligent waiver of his constitutional rights. *See, e.g, Moore v. State, supra.* Depending on the argument presented by the defendant in his suppression motion, a trial court should determine in the hearing whether the statement is inadmissible on account of its involunta-

riness or the lack of an effective waiver, or perhaps both of these grounds.

[redacted] As we have done in other cases, *see Williams v. State,* 327 Ark. 97, 102, 938 S.W.2d 547, 550 (1997), we employ the "limited-remand procedure" here and direct the Trial Court on remand to hold a hearing on the record for the limited purpose of considering the arguments and allegations presented in Mr. Rankin's pretrial suppression motion. If the Trial Court determines, at the conclusion of the hearing, that the statements were not given after a knowing and intelligent waiver, the Trial Court should suppress the statements and order a new trial. If the Trial Court determines that Mr. Rankin made his statements after knowingly and intelligently waiving his constitutional rights, a new trial will not be required. *Moore v. State, supra; Harris v. State,* 271 Ark. 568, 609 S.W.2d 48 (1980); *Guinn v. State,* 27 Ark. App. 260, 771 S.W.2d 290 (1989).

7. *Ark. Sup. Ct. R. 4-3(h)*

In accordance with Ark. Sup. Ct. R. 4-3(h), the record has been reviewed for erroneous rulings prejudicial to Mr. Rankin, and none has been found.

Remanded.

C.W. RICHARDSON, Greg Richardson, and CWR Construction, Inc. *v.* Carl and Norlene RODGERS

96-483 947 S.W.2d 778

Supreme Court of Arkansas
Opinion delivered July 14, 1997

Anderson & Kilpatrick, by: *Randy Murphy*, for appellants.

Boswell, Tucker, Brewster & Hicks, by: *Ted Boswell* and *John T. Holleman*, for appellees.

DAVID NEWBERN, Justice. This is an appeal from a default judgment. The appeal is dismissed for failure to comply with Ark. R. Civ. P. 54(b).

Carl Rodgers alleged he was seriously injured by a falling water pipe while working on renovation of the Pulaski County Courthouse. Mr. Rodgers was employed by IK Electric Service

Co., a subcontractor on the project. Mr. Rodgers and his wife, Norlene Rodgers, brought a negligence action to recover damages resulting from his injury and Ms. Rodgers's loss of consortium. The defendants were C.W. Richardson, Greg Richardson, CWR Construction, Inc. (referred to collectively as "CWR"), and Central Arkansas Risk Management ("CARM"). CWR Construction, Inc., was named as the prime contractor. The action against CARM was a direct action against the County's insurer.

In a timely answer, CARM denied liability. American States Insurance Company ("American"), the workers' compensation insurance carrier for IK Electric Service Co., filed a motion to intervene and a complaint in intervention. CWR failed to answer, and a default judgment was entered against them. A hearing was held on damages only, and awards totaling $1,450,000 and $50,000 were awarded to Mr. and Mrs. Rodgers, respectively, against CWR.

Based on its contention that CARM's answer denying negligence inured to CWR's benefit, and thus that there had been no default, CWR moved to set the default judgment aside pursuant to Ark. R. Civ. P. 55(c).

American's intervention complaint sought subrogation to the rights of Mr. Rodgers against the defendants. It stated that American had paid Mr. Rodgers $10,783.95 in medical payments and $19,192.42 in temporary total disability and permanent disability payments. The complaint also alleged that the payments to Mr. Rodgers were for the injuries he received due to CWR's negligence. The record does not disclose the disposition of American's claim.

The parties have not raised the question of the finality of the judgment or the failure to comply with Rule 54(b). When counsel were asked about the matter during oral argument, the response was that the claim of American was only a subrogation matter somehow subsumed in the position taken by the Rodgerses.

While it is true that American and the Rodgerses are on the same side vis-à-vis CWR and CARM, that is not so as between

them, and we have no idea whether American's intervention claim was adjudicated.

The failure to comply with Rule 54(b), indicated by the absence of an order adjudicating the rights of all parties is a jurisdictional issue that we are obligated to raise on our own. *Maroney v. City of Malvern,* 317 Ark. 177, 876 S.W.2d 585 (1994); *State Farm Mut. Auto Ins. Co. v. Thomas,* 312 Ark. 429, 850 S.W.2d 4 (1993). To be final and appealable, an order must cover all of the parties and all of the claims. *Maroney v. City of Malvern, supra; Williamson v. Misemer,* 316 Ark. 192, 871 S.W.2d 396 (1994).

An order is not appealable when it fails to mention an intervenor's claim and contains no recitation of facts which would allow a piecemeal appeal under Ark. R. Civ. P. 54(b). *Kinkead v. Spillers,* 327 Ark. 552, 940 S.W.2d 437 (1997); *Maroney v. City of Malvern,* 317 Ark. 177, 876 S.W.2d 585 (1994); *Martin v. National Bank of Commerce,* 316 Ark. 83, 870 S.W.2d 738 (1994); *South County, Inc. v. First Western Loan Co.,* 311 Ark. 501, 845 S.W.2d 3 (1993).

In *Martin v. National Bank of Commerce, supra,* we wrote,

> We do not reach the merits of appellant's claim because the trial court did not dispose of the intervenor's claim as is necessary pursuant to ARCP Rule 54(b). The order appealed from does not mention the intervenor's claim nor does it mention any facts that would allow a piecemeal appeal under Rule 54(b). As was the situation in *South County, Inc. v. First Western Loan Co.,* 311 Ark. 501, 845 S.W.2d 3 (1993), the record does not reflect what happened to the intervenor's claim. Therefore the order appealed from disposes of less than all the claims in this suit and is not a final, appealable order. *Id.*

Most recently in *Kinkead v. Spillers, supra,* we again dismissed because we found no mention of the disposition of the claim of an intervening lienor, Boatmen's Bank, in a property dispute between two other parties. We noted that intervention had been granted and thus there was no issue in that respect but we could not tell what had happened to the claim. Here we cannot even tell whether the intervention of American was allowed or whether

there may be issues concerning the intervention which may be subject to appeal. In the *Kinkead* case we wrote that the lien of Boatmen's Bank could not be protected by one of the parties to the underlying litigation and that "Boatmens' claim is not merely collateral to the [underlying dispute] and should be decided when disposing of the [underlying dispute]." The same is true of American's subrogation claim.

CWR has failed to meet its burden of producing a record showing that the jurisdictional requirements of Rule 54(b) have been met. *See Cortese v. Atlantic Richfield,* 320 Ark. 639, 898 S.W.2d 467 (1995).

Appeal dismissed.

GLAZE, IMBER, and THORNTON, JJ., not participating.

Special Justices WARREN E. DUPWE, PAUL E. LINDSEY, and DAVID G. NIXON join in this opinion.

OUACHITA WILDERNESS INSTITUTE *v.* Mark MERGEN

97-354 947 S.W.2d 780

Supreme Court of Arkansas
Opinion delivered July 14, 1997
[Petition for rehearing denied September 11, 1997.]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Daily & Woods, P.L.L.C., by: *Robert W. Bishop*, for appellant.

Walters, Hamby & Verkamp, by: *Michael Hamby*, for appellee.

DONALD L. CORBIN, Justice. This is an appeal by Appellant Ouachita Wilderness Institute, Inc. ("OWI"), who was found negligent and liable for damages to Appellee Mark Mergen's pickup truck, which had been taken by two juveniles who left OWI without authorization. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(15) (as amended by *per curiam* July 15, 1996). We affirm.

Facts and Procedural History

Ouachita Wilderness Institute, Inc., operates as a juvenile rehabilitation camp housing juvenile offenders under Ark. Code Ann. § 9-28-203 (Repl. 1995), directed by contract with Associated Marine Institute, Inc. ("AMI"), a contractor with the State of Arkansas Department of Human Services, Division of Youth Services. Appellee Mark Mergen, an employee of OWI, serves as an outdoor instructor. While working at OWI on December 24, 1995, Appellee placed his personal keys, which included the keys to his pickup truck, in his coat pocket. Appellee supervised a group of five juveniles while they cleaned the education building. During this time, one of those students took the keys from Appellee's coat pocket while the coat was left in the "team leaders" office, which was not locked. He later returned the key ring to Appellee's coat pocket. Appellee had no knowledge of the fact that his keys were taken.

Later that evening, the juveniles were in the dining hall watching movies. After a friend came to visit, Appellee left the area to submit a request for time off in the administration building next door. Upon his return, he noticed two juveniles were missing. The other supervisor, Cliff Roach, helped in trying to locate them. During the search, Appellee noticed his pickup truck was missing. He checked his key ring and found his truck keys were missing. The two juveniles had taken the pickup truck and were later involved in a high-speed police chase, which terminated when the truck crashed and was totalled. Appellee sued Appellant, AMI, and Eddie Prevost, the Executive Director of OWI. The trial court granted summary judgment to AMI prior to trial. A jury found Appellant negligent and awarded Appellee $26,400.

On appeal, Appellant argues the trial court erred as follows: (1) In failing to grant its motion for directed verdict; (2) in refusing to give its requested jury instruction on assumption of risk; (3) in instructing the jury that the measure of damages included incidental expenses; and (4) in failing to dismiss the complaint on a theory of charitable immunity.

Motion for Directed Verdict

Appellant argues that the trial court erred in failing to grant its motion for directed verdict on the following bases: (1) Appellee's failure to establish a case of negligence concerning the duty of Appellant to provide a safe workplace for Appellee; (2) Appellee's failure to establish that any negligence of Appellant was the proximate cause of Appellee's damages; and (3) the evidence established Appellee's fault to be greater than fifty percent.

Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence, which is evidence that goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Southern Farm Bureau Casualty Ins. v. Allen*, 326 Ark. 1023, 934 S.W.2d 527 (1996). It is not our province to try issues of fact, we simply review the record for substantial evidence to support the jury's verdict. *Id.* In determining whether there is substantial evidence, we view the evidence in the light most favorable to the party against whom the verdict is sought and give the evidence its strongest probative force. *Id.*

To establish a prima facie case in tort, a plaintiff must show that damages were sustained, that the defendant was negligent, and that such negligence was a proximate cause of the damages. *Id.* Negligence is the failure to do something which a reasonably careful person would do and a negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner. *Id.* While a party can establish negligence by direct or circumstantial evidence, that party cannot rely on inferences based on conjecture or speculation. *Id.*

Appellant first argues that the employer in this case owed no duty to Appellee. Appellee claimed that Appellant was negligent and should have provided a secure place for Appellee's keys, provided more supervision for its juveniles, locked the gate on the premises, and immediately notified the state police after the students were found to be missing. Appellant argues that there is no law creating a duty for employers to perform these acts.

Appellant also argues that the Fireman's Rule applies in this case, as the risk is one in which the employee has a duty to accept. The Fireman's Rule (also known as the professional-rescuer doctrine) generally provides that a professional firefighter may not recover damages from a private party for injuries the fireman sustained during the course of putting out a fire even though the private party's negligence may have caused the fire and injury. *Waggoner v. Troutman Oil Co., Inc.*, 320 Ark. 56, 894 S.W.2d 913 (1995). The Fireman's Rule has been justified based on public policy considerations, because the purpose of the firefighting profession is to confront danger. *Id.* Public policy would be violated if a citizen was said to invite private liability merely because he happened to create a need for public services. *Id.*

Although Appellant's assertion that it had no duty to protect Appellee's property may have merit, we do not decide the issue because Appellant failed to clearly set out the theory of duty in its motion for directed verdict. At trial, Appellant did not elect to put on a defense. At the conclusion of Appellee's case, Appellant's counsel stated:

> Defendants move for directed verdict, and I'm going to follow it with reasons, your Honor. The plaintiff has failed to establish a negligence case. The plaintiff has failed to establish that any possible negligence was a proximate cause of the plaintiff's damages. The evidence clearly establishes, as a matter of law, there was an intervening cause which caused the damages to Plaintiff's vehicle. Finally, the evidence establishes that the plaintiff's fault was greater than fifty percent.

Rule 50(a) of the Arkansas Rules of Civil Procedure provides in part that "[a] motion for a directed verdict shall state the specific grounds therefor." The purpose of this requirement is to assure that the specific ground for a directed verdict is brought to the trial court's attention. *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996). In order to preserve for appeal the issue of sufficiency of the evidence, the party moving for a directed verdict must state the specific ground upon which it seeks such relief. *Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997); *Stroud Crop, Inc. v. Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994). Failure to state the specific grounds for relief in a directed verdict

motion precludes this court's review of such issue on appeal. *Stacks*, 323 Ark. 643, 916 S.W.2d 120. Merely stating that the plaintiff failed to establish a negligence case is not sufficient to apprise the trial court of the particular proof alleged to be missing.

The argument pertaining to the Fireman's Rule is also mentioned by Appellant for the first time on appeal. We will not address arguments raised for the first time on appeal. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996). If a particular theory is not presented at trial, the theory will not be reached on appeal. *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). We thus summarily dispose of appellant's arguments on the issue of duty because the abstract does not reflect that such theory was ever presented to or ruled on by the trial court.

Appellant did, however, specifically argue that the evidence failed to establish that any negligence of Appellant was the proximate cause of damages and that the evidence showed that Appellee's fault was greater than fifty percent. When the existence of evidence, and all the reasonable inferences therefrom, created a question for the jury, the trial court properly denied appellant's motion for directed verdict. *McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 365 (1996). Proximate cause is usually an issue for the jury to decide, and when there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *Id.* Arkansas is a comparative fault state, as provided in Ark. Code Ann. § 16-64-122 (Supp. 1995), and this case proceeded under that theory. Under the comparative fault statute, there must be a determination of proximate cause before any fault can be assessed against a claiming party. *Craig v. Traylor*, 323 Ark. 363, 915 S.W.2d 257 (1996). Proximate cause becomes a question of law only if reasonable minds could not differ. *Id.* Proximate cause is defined 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." *Id.* at 370, 915 S.W.2d at 260 (quoting *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 888 S.W.2d 303 (1994)).

[redacted] The original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is in itself sufficient to stand as the cause of the injury and the intervening cause must be such that the injury would not have been suffered except for the act, conduct, or effect of the intervening cause totally independent of the acts or omissions constituting the primary negligence. *State Farm Mut. Auto. Ins. Co. v. Pharr*, 305 Ark. 459, 808 S.W.2d 769 (1991). The mere fact that other causes intervene between the original act of negligence and the injury for which recovery is sought is not sufficient to relieve the original actor of liability if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable. *Id.* In no case is the connection between an original act of negligence and an injury broken by an intervening act of another if a person of ordinary capacity and experience, acquainted with all the circumstances, could have reasonably anticipated that the intervening event might, in the ordinary course of things, follow his act of negligence or if the negligence is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause. *Id.* An intervening cause will not excuse the original misconduct but will be held to be the result of it. *Id.* Moreover, the intervening act or omission of a third person is not a superseding cause when the original actor's negligent conduct is a substantial factor in bringing about an injury, if the actor, at the time of his negligent conduct, realized that a third person might so act or if the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent. *Id.*

Appellant argues that Appellee's keys were taken, not through any fault of Appellant, but because Appellee left them in a coat pocket that was accessible to the juveniles at OWI. Appellant also argues that the fact that two juveniles were able to leave OWI was not the proximate cause of the juveniles damaging Appellee's truck, as they did not gain control of the vehicle until they had the keys. Moreover, Appellant asserts that Appellee was aware that OWI was a rehabilitation camp for juvenile offenders with no cells, no bars, and no weapons to help prevent unauthorized

departures. Additionally, Appellant maintains that Appellee was negligent, as he was a supervisor of the juveniles on the night in question, but left the area, leaving one other supervisor to watch twenty-six juveniles, at which time the two juveniles fled.

In viewing the testimony in a light most favorable to Appellee, there was evidence from which the jury could have found Appellant negligent. The testimony revealed questions concerning insufficient staff at OWI. James Coulverhouse, the interim Executive Director of OWI, admitted that OWI failed to keep sufficient staff to supervise the juveniles on the night in question. The evidence also revealed the fact that employees were not provided a place for the safe keeping of their personal belongings, while the keys for the OWI vehicles were locked in a cabinet in an office that was also locked and inaccessible to the juveniles. In addition, the testimony reflected that the gate that provides access to the facility was not locked on the night in question.

In short, there was substantial evidence presented from which the jury could have concluded that Appellant was negligent in failing to provide a secure storage place for the employees' personal car keys, especially given the fact that Appellant and its staff were apparently aware of the possibility of vehicles being taken by the juvenile offenders, as they secured the keys to OWI vehicles in a locked cabinet in a locked office. Furthermore, the jury could have reasonably concluded that the intervening acts of the juveniles in stealing the truck and wrecking it could reasonably have been anticipated by Appellant such that its negligence was the proximate cause of Appellee's damages. We thus conclude there was substantial evidence to support the jury's verdict on the issues of negligence and causation, and that the trial court committed no error in denying Appellant's motion for a directed verdict.

Assumption of Risk

Appellant argues that the trial court erred in failing to give Appellant's requested instruction on assumption of risk. The theory of assumption of risk bars recovery when it is shown as a matter of law, that a dangerous situation existed which was incon-

sistent with plaintiff's safety, that plaintiff knew the dangerous situation existed and realized the risk of injury, and plaintiff voluntarily exposed himself to the dangerous situation which proximately caused his injuries. *Capps v. McCarley & Co.*, 260 Ark. 839, 544 S.W.2d 850 (1976). As noted previously, Arkansas is a comparative fault state. This court determined in *Dawson v. Fulton*, 294 Ark. 624, 745 S.W.2d 617 (1988), that because the jury must compare negligence pursuant to section 16-64-122, the doctrine of assumption of the risk is no longer applicable in Arkansas as a separate theory.

It is not error for the trial court to refuse a proffered jury instruction when the stated matter is correctly covered by other instructions. *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982). Each party has the right to have the jury instructed upon the law of the case with clarity and in such a manner as to leave no grounds for misrepresentation or mistake. *Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992). The trial court here instructed the jury as to comparative fault, and that appellee had the burden of proving that he had sustained damages, that Appellant was negligent, and that Appellant's negligence was a proximate cause of his injuries. The trial court was thus not obligated to give an instruction on assumption of risk when it is no longer a defense in Arkansas.

Charitable Immunity

Appellant asserts that the trial court erred in failing to dismiss the complaint against Appellant as it is entitled to charitable immunity. We disagree. The Arkansas Volunteer Immunity Act, Ark. Code Ann. §§ 16-6-101—105 (Repl. 1994), defines "volunteer agency" as "any volunteer program of all departments, institutions, and divisions of state government, community volunteer organization, or any not-for-profit corporation which has received a 501(c)(3) designation from the United States Internal Revenue Service, other than one established principally for the recreational benefit of its stockholders or members[.]" Section 16-6-104(c) provides that while a qualified volunteer is entitled to immunity, "[n]othing in this chapter shall be construed to limit the liability of any volunteer agency." Accordingly, as a volunteer

agency, Appellant is not entitled to immunity under the Arkansas Volunteer Immunity Act.

[redacted] Furthermore, Appellant is similarly not immune from tort liability under the common-law doctrine of charitable immunity. In *Masterson v. Stambuck*, 321 Ark. 391, 902 S.W.2d 803 (1995), this court recently admonished that although we still recognize the common-law doctrine of charitable immunity, it is to be very narrowly construed. To determine whether an organization is entitled to charitable immunity, we provided in *Masterson* the following illustrative, but not exhaustive, list of factors:

> (1) [W]hether the organization's charter limits it to charitable or eleemosynary purposes; (2) whether the organization's charter contains a "not-for-profit" limitation; (3) whether the organization's goal is to break even; (4) whether the organization earned a profit; (5) whether any profit or surplus must be used for charitable or eleemosynary purposes; (6) whether the organization depends on contributions and donations for its existence; (7) whether the organization provides its service free of charge to those unable to pay; and (8) whether the directors and officers receive compensation.

Id. at 401, 902 S.W.2d at 809 (footnote omitted).

[redacted] Considering those factors, we conclude that Appellant is not entitled to charitable immunity for several reasons. First, Appellant's "charter," or Articles of Incorporation, do not limit the corporation to eleemosynary purposes; in fact, there is no statement of purpose in the Articles of Incorporation other than the designation that OWI is a "Public-Benefit Corporation." Second, although Appellant is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code, there is no information in the record as to whether its goal is to break even. Moreover, Appellant is almost exclusively funded by the state and thus not dependent upon charitable contributions for its funding. Likewise, the state pays for the services rendered by Appellant to juvenile offenders, therefore, such services cannot be classified as being "free of charge." Furthermore, Appellant concedes that it must return any surplus funds to the state treasury pursuant to Ark. Code Ann. § 9-28-212 (Supp. 1995), instead of using the funds for charitable purposes. Finally, Appellant's officers are

compensated for their services to the corporation. In sum, under the totality of the relevant facts and circumstances, the trial court did not err in concluding that Appellant is not entitled to charitable immunity under either the common-law doctrine or the Arkansas Volunteer Immunity Act.

Incidental Expenses

Appellant argues that the trial court erred in instructing the jury that the measure of damages included incidental damages. The trial court instructed the jury that in awarding damages to Appellee it could consider:

> The difference in the fair market value of his truck immediately before and immediately after the occurrence plus a reasonable amount for loss of use and other incidential [sic] expenses; such as storage fee.

We do not decide this issue because the total award of damages of $26,400 appears to include only the fair market value of Appellee's truck, which is provided for in the AMI damage instruction, loss of use, and storage expenses, which Appellant conceded was allowable. Thus, even though, arguably, the trial court may have erred in instructing the jury as to "other" incidental expenses, the error was harmless because Appellee was not awarded any such damages. Where the giving of an erroneous instruction was harmless, the appellate court will affirm. *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993). No prejudice was shown, therefore, the giving of the incidental damage instruction was harmless error.

Affirmed.

NEWBERN, GLAZE, and BROWN, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. This is a negligence case. The majority opinion rejects the sufficiency-of-the-evidence argument of Ouachita Wilderness Institute, Inc., on the ground that no argument on "duty" was presented to the Trial Court. The directed-verdict motion contained this sentence: "The plaintiff has failed to establish a negligence case." Negli-

gence is nothing other than the violation of a duty to act or not to act in a certain way.

> In other words, "duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same — to conform to the legal standard of reasonable conduct in the light of apparent risk.

W. KEETON, D. DOBBS, R. KEETON, AND D. OWEN, PROSSER & KEETON ON TORTS, p. 356 (5th Ed. 1984). It was enough for the Institute to question whether the facts proven amounted to negligence. It was for the jury to decide whether the actions of the Institute were, what "a reasonably careful person . . . would not do under circumstances similar to those shown by the evidence in this case." AMI 301.

The problem, however, is that the Trial Court declined to give a jury instruction patterned on Ark. Code Ann. § 16-64-122(c) (Supp. 1995). That subsection, found in our basic comparative fault statute, provides: "The word 'fault' as used in this section includes any act, omission, conduct, *risk assumed*, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party." [Emphasis supplied.] We no longer allow an "assumption of risk" instruction which would inform the jury that if the plaintiff assumed the risk the defendant is not liable. *Rogers v. Kelly,* 284 Ark. 50, 679 S.W.2d 184 (1984). That does not mean, however, that in applying the statutory comparative fault scheme the jury should not be informed that "fault" includes "risk assumed." Thus informed, the jury can intelligently compare the fault of the parties.

The Institute's proffered instruction number 11 was, "When I use the word 'fault' in these instructions, I mean negligence and assumption of risk." That was a proper instruction which should have been given. The refusal to give it was prejudicial to the Institute's case.

I respectfully dissent.

TOM GLAZE, Justice, dissenting. I disagree with the majority that Ouachita Wilderness Institute failed "to clearly set out the

theory of duty in its motion for directed verdict." The basic law of negligence is that there must be a determination of what duty, if any, is owed before factual issues of breach, proximate cause, and damages can be determined. *See First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 321 Ark. 210, 900 S.W.2d 294 (1995); *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). Clearly by arguing to the trial court that Mergen failed to establish a negligence case, OWI was challenging Mergen's burden to first establish what duty, if any, OWI owed to Mergen as a matter of law.[1]

The threshold inquiry in a negligence case is whether the defendant owes a legal duty to the plaintiff. Here, then, the initial issue to decide is whether OWI, as owner and operator of the juvenile rehabilitation camp, owed any duty to employee Mergen to protect him from the illegal activities of the juveniles. If no duty was proved owed to Mergen, OWI's directed verdict motion should have been granted.

In *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983), the court stated the rule that one ordinarily is not liable for the acts of another unless a special relationship exists. 279 Ark. at 300. This court in *First Commercial Trust Co. v. Lorcin Eng'g*, 321 Ark. 210, 215, 900 S.W.2d 202, 204 (1995), adhered to the more exact rule that, in general, no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of some special relationship between the parties, citing employer to employee as an example. *See also* 57A AM.JUR. 2D, *Negligence*, §§ 105, 109 (1989). Further, even when a special relationship exists, a duty to protect another from a criminal act may not be imposed unless the harm is foreseeable. *Keck*, 279 Ark. 294, 652 S.W.2d 2.

My review of the record reflects that Mergen fell short of his burden showing that OWI owed him a duty to protect his truck

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[1] The majority also holds OWI was required to object to AMI 305(b), the duty of care instruction, before OWI could preserve its legal-duty argument on appeal. However, OWI preserved its duty-owed argument when it raised its directed verdict motion, arguing Mergen's evidence failed to prove OWI was negligent.

key from theft. Mergen presented no evidence that OWI should have foreseen that the boys would steal his truck key from his jacket pocket. In fact, Mergen testified that he had previously left his keys in his jacket or coat unattended without incident, even though Mergen stated that he knew there was a risk in doing so. OWI had the right to assume Mergen would exercise some care for his personal property. Finally, except for a brief reference to the break-in of a box where OWI had kept its motor-pool keys at one time, Mergen presented no evidence of any criminal activity occurring at OWI sufficient to place OWI on notice that employees' personal property was not safe from criminal acts by the juveniles. Because Mergen failed to carry this elementary burden, I would reverse.

BROWN, J., joins this dissent.

STATE of Arkansas *v.* Albert BELL

CR 96-1543 948 S.W.2d 557

Supreme Court of Arkansas
Opinion delivered July 14, 1997
[Petition for rehearing denied September 11, 1997.*]

* GLAZE, J., would grant.

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

J.W. Green, Jr., for appellee.

ROBERT L. BROWN, Justice. This is the second appeal relating to the judgments of conviction of Albert Bell. Terry Sims and Albert Bell gave statements to law enforcement officers confessing to the murders of Julian Russell and Mary Lou Jones at Cloud's Grocery Store in Casscoe, Arkansas County. At the ensuing trial of Albert Bell, he was convicted of both murders and sentenced to two consecutive life sentences. We remanded for the limited purpose of a new suppression hearing because the prosecutor failed to make available State Police Sergeant Gary Allen, who allegedly played "bad cop" to Officer John McCord's "good cop" in the

police interrogation of Bell. *See Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996). We said in this decision that a new trial would only be warranted in the event that Bell's statement was suppressed by the trial court on remand. Bell's remaining points on appeal were rejected by this court.

Following the remand, Bell filed an amendment to his motion to suppress. In the motion, Bell complained that he was not allowed to consult with counsel despite requesting to speak with an attorney and, further, was not allowed to consult his parents. Bell also complained "[t]hat each of the statements was taken in violation of the *Arkansas Rules of Criminal Procedure*, specifically *Rules* 2.2 through 3.5." At the suppression hearing on remand, State Police Investigator John McCord testified that he first spoke with Bell, who was age 16, on January 5, 1993. Officer McCord testified that on that day, he and State Police Officer Lloyd Franklin waited at the Stuttgart High School for Bell to be dismissed from class. He testified that he had told Bell in the principal's office that he did not have to go to the Arkansas County Sheriff's Department with them. When school was out, the police officers called Bell and Sims over to an unmarked police car and placed them in the back seat. They then drove the two young men to the sheriff's department for questioning. After leaving the high school, Officer McCord did not tell Bell again that he was free to leave.

Bell's interview at the sheriff's department took about 30 minutes and his mother was with him during the interview. Officer McCord testified that Bell was not a suspect at this time and was free to leave. He admitted that Sims left the sheriff's department during this time and was chased by police officers. It was later revealed that Sims returned on his own. Officer McCord testified that he did not read Bell his *Miranda* warnings at this time because Bell was not a suspect. Rather, he questioned Bell because Bell was a friend of Sims and because Bell had been seen near the store about the time of the murders. Bell denied being with Sims on the day of the murders.

Deputy Sheriff David Box testified that he was instructed to locate Bell on January 8, 1993, and bring him to the sheriff's

department for questioning. He found Sims and Bell at Bell's grandmother's house, but they were not placed under arrest or handcuffed. Deputy Box testified that if the two young men had refused to go with him, he would have radioed the sheriff for instructions. He admitted that he did not tell Sims and Bell that they did not have to accompany him.

Officer McCord testified that he interviewed Bell a second time on January 8, 1993, but this time Bell was considered a suspect. He testified that the investigation began to focus on Sims on January 5, 1993, because Sims had given inconsistent times when he returned a videotape to Cloud's Grocery Store. The state police officer also stated that Sims's neighbor was missing a .22 revolver, which was the caliber of the gun used in the Casscoe murders. He added that Bell acknowledged he understood his *Miranda* rights on January 8, 1993; that he agreed to speak with him; and that he initialed the separate *Miranda* warnings and signed the waiver of rights form. In the first statement taken from Bell on January 8, 1993, Bell repeatedly denied that he was with Sims on the night of the murders. However, Officer McCord knew that Eddrick Bell, Albert Bell's brother, on the previous day had placed Bell with Sims on the night in question. Eddrick Bell told the police officers that Sims had picked up Bell at about 7:00 p.m. that evening. When confronted with this statement, Bell admitted that he had been with Sims and that he accompanied Sims to Cloud's Grocery Store. He further told the interrogating officers that he sat in the car and saw Jeanette Gillmore shoot Julian Russell in the grocery store and that Sims ran out of the store while the shooting was in progress.

Officer McCord related at the hearing that Bell never asked to stop the questioning or to terminate the interview on January 8, 1993, and that he never asked for a lawyer. He estimated that he talked with Bell for an hour or less. After the police officer completed his interview, Bell was turned over to State Police Investigator John Howell for a polygraph examination.

Officer John Howell explained at the suppression hearing that Bell agreed to take the polygraph exam. He testified that he inquired about Bell's statement that a Jeanette Gillmore had done

the shooting, but Officer Howell stated that the polygraph test showed that Bell was being deceptive with his answers. Bell told Officer Howell that he would tell the truth if allowed to speak with Sims first. He was told that he could talk to Sims only after he told the truth. Bell then told Officer Howell that Sims shot the victims: "Terry just lost it and started shooting." Bell wanted to make a plea at that time, and Officer Howell informed him that only the prosecuting attorney had the authority to agree to a plea. Bell was allowed to speak with Sims, and he told Sims that he was going to tell the truth "regardless of what Terry had to say." Sims then agreed to tell the truth, and he confessed to shooting the two victims.

Officer John McCord had first testified that he did not believe he had probable cause to arrest Bell on January 8, 1993. When he retook the stand at a later date, he testified that it was "borderline" but he thought there was probable cause to arrest on January 8, 1993.

State police sergeant Gary Allen testified that he "sat in" on the January 8, 1993 interrogation. He denied that he conducted the interview or threatened or coerced Bell to make a statement. He did admit to telling Bell that he was lying.

Bell took the stand at the suppression hearing, as did his parents, who testified that they were excluded from the January 8, 1993 interview. Bell denied that he knew what a *Miranda* right was. He admitted that he had a juvenile offender history but denied that he had ever been read his *Miranda* rights previously. He stated that he had since learned of his rights in prison. Bell admitted that Officer McCord read him his rights on January 8, 1993, but he stated that Officer McCord did not explain what those rights meant. Bell admitted that he initialed the paragraphs on the waiver form and signed it because he was told to do so. He further stated that he requested an attorney. He did not think he could leave on January 8 because the police officers had chased Sims when he left the sheriff's department on January 5.

On cross-examination, Bell admitted that he was told that he had the right to remain silent, but he felt compelled to answer the questions that were being asked to him. He further testified that

he had heard *Miranda* warnings read in television programs but revealed that he did not understand them. Bell admitted that he did not ask for an explanation of his rights. He also indicated that at least some of his rights had been explained to him as a juvenile. Bell added that while he understood the words of the warnings, he did not understand what they meant.

The trial court entered its order and concluded that Rule 2.3 was not complied with when Bell was picked up from high school for questioning on January 5, 1993. Moreover, he was not advised of his *Miranda* rights on that date. The trial court observed that Rule 2.3 was also not complied with when Bell was picked up for questioning on January 8, 1993. Nor, according to the trial court, did police officers have probable cause to arrest him at that time. The court then stated:

> The record does not reflect any effort taken by the state to comply with Rule 2.3 nor any efforts by the state to determine whether the waiver executed by the defendant was made with a full awareness of both the nature of the rights being abandoned and the consequences of the decision to abandon them.

However, the court agreed that Bell had acknowledged that he understood his rights when they were read to him.

The court suppressed the statements made by Bell on both January 5 and January 8, 1993, and the State has appealed that order.

I. Rule 2.3

The State first disagrees that a violation of Ark. R. Crim. P. 2.3 transpired. Rule 2.3 states:

> If a law enforcement officer acting pursuant to this rule requests any person to come to or remain at a 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.*

Ark. R. Crim. P. 2.3 (emphasis added). The State makes three arguments under this point on appeal: (1) the consideration of Rule 2.3 was barred by the law-of-the-case doctrine; (2) the trial

court erred in concluding that Rule 2.3 was violated on January 5, 1993; and (3) any violation of Rule 2.3 on January 8, 1993, was immaterial because there was probable cause to arrest Bell at that time.

Law of the case.

The State contends that Bell was barred on remand from arguing that there was a Rule 2.3 violation because he had failed to argue that point in his first appeal. As a result, the State contends, the asserted error was barred by the doctrine of law of the case. Bell answers that the State's argument is not preserved for appeal because it was not raised in the trial court. While the State contends that the argument is jurisdictional, Bell urges that it is merely an affirmative defense.

Bell is correct that the law-of-the-case defense cannot be raised for the first time on appeal. It is undisputed that the State failed to make this argument to the trial court. Moreover, this court has previously recognized that law of the case is an affirmative defense like estoppel or *res judicata*. *See Earney v. Brantley*, 309 Ark. 190, 828 S.W.2d 832 (1992). The defense is not preserved for our review.

Violation of Rule 2.3 on January 5, 1993.

The State next contends that the trial court overlooked the uncontroverted testimony from Officer McCord that he told Bell at the Stuttgart High School on January 5, 1993, that he did not have to accompany him to the sheriff's department. Under the bright-line rule, according to the State, this was all that was required. Bell counters with the assertion that the evidence must be viewed in his favor, and that the trial court found no such Rule 2.3 admonition was given.

We decline to address the merits of this issue because it appears patently clear that Bell did not incriminate himself with his statement on January 5, 1993. Indeed, on that day he was not a suspect, and he told police officers that he was not at Cloud's Grocery Store or with Terry Sims on the night of the murders. He was subsequently found to be lying, but no incriminating evi-

dence was obtained from Bell as a result of his interview on that date. We conclude that any error associated with the January 5, 1993 interview was harmless beyond a reasonable doubt. *See Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997).

Violation of Rule 2.3 on January 8, 1993.

The State next contends that there could be no violation of Rule 2.3 on January 8, 1993, because Rule 2.3 had been complied with on January 5, 1993 and there was probable cause to arrest Bell on January 8th. Both the criminal rules and our caselaw recognize that if a police officer has probable cause to arrest, failure to give a Rule 2.3 warning is irrelevant. *See* Ark. R. Crim. P. 2.1; *see also Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989). Probable cause exists when there is reasonably trustworthy information within law enforcement's knowledge that would lead a person of reasonable caution to believe that a felony was committed by the person detained. *Hart v. State*, 312 Ark. 600, 852 S.W.2d 312 (1993); *Addison v. State*, *supra*; *Burks v. State*, 293 Ark. 374, 738 S.W.2d 399 (1987).

The essential facts that were available to law enforcement on January 8, 1993, were that Terry Sims had lied to them about the time he returned the movie to Cloud's Grocery Store on the day of the murders; that Sims was at the grocery store when the murders occurred; that a .22 caliber pistol was missing from the home of a friend of Sims, and that was the caliber of pistol used in the killings; that Bell told the police officers he was not with Sims after school on the day of the murders but that Bell's brother contradicted that story; that Bell's brother told law enforcement officers that just prior to the murders Sims came by to pick up Bell and that the two young men had earlier discussed returning a videotape and getting a soda; and that Bell returned a short time later with a soda pop.

This court has held that the test for determining probable cause rests on the collective information of the police officers. *See Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980). We further are of the opinion that the fact that Officer McCord was contradictory about whether he had probable cause

to arrest is not determinative of the issue. We conclude that this evidence was sufficient to lead a person of reasonable caution to believe that Sims had committed the killings while Bell was present. Even though "mere presence" does not make one an accomplice [*see* Ark. Code Ann. § 5-2-403 (Repl. 1993)], these facts are enough to constitute probable cause to arrest. The trial court was clearly erroneous in suppressing the January 8, 1993 statement due to the failure to give a Rule 2.3 warning and in finding that probable cause did not exist.

[redacted] We further take this opportunity to state that in the future we will not interpret Ark. R. Crim. P. 2.3 to require a verbal warning of freedom to leave as a bright-line rule for determining whether a seizure of the person has occurred under the Fourth Amendment and whether a statement to police officers must be suppressed. Rather, we will view a verbal admonition of freedom to leave as one factor to be considered in our analysis of the total circumstances surrounding compliance with Rule 2.3. In short, when interpreting Rule 2.3 in the future in deciding whether a seizure of a person has transpired, we will follow *United States v. Mendenhall*, 446 U.S. 544 (1980). *See also Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997)(Brown, J., concurring opinion). To the extent that our decisions in *Burks v. State, supra*; *Addison v. State, supra*; *Hart v. State, supra*; *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996); and *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997), state a contrary interpretation, we retreat from that interpretation.

II. Comprehension of Waiver

The State also contends that the circumstances prove that Bell had read and understood his *Miranda* rights on January 8, 1993, and that the trial court clearly erred in ruling otherwise. The State specifically urges that it was not required to make any special or additional effort to assess Bell's ability to understand his rights and the consequences of a waiver. We agree.

It was undisputed that Bell had been read his *Miranda* rights prior to giving the statement on this date. Bell also had some familiarity with the criminal justice system due to the fact that he

had previously been on probation as a juvenile offender. In fact, he knew that as a juvenile, he was entitled to have his parents or a lawyer present when being questioned. He was age 16 and a high school sophomore who was taking regular courses in math, science, and English, though he had also been in remedial classes since the fourth grade. He further agreed that he understood the words in his warnings but denied knowing their import.

A defendant's waiver of Fifth and Sixth Amendment rights must be knowing and intelligent with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Clay v. State*, 318 Ark. 122, 883 S.W.2d 822 (1994); *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992). We analyze the issue of a knowing and intelligent waiver under the test of totality of the circumstances. *See Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997); *Bradford v. State*, 325 Ark. 278, 927 S.W.2d 329 (1996). Bell was 16 at the time of his confession. He was in the 10th grade and apparently on track to graduate from high school. Moreover, he had some experience with the criminal justice system, and he initialed each of his *Miranda* rights after reading them. He further agreed that he knew what the words meant.

Balanced against these factors is Bell's self-serving statement that he did not realize the consequences of a waiver. He also contends that he requested counsel, which partially flies in the face of his contention that he did not understand his *Miranda* rights.[1] While it is true that we defer to the trial court's assessment of credibility [*State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997)], here the trial court provides no insight as to why it found that Bell did not understand the consequences of what he was doing. Indeed, the factors clearly preponderate in favor of a knowing and intelligent waiver. The mere statement of the accused that he did not comprehend a waiver's significance is not enough in light of his statement that he understood the words and his acknowledgment to the officers that he understood his rights.

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[1] The trial court made no ruling on whether Bell requested counsel and that precise issue is not before us in this appeal.

We hold that the trial court clearly erred in suppressing the statement of Bell on this basis.

Because we reverse the decision of the trial court, a new trial is not warranted. *See Bell v. State, supra.* A mandate will be issued affirming the convictions and sentences in this case.

Reversed.

NEWBERN, GLAZE, and IMBER, JJ., dissent.

DAVID NEWBERN, Justice, dissenting. The decision of the Trial Court to suppress the incriminating statement given by Albert Bell to the police on January 8, 1993, rested on two alternate findings. First, the Trial Court found that the police failed to apprise Mr. Bell on January 8 that he was under no legal obligation to accompany them to the police station, that the police did not have probable cause to arrest Mr. Bell on that date, and that suppression of the statement was therefore required under Ark. R. Crim. P. 2.3. Second, the Trial Court concluded that Mr. Bell did not knowingly and intelligently waive his constitutional rights prior to making his statement on January 8 and that suppression of the statement was also required under the Fifth and Sixth Amendments to the United States Constitution. The Trial Court's decision to suppress Mr. Bell's January 8 statement was correct under our cases that have interpreted Rule 2.3 and discussed the concept of probable cause.

The rule of criminal procedure at issue in this case is Ark. R. Crim. P. 2.3. The rule was adopted by a *per curiam* order of this Court on December 22, 1975, and made effective on January 1, 1976. *See In the Matter of Rules of Criminal Procedure,* 259 Ark. 863, 530 S.W.2d 672 (1975). The rule provides as follows:

> WARNING TO PERSONS ASKED TO APPEAR AT A POLICE STATION.
>
> If a law enforcement officer acting pursuant to this rule requests any person to come to or remain at a 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.

Ark. R. Crim. P. 2.3.

As we have consistently held, most recently only two months ago, a police officer who requests a person to come to the police station has a "positive duty" under Rule 2.3 to express to the person *verbally* that he or she has no legal obligation to comply with the request. *Martin v. State,* 328 Ark. 420, 429, 944 S.W.2d 512, 517 (1997). The obvious reason for the requirement is the impossibility, absent such a verbalization requirement, of administering a rule which requires that the matter be "made clear" to the person requested to accompany an officer.

Our "bright-line rule" is that "a statement must be suppressed under Rule 2.3" if the police "simply fail to notify the person" that he or she does "not have to come to the station for questioning." *Id.* However, if the police had probable cause to arrest the person at the time of the request, then suppression of the statement will not be required even if the police violate Rule 2.3. In that instance, the violation of Rule 2.3 is "excused." *Id.*

As mentioned, the Trial Court found that suppression of Mr. Bell's January 8 custodial statement was required under Rule 2.3. In reversing the Trial Court on this point, the majority appears to hedge on the initial question of whether the police in this case even violated Rule 2.3. But the majority concludes that, regardless of whether the rule was violated, it was error for the Trial Court to suppress Mr. Bell's January 8 statement because the police had probable cause to arrest him at the time they requested him to come to the police station.

In light of its ruling on the probable-cause issue, the majority determines that it is "irrelevant" whether the police violated Rule 2.3. However, the majority seizes the "opportunity" in this case to announce that, "in the future," the failure of the police to give a verbal warning will not be dispositive of the questions of "whether a seizure of the person has occurred under the Fourth Amendment and whether a statement to police officers must be suppressed." Under the majority's proposed rule, the courts would consider the police's failure to give a verbal warning as merely one factor in determining whether the police have complied with Rule 2.3. The majority says that this approach is based

upon "the constitutional rule laid down in *United States v. Mendenhall,* 446 U.S. 544 (1980)." It fashions its opinion as a "retreat" from the numerous cases that imposed the verbal-warning requirement on police officers under Rule 2.3.

The majority's analysis of Rule 2.3 is, in my view, supported by neither the law nor the facts in this case.

1. The verbal-warning requirement

The proposal to abolish the "positive duty" we have imposed on the police under Rule 2.3 is improper on procedural and substantive grounds. First, the majority opinion, by its own analysis, makes its announcement not only unnecessary to this case but "purely academic" with respect to this case. *Kapp v. Bob Sullivan Chevrolet Co.,* 234 Ark. 395, 405, 353 S.W.2d 5, 11 (1962). We consistently refuse to rule on issues that are unnecessary to our decisions. *See Shackelford v. Patterson,* 327 Ark. 172, 179, 936 S.W.2d 748, 752 (1997); *Avery v. Ward,* 326 Ark. 829, 838, 934 S.W.2d 516, 522 (1996); *Duncan v. State,* 263 Ark. 242, 244, 565 S.W.2d 1, 2 (1978); *Rogers v. Watkins,* 258 Ark. 394, 396, 525 S.W.2d 665, 667 (1975). If the majority wishes to abandon precedent and alter fundamentally the requirements of Rule 2.3, it should do so in a case in which the question of whether the rule has been violated is ripe and squarely before us.

Second, the majority proposes a dramatic change in the law of criminal procedure on the basis of a contention that the parties did not argue, brief, or in any manner present to the Trial Court or this Court. In so doing, the majority strays from our sound practice of declining to resolve legal questions that are not briefed by the parties. *See, e.g., Rider v. Cunningham,* 232 Ark. 407, 409, 337 S.W.2d 868, 869 (1960); *Union Motor Co. v. Turbiville,* 223 Ark. 92, 97 n.5, 264 S.W.2d 592, 594 n.5 (1954); *Johnson v. McAdoo,* 222 Ark. 914, 917 n.2, 263 S.W.2d 701, 703 n.2 (1954); *Wright v. Aaron,* 214 Ark. 254, 263 n.6, 215 S.W.2d 725, 729 n.6 (1948); *Avery v. State,* 15 Ark. App. 134, 139, 690 S.W.2d 732, 735 (1985) (Cracraft, C.J., concurring). In the case at bar, the State has not asked the Court to overrule our cases such as *Martin v. State, supra,* that require suppression of evidence under Rule 2.3

when the police fail to make a verbal warning and lack probable cause to arrest. The State accepts this "bright-line rule" as the law and essentially concedes that the police violated Rule 2.3 on January 8. Its only argument on appeal is that suppression of Mr. Bell's statement was improper because the police had probable cause to arrest Mr. Bell.

Third, the majority offers no persuasive rationale for departing from the principle of *stare decisis* and abandoning Rule 2.3's verbal-warning requirement. As mentioned, we held only two months ago that Rule 2.3 imposes "a 'positive duty' upon the police to inform the citizen of his or her right to refuse the request" to come to, or remain at, a police station "although the plain words of Rule 2.3 do not specifically require such a verbal notice." *Martin v. State,* 328 Ark. at 429, 944 S.W.2d at 517.

In the *Martin* case, we found that the police had requested the defendant to come to the station for questioning but had failed to give him any verbal notification that he could refuse the request. We said that "this fact alone amounted to a violation of Rule 2.3" and that the Trial Court erred by denying the motion to suppress the statement given by the defendant to the police. *Martin v. State,* 328 Ark. at 430, 944 S.W.2d at 517. We did not reverse, however, because we determined that the admission of the statement was harmless error. The State did not suggest in the *Martin* case that the police had probable cause to arrest the defendant and that his statement was properly admitted on this basis. The Court, obviously following the sound practice of not deciding issues that are not argued or briefed by the parties, therefore did not address the probable-cause issue.

We cited in the *Martin* case four other decisions from this Court imposing the verbal-warning requirement under Rule 2.3. *See Prowell v. State,* 324 Ark. 335, 921 S.W.2d 585 (1996); *Hart v. State,* 312 Ark. 600, 852 S.W.2d 312 (1993); *Addison v. State,* 298 Ark. 1, 765 S.W.2d 566 (1989); *Burks v. State,* 293 Ark. 374, 738 S.W.2d 399 (1987).

As mentioned, the majority proposes to "retreat" from these cases and analyze the "totality of the circumstances"—rather than the single question of whether a verbal warning was given—in

order to determine whether the police have violated Rule 2.3, whether a "seizure" has occurred under the Fourth Amendment, and whether a defendant's custodial statement ultimately should be suppressed. The majority asserts this approach is based upon "the constitutional rule" announced in *United States v. Mendenhall, supra.*

The observation of the majority, also espoused in the concurring opinion in the *Martin* case, is that taking a person to the police station without expressing his or her freedom not to go has been viewed as a "seizure" of the person. That is based on an erroneous view of our Rule 2.3 cases. Whatever the language in those cases may be, it is not the law that a police-citizen encounter in which the police fail to give a Rule 2.3 warning is necessarily an illegal seizure under the Fourth Amendment. The concurring justices in the *Martin* case, and the majority in this case, apparently believe our Rule 2.3 cases stand for that proposition. In the *Martin* case, the concurring justices roundly criticized the idea that an illegal Fourth Amendment seizure necessarily occurs when the police fail to give a Rule 2.3 warning. The concurring opinion cited the plurality opinion in *United States v. Mendenhall, supra,* for the proposition that a person is "seized" under the Fourth Amendment only when, considering the totality of the circumstances rather than any one factor, "a reasonable person would have believed that he was not free to leave." *Martin v. State,* 328 Ark. at 437, 944 S.W.2d at 521 (Brown, J., concurring), *quoting United States v. Mendenhall,* 446 U.S. 544, 554 (1980). The concurring opinion cited other language from the *Mendenhall* case and language from other court decisions for the proposition that whether a Fourth Amendment seizure occurs does not depend on whether a person is told that he or she is free to decline to cooperate. The concurring opinion urged that we follow these principles and reject the idea that a police officer's failure to provide a verbal Rule 2.3 warning transforms his encounter with a citizen into an illegal Fourth Amendment seizure. It made an additional, but different, suggestion that the court utilize the "totality of circumstances" test, not only to determine whether a Fourth Amendment seizure has occurred, but also to determine whether a Rule 2.3 violation has occurred.

First, it is important to understand that our cases have never held that an illegal Fourth Amendment seizure occurs when the police request a person to accompany them to the station without providing the verbal warning prescribed by Rule 2.3. To the extent that some of the language in our Rule 2.3 cases suggests otherwise, it is misleading. *See, e.g., Hart v. State,* 312 Ark. at 605, 852 S.W.2d at 315 ("Since the detectives did not comply with [Rule 2.3], there was a seizure of the appellant and a violation of his rights under the Fourth Amendment unless the detectives had probable cause to arrest him.") The definition of a Fourth Amendment seizure has long been settled by the Supreme Court and derives from the plurality opinion in the *Mendenhall* case. It is erroneous to suggest that our Rule 2.3 cases add anything to it.

Second, it is important to understand that Rule 2.3 and the Fourth Amendment impose different and independent obligations on the police. In this case, if Mr. Bell had alleged that his custodial statement on January 8 should be suppressed because it was the fruit of an illegal seizure under the Fourth Amendment, then the fact that he was not given a Rule 2.3 warning would not necessarily establish a seizure and trigger application of any exclusionary rule. If the claim is that a statement should be suppressed because it followed upon an illegal Fourth Amendment seizure, that claim is analyzed, as the majority suggests, under the "totality of the circumstances" test.

If, however, the claim is that the police requested a person not under arrest to accompany them to the station without providing the verbal warning prescribed by Rule 2.3, then our bright-line interpretation of Rule 2.3 applies. Such a claim has nothing to do with the Fourth Amendment, and thus the definition of "seizure" from the *Mendenhall* case and the "totality of the circumstances" test are inapposite.

2. *Probable cause*

The majority's recitation of facts constituting probable cause to arrest Mr. Bell is as follows:

> . . . Terry Sims had lied to them about the time he returned the movie to Cloud's Grocery Store on the day of the murders; that

> Sims was at the grocery store when the murders occurred; that a .22 caliber pistol was missing from the home of a friend of Sims's, and that was the caliber of pistol used in the killings; that Bell told the police officers he was not with Sims after school on the day of the murders but that Bell's brother contradicted that story; that Bell's brother told law enforcement officers that just prior to the murders Sims came by to pick up Bell and that the two young men had earlier discussed returning a videotape and getting a soda; and that Bell returned a short time later with a soda pop.

If those are the facts that were known to State Police Investigator McCord, I suggest the officer had a pretty good understanding of the concept when he determined, as he initially testified, that he did not have probable cause to arrest Mr. Bell. Deputy Box, who was sent to pick Mr. Bell up, obviously did not think he had probable cause to arrest in view of his testimony that, had Mr. Bell refused to go with him, he would have called the sheriff's office for instructions. Far more important, the Trial Court specifically found that the officers lacked probable cause to arrest Mr. Bell.

As we have held on numerous occasions,

> probable cause to arrest without a warrant exists when the facts and circumstances within the collective knowledge of the officers and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed by the person to be arrested.

Friend v. State, 315 Ark. 143, 147, 865 S.W.2d 275, 277 (1993).

When we review a trial court's ruling on the legality of an arrest—*i.e.,* whether there was probable cause for it—we say that "all presumptions are favorable to the trial court's ruling" on the issue and that "the burden of demonstrating error" rests on the appellant. *Id.* Moreover, although "[p]robable cause to arrest without a warrant does not require the quantum of proof necessary to sustain a conviction," *Addison v. State,* 298 Ark. 1, 9, 765 S.W.2d 566, 570 (1989), "mere suspicion" does not qualify as probable cause, and "[e]ven a 'strong reason to suspect' will not suffice." *Roderick v. State,* 288 Ark. 360, 363, 705 S.W.2d 433, 435 (1986)(citations omitted). *See Rose v. State,* 294 Ark. 279,

282, 742 S.W.2d 901, 902 (1988)(stating "suspicion" will "not rise to the level of probable cause"); *Moore v. State,* 265 Ark. 20, 576 S.W.2d 211 (1979).

The State has not carried its burden of demonstrating that the Trial Court's ruling on the question of probable cause was in error. The facts recited by the majority, at best, merely give rise to a *suspicion* that Mr. Bell had committed an offense. These facts show that, by January 8, the police had reliable information connecting Mr. Sims to the murders. With respect to Mr. Bell, however, the facts justified only the belief that Mr. Bell might have been with Mr. Sims at the store around the time of the murders.

Although the "essential facts" mentioned by the majority may have given the police probable cause to believe that Mr. Bell was *present* at the store with Mr. Sims, "mere presence" at the scene of a crime is not an offense. *See also Branam v. State,* 277 Ark. 204, 207, 640 S.W.2d 445, 447 (1982)(stating the fact that appellant was seen visiting co-defendant's apartment prior to the crime does not give rise to probable cause); *Vega v. State,* 26 Ark. App. 172, 175, 762 S.W.2d 1, 2 (1988)(stating the fact that appellant and his companion were seen near building where burglary had occurred merely gave rise to "suspicion," not probable cause).

There is an additional reason to affirm the Trial Court's ruling on the probable-cause issue. We have said that the question of whether the police have probable cause for an arrest rests upon the collective information of the police officers rather than upon the information known to the individual officer who encounters the defendant. *Tillman v. State,* 271 Ark. 552, 609 S.W.2d 340 (1980). The majority relies upon this principle to explain away the fact that Deputy Box and Officer Plafcan, the officers who approached Mr. Bell on January 8, did not individually have probable cause to arrest Mr. Bell. According to the majority, the police "collectively" possessed knowledge that constituted probable cause to arrest Mr. Bell, and thus Mr. Bell's statement on January 8 was erroneously suppressed.

The majority overlooks, however, our holding in *Friend v. State, supra,* and Ark. R. Crim. P. 4.1(d). According to Ark. R. Crim. P. 4.1(d),

> [a] warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid *where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause* [emphasis added].

We considered that rule in the *Friend* case and held that an arrest made by an officer who personally lacks probable cause to arrest is invalid unless the arresting officer is specifically instructed to make an *arrest* by officers who possess probable cause to arrest. In the *Friend* case, the testimony showed that the arresting officers lacked probable cause themselves and were instructed only to stop the appellant and hold him for questioning. No one who possessed probable cause to arrest told the officers who detained the appellant to arrest him. As a result, we held the arrest was made in violation of Ark. R. Crim. P. 4.1(d).

The *Friend* case has a clear application to the case at bar. Under our cases interpreting Rule 2.3, we say that a violation of the rule is excused if the police had probable cause to arrest the defendant at the time of the request to accompany the police to the office. The rationale behind this "exception" to the suppression requirement is that, if the police could have *legally* arrested the defendant in any event, then there is no reason to suppress the statement on account of their failure to provide the verbal warning under Rule 2.3. The availability of this "probable-cause exception" thus depends on whether the police could have made a legal arrest of the defendant at the time the "request" under Rule 2.3 was made.

Here, there was no "arrest" of Mr. Bell, and thus it may be tempting to distinguish the *Friend* case on that basis. However, it is clear that Deputy Box and Officer Plafcan, at the time they requested Mr. Bell to accompany them to the station, could not have made a legal arrest. The testimony at the suppression hearing clearly shows that they, like the officers in the *Friend* case, were not instructed to arrest Mr. Bell. Thus, even if the police "collectively" had probable cause to arrest Mr. Bell, any arrest made by these particular officers at that moment on January 8 would have been illegal under our holding in the *Friend* case. Therefore, we cannot say that the statement should have been admitted under the

"probable-cause exception" to the general rule of suppression prescribed by Rule 2.3.

I respectfully dissent.

GLAZE and IMBER, JJ., join in Part Two of this opinion.

ANNABELLE CLINTON IMBER, Justice, dissenting. I join the portion of Justice Newbern's dissent finding that the police lacked probable cause to arrest Bell on January 8. I write separately to dissent from the majority's significant announcement, without explanation and completely in the form of *obiter dictum*, that this court will no longer interpret Ark. R. Crim. P. 2.3 to require police officers to inform individuals that they have no legal obligation to accompany them to the police station. This declaration is entirely unnecessary to a resolution of the present case, given the majority's holding that the officers' failure to give Bell a Rule 2.3 warning on January 8 was irrelevant because they had probable cause to arrest Bell on that date. I fail to understand how this case squarely presents us with an opportunity to reconsider our adherence to the bright-line interpretation of Rule 2.3. *See Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997) (Brown, J., concurring). I would note that the State does not even request that we undertake such a reconsideration of Rule 2.3. Quite the opposite, the State relies on our bright-line interpretation, arguing that the trial court erred in finding that the police violated Rule 2.3 on January 5, emphasizing McCord's testimony that he told Bell he did not have to accompany him.

As early as *Burks v. State*, 293 Ark. 374, 738 S.W.2d 399 (1987), we have read Rule 2.3 to impose a positive duty upon police officers to warn individuals that they are free to leave. *See also Martin v. State*, *supra*; *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996); *Smith v. State*, 321 Ark. 580, 906 S.W.2d 302 (1995); *Hart v. State*, 312 Ark. 600, 852 S.W.2d 312 (1993); *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989); *Burnett v. State*, 295 Ark. 401, 749 S.W.2d 308 (1988). I consider it imprudent to abandon such an established line of precedent where the parties have presented absolutely no argument or briefing on the relative

merits of such a course of action. For these reasons, I respectfully dissent.

Donna M. MASTERSON and DG's Shiloh Two, Inc. *v.* STATE of Arkansas ex rel. Winston Bryant, Attorney General

96-1064 949 S.W.2d 63

Supreme Court of Arkansas
Opinion delivered July 14, 1997

Everett Law Firm, by: *William B. Putman*, and *Mashburn & Taylor*, by: *Timothy L. Brooks*, for appellants.

Winston Bryant, Att'y Gen., by: *James DePriest*, Senior Asst. Att'y Gen., for appellees.

RAY THORNTON, Justice. Donna M. Masterson owns and controls DG's Shiloh Two, Inc. Both are appellants in this action. Between January 1993 and August 1996, DG's Shiloh Two owned, and Donna Masterson managed, two bingo halls located in Springdale, Arkansas. In January, 1993, the State of Arkansas *ex rel.* Winston Bryant, Attorney General, appellee, filed a complaint in the chancery court of Washington County against appellants alleging that the bingo operations constituted public nuisances and seeking an order to abate and enjoin such activities. Other operators of bingo halls were named but were dismissed when they discontinued their bingo operations. Appellants continued to operate their bingo halls and agreed with appellee to submit the matter to the chancery court upon stipulated facts.

Appellants argued that appellee failed to allege irreparable harm as a basis for injunctive relief, and urged that the adoption by the state of Ark. Code Ann. §§ 26-52-1501—1507 (Supp. 1995), which taxes gross receipts from bingo operations, under which appellants remitted $316,266.00 in taxes to the state, supports

appellants' contention that the bingo halls are not public nuisances. Appellants also argued that the chancery court lacked subject-matter jurisdiction.

On August 12, 1996, the chancery court entered a decree abating the bingo activities as a public nuisance and enjoining the appellants from continuing such activities. On appeal, appellants assert that the chancery court erred in finding that their bingo operations constituted a public nuisance, and further contend that the court lacked subject-matter jurisdiction to conclude that bingo is a lottery or to abate and enjoin such activity. Finally, appellants argue that the court erred in not granting their motion for summary judgment. We have considered each assignment of error and have determined that the trial court should be affirmed. This resolves any issue concerning summary judgment.

Subject-Matter Jurisdiction of Chancery Court

Appellants correctly state the general rule that a chancellor has no criminal jurisdiction. *State v. Vaughan*, 81 Ark 117, 98 S.W. 685 (1906). Further, it is correct that "except in narrow circumstances . . . equity will not enjoin the commission of a crime because the remedy at law is adequate." *Bates v. Bates,* 303 Ark 89, 93, 793 S.W.2d 788, 791 (1990). However, there are circumstances to which we refer in *Bates* and other cases where both criminal and equitable relief are appropriate. In a case involving an erroneously granted exception to the provisions of a city ordinance prohibiting the erection of a nonfireproof building, the chancery court refused to issue an injunction against the prohibited structure because the ordinance prescribed criminal punishments of a fine for each day of violation. *Meyer v. Seifert,* 216 Ark 293, 225 S.W.2d 4 (1949). The appellees in that case argued that the criminal penalty was exclusive. We disagreed and reversed, stating in the words of Justice Robert A. Leflar:

> That equity will not act to restrain ordinary violations of the criminal law, but will leave the task of enforcing the criminal laws to courts having criminal jurisdiction, is basic learning in our legal system. But it is equally basic that if grounds for equity jurisdiction exist in a given case, the fact that the act to be

> enjoined is incidentally violative of a criminal enactment will not preclude equity's action to enjoin it.

Id. at 296-97, 225 S.W.2d at 6.

[redacted] In *State ex rel. Att'y Gen. v. Karston*, 208 Ark. 703, 187 S.W.2d 327 (1945), we decided that the chancery court erred in refusing to entertain jurisdiction of an injunction proceeding brought by the Attorney General seeking to enjoin the operation of a gambling house and stated:

> The chancery court held that it had no jurisdiction in this case. We have repeatedly recognized that equity has authority to abate a public nuisance. In *Ross et al. v. State*, 184 Ark. 385, 42 S.W.2d 376, we quoted from *Marvel v. State*, 127 Ark. 595, 193 S.W.2d 259, 5 A.L.R. 1458, as follows: "The Legislature has not conferred the jurisdiction upon the chancery court to abate public nuisances. *This jurisdiction they have always had.*"

Id. at 710, 187 S.W.2d at 330 (emphasis added).

[redacted] We also quoted with approval the statement from 39 AM. JUR. 410, as follows:

> Where the act is both a public nuisance and a crime, the state may suppress it by a suit in equity, or resort to a criminal prosecution, or may do both. . . . To warrant an injunction where the nuisance is also a crime, there must be proof of what that law denominates a nuisance as distinguished from a mere crime.

Id. at 711, 187 S.W.2d at 330.

In an earlier case involving the same gambling house, *Albright v. Karston*, 206 Ark. 307, 176 S.W.2d 421 (1943), we reversed the local chancellor's decree protecting the gambling house from interference by the state police. We pointed out that "a gambling house was a public nuisance at common law, and the operation of a gambling house has by statute been made a felony in Arkansas." *Id.* at 311-312, 176 S.W.2d at 328.

[redacted] In *State ex rel. Att'y Gen. v. Karston, supra*, we cited many decisions declaring a gambling house to be a public nuisance at common law, determined that the Attorney General has the power and duty under common law to institute equitable proceedings to enjoin the nuisance, and summed up as follows:

> [B]y the weight of authority, equity may act to suppress a public nuisance, even though the maintenance of the nuisance is a crime, where there is alleged in addition to the public nuisance, some facts which show the remedy at law, by prosecution of the criminal, is inadequate and incomplete to effect relief.

Id. at 712, 187 S.W.2d at 331.

In the case under consideration we note that the stipulation of facts, considered together with the principles we have reviewed, support the chancery court's following conclusions of law:

> That each of the bingo halls at issue in this case have operated (openly, publicly, repeatedly, continuously, persistently, and intentionally) on a regular basis for an extended period of time, notwithstanding any potential application or enforcement of any criminal statutes. *It appears to this court that, whatever remedy may exist at law, it has proved to be inadequate.* (Emphasis added.)

We will not reverse the findings and conclusions of a chancery court unless they are clearly erroneous. *Osborne v. Power*, 318 Ark. 858, 890 S.W.2d 570 (1993). We conclude that the findings are not clearly erroneous, and agree with the chancery court's conclusion of law "that this Court, as a court of equity, has jurisdiction to abate a public nuisance." We hold that the chancery court has subject-matter jurisdiction.

Bingo Halls as a Public Nuisance

In reviewing the question whether the chancery court had subject-matter jurisdiction to enjoin a public nuisance, we cited *Albright v. Karston, supra* and *State ex. rel. Att'y Gen. v. Karston, supra,* for guidance as to the availability of equitable relief when criminal penalties are also available. In these cases, we pointed to many other cases that declared gambling houses to be public nuisances at common law. The availability of equitable relief to enjoin a gambling activity was discussed in *Meyer v. Seifert*, where we stated:

> In one of the most publicized cases that ever arose in Arkansas, Chancellor Martin enjoined the holding at Hot Springs of a world championship heavyweight prize-fight between James J.

> Corbett and Robert Fitzsimmons. *State ex rel. Atty. Gen. v. Corbett, Fitzsimmons, et al.*, Martin's Chanc. Decisions 366. Judge Martin conceded that ordinarily equity does not enjoin the commission of crimes, but pointed out that it does issue such injunctions where property interests are involved, and emphasized the prospective property injuries threatened by the prizefight, notably the payment of money by purchases of tickets of admission to the illegal enterprise, losses by bettors . . . .

Id. at 297, 225 S.W.2d at 6-7.

This articulation of possible property losses incurred through gambling activities may reflect the rationale for decisions that a gambling house constitutes a public nuisance at common law. The protection of property rights of the public affected by illegal gambling activities meets the test for equitable relief suggested by Chief Justice Hill in *State v. Vaughan*, where after denying the injunction in the particular case, we added:

> On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime.

Id. at 126, 98 S.W. at 690.

Appellants argue that because the state is taxing its bingo operations, those operations cannot be considered a nuisance. We have considered a similar argument that Act 939, (codified at Ark. Code Ann. §§ 26-52-1501—1507 (Supp. 1995)), legalizes bingo in our recent decision in *Billy/Dot, Inc. v. Fields*, 322 Ark. 272, 908 S.W.2d 335 (1995), where we stated:

> Billy/Dot admits that it operates a bingo establishment where money is at risk, but it is wrong in contending that Act 939 legalizes bingo. The Act specifically does not make bingo legal, as is evidenced by its Emergency Clause: "[T]hat this tax and the requirement for annual registration are not intended to address any question of legality or illegality of the conduct of playing bingo;" Act 939 only provides for taxation of bingo revenues. Because there is no lawful business operation at issue here, there is no valid property right to be protected in this matter.

Id. at 277, 908 S.W.2d at 337. In *Billy/Dot*, we also made the following determination:

> Here, there is no question but that playing bingo for money constitutes gambling which is a criminal offense under our statutes, and the chancery court so found. In doing so, the court correctly cited *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992), in its order.

Id.

[redacted] The operation of a commercial bingo hall meets the definitions of a gambling house, and is therefore a common-law public nuisance. In the case before us it was stipulated that the operation of the bingo halls has been profitable enough to make necessary the payments of taxes of $316,266.00 on gross receipts from July 1993 until June of 1996, and that appellants intend to continue the activities, thereby showing that the operation of the gambling houses have resulted in losses to the public patrons of money from their purchase of cards and pull-tabs from which the proceeds are at least sufficient to pay appellant's taxes. It was also stipulated that no prosecution has been initiated against those operations by anyone, thereby showing that the prosecuting attorney has not brought criminal charges. Whether this is because of the difficulty in gaining convictions, or a belief that other criminal violations have higher priority, or because the prosecuting attorney simply chooses not to prosecute is not relevant. The stipulation that no prosecution has occurred notwithstanding the open continuous, and lucrative operation of the public nuisance supports the chancery court's conclusion that there is no adequate remedy at law. Equity may act to suppress a public nuisance where the remedy at law is inadequate and incomplete. *State ex rel. Att'y Gen. v. Karston, supra.*

Appellees urge that appellants' operation of commercial bingo halls should be declared to be a public nuisance because it flouts the public policy of Arkansas, as expressed in the prohibition against lotteries contained in Ark. Const. art. 19, § 14.[1] We need

[1] Article 19 § 14 provides, "no lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed." The term "lottery" has been defined in *Burks v. Harris*,

not address that argument because of our determination that appellants are operating gambling houses, and that such activities are public nuisances under the common law.

Conclusion

On the basis of the stipulations agreed to in this case, the chancery court found that appellants' bingo halls are public nuisances that have operated openly, continuously, and intentionally, for an extended period of time, without any application or enforcement of criminal penalties. The chancery court made specific findings and conclusions of law, including the following:

> That each of the bingo halls. . .have operated on a regular basis for an extended period. . .notwithstanding any potential application or enforcement of any criminal statute. It appears to this court that, whatever remedy may exist at law, it has proved to be inadequate.
>
> That the bingo activities conducted by defendants should be abated as a public nuisance and each defendant should be enjoined and restrained from conducting any further bingo activities.

These findings and conclusions are not clearly erroneous, and are consistent with the principles of law we have articulated. The judgment of the chancery court is affirmed.

CORBIN, J., dissents.

DONALD L. CORBIN, Justice, dissenting. I dissent for the reason that the chancery court lacked jurisdiction to enjoin Appellants' operation of two bingo halls as public nuisances. At first glance, the majority opinion appears to rely upon this court's decision in *State ex rel. Att'y Gen. v. Karston*, 208 Ark. 703, 187

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91 Ark. 205, 120 S.W. 979 (1909), as containing three essential elements; consideration, chance, and prize. We also note that Ark. Code Ann. § 5-66-119 (Repl. 1993), provides that engaging in activities ordinarily described as chain letters or pyramid schemes for cash or other compensation is participation "in a lottery, which is declared to be unlawful," and further provides for the chancery court to enjoin such activities upon complaint by the Attorney General or prosecuting attorney.

This legislative declaration that equitable relief is appropriate to abate the public nuisance of an unlawful lottery is consistent with our own holding.

S.W.2d 327 (1945), quoting parts of that decision that are favorable to the majority's conclusion. Upon closer examination, however, it becomes clear that the majority completely ignores the ultimate holding of that decision:

> [T]he state may properly seek to protect the community by asking the aid of a court of equity *where the criminal law enforcement agencies have broken down, and thereby rendered the remedy at law to be inadequate or incomplete.*

Id. at 716, 187 S.W.2d at 333 (emphasis added). Contrary to the majority's implication, that decision did not rest on prior holdings that gambling houses were common-law nuisances. Nor did it provide that whenever a criminal law is being violated, the State may put an end to it by seeking an injunction on the ground that the criminal activity is, in and of itself, a public nuisance. Instead, the decision in *Karston* turned upon the particular facts of that case, which are drastically different from those in the present case.

Karston, who was a notorious bookmaker in Hot Springs, had been arrested for gambling no less than ten times, but to no avail because he continued his bookmaking operations after his arrests. Moreover, there were allegations in that case that the local law enforcement agencies were condoning Karston's activities and had refused to prosecute him on the charges. This court thus held that because the criminal law had broken down, rendering the remedy at law inadequate, equity had the power to enjoin the activity as a public nuisance. Here, there was no evidence or even allegation that the activities of the bingo halls constituted a public nuisance beyond the mere contention that they were being operated in violation of the law. No citizen complaints were heard and no allegations were made that anyone had suffered injury as a result of the bingo operations. In short, there was no demonstration that the criminal law had broken down such that equity became empowered to enjoin the activity as a public nuisance.

The first case to address the issue of whether equity could issue an injunction to stop a gambling operation was *State v. Vaughan*, 81 Ark. 117, 98 S.W. 685 (1906). In that case, this court held:

> It is demonstrably true that it is a sound principle of equity jurisprudence that *an injunction will not lie at the instance of the State to restrain a public nuisance where the nuisance is one arising from the illegal, immoral or pernicious acts of men which for the time being make the property devoted to such use a nuisance, where such nuisance is indictable and punishable under the criminal law.* On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin notwithstanding the act enjoined may also be a crime.

Id. at 126, 98 S.W. at 690 (emphasis added).

In *Karston*, this court relied on the above language from *Vaughan*, as well as the decision in *DeQueen v. Fenton*, 98 Ark. 521, 136 S.W. 945 (1911), which held that the chancery court has no criminal jurisdiction, and thus, has no jurisdiction to restrain acts *solely* because they are criminal. Additionally, the *Karston* court cited 39 Am. Jur. *Nuisances* § 147 (1942) for the proposition that "[t]o warrant an injunction where the nuisance is also a crime, there must be proof of what that law denominates a nuisance as distinguished from a mere crime." *Karston*, 208 Ark. at 711, 187 S.W.2d at 330. In other words, in order for equity to enjoin criminal activity, there must be evidence that the activity is a nuisance, in the traditional meaning of that term, in addition to the fact that the activity is a crime.

Subsequent to the decision in *Karston*, in *Hickinbotham v. Corder*, 227 Ark. 713, 301 S.W.2d 30, *cert. denied*, 355 U.S. 841 (1957), this court held that there were only two instances where chancery will assume jurisdiction to enjoin the commission of a criminal offense: (1) Where the enforcement of the criminal law will not deter violation, or (2) where the complaining party has shown an injury. Here, enforcement of Ark. Code Ann. § 5-66-103 (Repl. 1993) would deter violations of the law in that the persons convicted of gambling shall be sentenced to one to three years in prison. Moreover, in this case, the complaining party, the State, has shown no injury. There was absolutely no indication at all that any property owners or other citizens had complained about any adverse affects resulting from the bingo halls' operations.

More recently, in *Bates v. Bates*, 303 Ark. 89, 793 S.W.2d 788 (1990), the appellant sought to have the chancery court enjoin her housemate from committing acts of domestic abuse against her under a theory that chancery has jurisdiction to protect personal and property rights. This court held that equity may only protect those rights when certain conditions are present, one of which is where the remedy at law is inadequate. Appellant argued that the criminal statutes were ineffective because battered housemates are afraid to file criminal charges and prosecutors do not act diligently. This court held that "[e]ven if the arguments were valid, we would not ignore the jurisdictional language of the Constitution and, in doing so, deprive an accused of his Constitutional right to a trial by jury." *Id.* at 92, 793 S.W.2d at 790. This court held further that "equity will not enjoin the commission of a crime because the remedy at law is adequate. . . . If the rule were otherwise, the constitutional right of trial by jury would be infringed." *Id.* at 93, 793 S.W.2d at 791. This court did acknowledge a limited exception to that rule, which arises when the criminal act is "incidental" and there is a danger of "irreparable pecuniary injury to property or pecuniary rights of the complaining party." *Id.* at 93, 793 S.W.2d at 791 (quoting *Smith v. Hamm*, 207 Ark. 507, 181 S.W.2d 475 (1944)). Such exception is not applicable to this case because the criminal act of operating a gambling house was the sole reason for enjoining the activity.

In the present case, there was no evidence whatsoever that the criminal law had broken down or that the remedies at law were inadequate. In fact, there was no evidence that the legal remedy had even been attempted before the State filed for an injunction. Instead, the facts presented below indicate that the bingo halls had been in operation since January 1, 1993, and that the State filed its suit for injunction a mere twenty-one days later. It was stipulated by both parties that Appellants had never been arrested for any violation of the law pertaining to their bingo operations, and that further, there were no allegations concerning rowdiness, drunkenness, excessive traffic, loud noises, or any of the more traditional nuisances.

The trial court's ruling that the remedies available at law were inadequate just because the bingo halls had been in continual

operation for some time is clearly erroneous. It is not enough to render the legal remedy inadequate to merely point to the fact that a criminal offense has been committed. According to our case law, there must be more — i.e., an allegation that local law enforcement authorities have refused to enforce the criminal law or that the bingo operators have been arrested in the past and such arrests have not deterred their illegal gambling activities. The majority's decision in this case circumvents the constitutional right to trial by jury, by allowing courts of equity to stop allegedly criminal activity and deprive the actors of their livelihood without requiring the State to prove beyond a reasonable doubt that such actions are criminal.

For the reasons given, I would reverse the ruling of the chancery court and dismiss the case.

Dr. James Y. SUEN *v.* Kenneth GREENE

96-702 947 S.W.2d 791

Supreme Court of Arkansas
Opinion delivered July 11, 1997

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *Charles R. Ledbetter*; and *Friday, Eldredge & Clark*, by: *Philip Malcom* and *Robert S. Shafer*, for appellant.

Robert S. Blatt; *Morgan & Weisbrod*, by: *Les Weisbrod*, *Michael S. Box*, and *William A. Newman*; and *The Keenan Law Firm*, by: *Don C. Keenan*, for appellee.

RAY THORNTON, Justice. This is a medical malpractice case. Mr. Kenneth Greene, appellee, was injured during surgery performed by Dr. James Y. Suen, appellant, in November of 1986. He filed this complaint in July of 1990, and the matter was tried before a jury in Crawford County in a fifteen-day trial, which lasted from September 23 to October 13, 1995. The jury returned a verdict absolving appellant of medical malpractice. On appellee's motion, the trial court granted a new trial, and appellant appeals from that order.

The record in this case consists of thirty-four bound volumes containing more than 7,400 pages together with a box of exhibits. We have reviewed the trial court's decision to grant a new trial because of side-bar comments by appellant's counsel, its determination that it had erred in not striking the testimony of one expert witness, and that it had erred in refusing to declare a mistrial after another witness for appellant gave unresponsive answers in testimony. We have concluded that these irregularities do not meet the standard set forth in Ark. R. Civ. P. 59; that is, they do not "materially affect the substantial rights of [the] party." Ark. R. Civ. P. 59(a); *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993). Put another way, the irregularities complained of do not show a reasonable possibility of prejudice to appellee's right to a fair trial. *Nazarenko v. C.T.I. Trucking Co.*, 313 Ark. 570, 856 S.W.2d 869 (1993). We hold that granting a new trial on these grounds was a clear abuse of discretion and we reverse and dismiss.

In granting appellee's motion for new trial, the trial court determined (1) that it had committed error in failing to strike testimony of Dr. Ossami Al-Mefty, one of appellant's expert witnesses; (2) that it had committed error in failing to declare a mistrial for unresponsive and prejudicial responses of Dr. William Friedman, an expert medical witness of appellant's; and (3) that prejudice to appellee's right to a fair trial resulted from appellee's many objections to "side-bar comments" by appellant's trial counsel. Rule 59(a) of the Arkansas Rules of Civil Procedure provides:

> A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party:
> (1) any irregularity in the proceeding or any order of the court or abuse of discretion by which the party was prevented from having a fair trial;
> (2) misconduct of the jury or prevailing party[.]

Ark. R. Civ. P. 59(a)(1)-(2).

We have held that, while a trial court's discretion is much broader where the question is whether a jury verdict is supported by a preponderance of the evidence, still, its discretion when granting a new trial under other provisions of Rule 59 should not be disturbed absent manifest abuse of discretion, or "discretion improvidently exercised." *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995). The party moving for a new trial under these provisions must show that his rights have been materially affected by demonstrating that a reasonable possibility of prejudice resulted from the misconduct. *Diemer v. Dischler, supra.*

With this rule in mind, we first examine the court's order finding that the conduct of Mr. Malcom, attorney for appellant, in making side-bar comments materially affected the substantial rights of the appellee, and prevented the appellee from having a fair trial. The record has been abstracted to include every instance of alleged unresponsiveness of witnesses to questions by appellee's counsel, and every instance of side-bar comments in both the direct and redirect examinations. We have reviewed all these exchanges, and we observe that the effort to present the qualifica-

tions of Dr. Friedman as an expert fairly reflects the general nature of the "unresponsive answers" and side-bar comments with which the record is replete. A few examples follow:

Mr. Malcom [appellant's attorney]: Doctor, if you could, I'd like you to visit with us a moment. Have you continued through the years, both when you've been [in] academics and when you've been in private practice, with lecturing or teaching or conducting seminars? I want to cover first the United States with regard to specific areas that would relate to his case.

> MR. MORGAN: Your Honor, I object to the side-bar remarks throughout the question. He can ask the question without the side-bar remarks.
>
> MR. MALCOM: I'll rephrase the question.
>
> * * *
>
> MR. MALCOM: Can you tell the ladies and gentlemen of the jury, and I know [there are] references in your curriculum vitae, but please go ahead and tell us what kind of lecture you conduct.
>
> MR. MORGAN: Your Honor, I object to the side-bar remark.
>
> THE COURT: Yes, let's just ask the questions.
>
> * * *
>
> MR. MALCOM: Just give us [a] general overview. You don't have to cover everything specifically.
>
> DR. FRIEDMAN: Well, I have tried to lecture at major meetings only, because other than that I don't have time to just go to any meeting.
>
> MR. MORGAN: Objection, nonresponsive, Your Honor.
>
> THE COURT: Yes, let's just tell us what you've done.
>
> * * *
>
> MR. MALCOM: I thought we'd save some time. Please go to it [the curriculum vitae].
>
> DR. FRIEDMAN: And so we'll do that, I guess.
>
> MR. MORGAN: Objection to side-bar remark.
>
> THE COURT: Sustained. You just need to go to your curriculum [vitae]. That's what it's here for.
>
> DR. FRIEDMAN: I'm going as fast as I can, Your Honor.
>
> MR. MORGAN: Objection to the side-bar, Your Honor.
>
> THE COURT: Yes. Be responsive to questions.

MR. MORGAN: I would ask the Court to instruct the witness just to answer the questions and leave the side-bar remarks off.

THE COURT: Yes. Just answer questions, Doctor.

DR. FRIEDMAN: Okay.

MR. MORGAN: I object to the okay, Your Honor.

THE COURT: Yes. That'll be sustained.

* * *

MR. MALCOM: Continue on, sir, if you could, and we'd like you to just briefly hit some high points?

MR. MORGAN: Objection to the side-bar, Your Honor.

THE COURT: Sustained.

* * *

MR. MALCOM: Let's go forward a few pages and let's go to the early 1980's. Can you get on page 15 with me?

DR. FRIEDMAN: Yeah.

MR. MALCOM: This is nine years later, 1981.

MR. MORGAN: Objection. Side-bar remark.

THE COURT: Sustained.

These few examples from the abstracted testimony serve as illustrations of strictly enforced rules of procedure, and we do not find any irregularity that would materially affect the substantial rights of appellee, by preventing the appellee from having a fair trial.

The record shows that the trial court was firm and decisive in maintaining tight control over the proceedings. Near the end of the fourteenth day of the trial, the following exchange occurred:

THE WITNESS: Your Honor, can I have the operative report in front of me, please?

THE COURT: I think that's reasonable.

MR. MORGAN: Let me show you what has been marked as exhibit. . . well, let me ask you this first and then I will. . .

MR. MALCOM: We have the exhibits that I got yesterday, Your Honor, I can get them to give them to him.

MR. MORGAN: Your Honor. . .

THE COURT: Mr. Malcom. . .

MR. MALCOM: Yes.

THE COURT: Mr. Malcom, if you interrupt again or walk in front of people again I'm going to remove you from the

> courtroom. You have interrupted his examination at least five times. You know that's not the way it's done, don't you?
> MR. MALCOM: Your Honor, I've been in the court and a lawyer for 20 years and I know a lot of things, the way they're not done.
> MR. MORGAN: Your Honor, I object to that remark.
> THE COURT: Mr. Malcom, you are excluded from the courtroom for the rest of this witness. Mr. Ledbetter will have to take over.

Mr. Malcom left the courtroom, and after conference, Mr. Ledbetter persuaded the trial court to allow him to return on the condition that he only be permitted to make objections.

As a ground for a new trial, the order of the trial court does not find any misconduct of counsel, but suggests that his frequent "side-bar" comments violated appellees right to a fair trial. We observe that most of Mr. Malcom's "side-bar" comments to which appellee objected were casual remarks designed to expedite the proceedings or were referrals to previous testimony.

[redacted] This court has held that the misconduct of the prevailing party includes the misconduct of the prevailing party's attorney. *Hacker v. Hall*, 296 Ark. 571, 759 S.W.2d 32 (1988). This case can be compared to *Alexander v. Chapman*, 289 Ark. 238, 711 S.W.2d 765 (1986), where we held that a new trial should have been granted because prejudice resulted from the cumulative effect of opposing counsel's conduct. In that case, counsel did not cease his unreasonable courtroom conduct, even though he was repeatedly admonished and the trial court repeatedly sustained objections to his leading questions.

[redacted] The conduct in this case does not rise to the level of *Alexander v. Chapman*. It is clear from a review of the abstract that in this case counsel for the plaintiff and the defendant were vigorously and professionally advocating the interests of their clients. The trial court maintained a firm control over the proceeding and we are unable to find any reasonable possibility of prejudice against appellee's rights to a fair trial resulting from the actions of appellant's attorney. Absent any showing that counsel's conduct prevented appellee from having a fair trial, the trial court's action in ordering a new trial for that reason was a manifest abuse of discretion.

We next consider whether the trial court abused its discretion in setting aside the jury verdict and ordering a new trial on the ground that its own errors in the conduct of the trial prevented appellee from having a fair trial. We first address the issue whether the trial court committed error which deprived appellees of a fair trial by failing to strike Dr. Ossama Al-Mefty's testimony. As in the examples referred to during the qualification of Dr. Friedman as an expert, it appeared that appellee's attorney, through frequent objections, most of which were sustained by the court, insisted upon great precision in phrasing questions and answers. While this high standard of precision resulted in numerous objections, we have not found any examples where the answers provided by Dr. Al-Mefty, or the rulings of the trial court constituted irregularities in the proceedings which prevented appellee from having a fair trial. However, appellee asserts that the cumulative effect of all of appellee's objections may have had that result. We cannot agree with that argument. It is apparent that in many instances Dr. Al-Mefty, whose primary language is not English, was seeking to answer fully and completely. The trial court imposed sufficient discipline upon his answers to ensure that the appellee was not prevented from having a fair trial because of Dr. Al-Mefty's tendency to ramble. While Dr. Al-Mefty exhibited some reluctance to give answers during cross examination, the trial court guided and prodded with the result being that the appellee ultimately obtained an answer to each question.

We have stated that "[a] verdict may not be set aside arbitrarily and without reasonable cause." *Martin v. Blackmon*, 277 Ark. 190, 195, 640 S.W.2d 435,437 (1982); see also *Big Rock Stone & Material Co. v. Hoffman*, 233 Ark. 342, 344 S.W.2d 585 (1961). Granting a new trial on the basis that a witness was generally "nonresponsive" is arbitrary and unreasonable. It invites abuse and threatens the right of trial by jury. In practical effect it permits the trial court to substitute its view of the evidence for that of the jury. *See Razorback Cab of Fort Smith v. Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993).

It is well established that the trial court should not substitute its view of the evidence for that of the jury. There is no disagreement that the grounds for granting a new trial (a) because

of the conduct of appellee's counsel, and (b) because the trial court decided it committed error in not striking the testimony of Dr. Al-Mefty did not reflect a material irregularity which prevented appellee from having a fair trial. Therefore, the decision of the trial court in ordering a new trial on those grounds was a manifest abuse of discretion.

We now turn to the trial court's determination that it erred in refusing to order a mistrial because Dr. William Friedman's unresponsive answers and side-bar comments should have resulted in a mistrial, and that the trial court's failure to order a mistrial was a substantial irregularity that prevented appellee from having a fair trial.

In addressing the issue of whether the comments by Dr. Friedman prevented appellee from having a fair trial, we note that much of the dispute centered upon the standard of care, and testimony by a witness for the plaintiff that a "tin-foil" test should have been used. Not only Dr. Friedman, but Dr. Graves Hernsberger, Dr. Edgardo Angtuaco, and Dr. Paul Wills, as well as Dr. Suen and Dr. Al-Mefty testified that Dr. Suen performed the surgery according to the appropriate standard of care. After qualifying as an expert witness, Dr. Friedman testified that if he had been handling the operation he would have followed similar procedures to those employed by the appellant. He stated that the standard of care used by appellant was the "standard of care for ENT surgeons in Little Rock, Arkansas in 1986." This testimony was eventually stricken and the jury instructed to ignore it. No prejudice to appellee resulted from this ruling.

Dr. Friedman was abrasive while on the witness stand; at one point he testified with reference to the "tin-foil" test "that a lie had been perpetrated on this court" by an expert witness for appellee. Appellee moved that the testimony be stricken or in the alterative for a mistrial. The testimony was stricken and the jury was instructed to disregard it. Several expert witnesses for appellant agreed that a "tin-foil" test was not referenced in the literature. It is clear that Dr. Friedman was unresponsive and resistant to answering hypothetical questions which were predicated upon assumptions that he could not accept as correct and the trial court

struck his testimony. After Dr. Friedman's entire testimony had been stricken, appellee never renewed his motion for a mistrial, at that point or thereafter, and when appellant moved for a mistrial, appellee responded: "I believe that the court was justified in the position that it took." The trial court utilized an extreme remedy in striking all of Dr. Friedman's testimony, and appellee agreed that the matter was properly handled. We find no reasonable possibility that appellee was prejudiced, or prevented from having a fair trial because of Dr. Friedman's testimony, all of which had been stricken. The trial court did not commit an error in failing to order a mistrial.

"A mistrial is a proceeding that has miscarried and the consequence is not a trial." *Midwest Line Co. v. Independence County Chancery Court*, 261 Ark. 695, 702, 551 S.W.2d 537, 540 (1977). "A new trial is defined by statute as a reexamination in the same court of an issue of fact after a verdict by a jury or a decision by the court." Id. at 701-02, 551 S.W.2d at 540. It seems clear that the decision by the trial court during the trial that Dr. Friedman's unresponsive answers and side-bar comments did not call for a mistrial was correct.

The trial court exercised great discipline and required strict compliance with rules of procedure. When confronted with difficult decisions, such as striking appellant's main expert witness, removing appellant's counsel from the courtroom, and sustaining objections to, and striking portions of the testimony of other witnesses for the appellant, the court reacted in such a way as to ensure that appellee received a fair trial.

Because we find in this case no reasonable possibility that appellee was deprived of a fair trial by reason of the conduct of appellant's attorney, or by the actions of the trial court in failing to grant a mistrial, and failing to strike Dr. Al-Mefty's testimony, we conclude that the order of the trial court granting a new trial on those grounds was a manifest abuse of discretion, and reverse and dismiss this appeal. Since we uphold the jury verdict and overrule the grant of the motion for a new trial, the venue issue raised in the alternative is moot.

Reversed and dismissed.

NEWBERN, GLAZE, and IMBER, JJ., dissent.

TOM GLAZE, Justice, dissenting. This case is one where the trial court granted a new trial, and this court's standard is simple — in granting the new trial, did the judge manifestly and clearly abuse his discretion by acting improvidently or thoughtlessly without due consideration? The majority court says yes, but if the majority was right, based upon the record before us now, a judge could never order a new trial.

In pertinent part, Rule 59(a) provides that a new trial may be granted (1) for any irregularity in the proceeding which caused the party from having a fair trial, or (2) for jury or party misconduct. Here, as the majority court concedes, the defendant's medical expert witnesses, Doctors Sam Al-Mefty and William Friedman, were reluctant to answer questions on cross-examination, and indeed, Friedman openly and defiantly refused to respond to questioning. Both of these doctors had willingly and convincingly given testimony on direct examination that not only was designed to establish the defendant's, Dr. James Y. Suen's, competence (lack of negligence) in his performance of plaintiff Kenneth Greene's surgery, but also was designed to impeach and discredit Greene's expert witnesses, Doctors Martin Lazar and Roger Rose. As the majority opinion relates, "Dr. Friedman was unresponsive and resistant to answering hypothetical questions which were predicated upon assumptions he could not accept as correct."

Most important, Dr. Friedman, in challenging Greene's case and medical experts, accused Dr. Rose of "inventing a tin-foil test for this case," and when referring further to the test, told the jury, "I feel a terrible lie has been perpetrated in this court." After this last Friedman remark, the trial judge recessed and met with counsel in conference to study and consider his options in minimizing the remark's prejudicial impact on the jury. At defense counsel's urging, the judge rejected Greene's motion for mistrial, and instead framed a cautionary instruction by which he informed the jury that Dr. Friedman was wrong in making his remark that a lie had been perpetrated, and the jury should not consider it. The judge's instruction was to no avail because Friedman, on further

questioning by plaintiff's counsel, refused to answer plaintiff's hypothetical questions that tended to place blame on Dr. Suen for plaintiff's injury. He said, "I can't make those assumptions because it's too hard, given what I know."

While the trial judge instructed the jury that Dr. Friedman's testimony "will be stricken from the record" and directed the jury not to consider it, this court has repeatedly reversed cases because the "metaphorical or proverbial bell" had been rung and prejudice ensued from the improper remarks. *See Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997); *Synergy Gas Corp. v. Lindsey*, 311 Ark. 265, 843 S.W.2d 825 (1992). Here, if any "lie" or fraud occurred in this case, that was within the province of the jury, not for Friedman, to decide.

In addition to the pernicious remarks made by Dr. Friedman, the trial judge had to decide, when faced with Greene's new trial motion, if Greene had been prevented from having a fair trial because of Al-Mefty's and Friedman's misconduct by refusing to answer questions on cross-examination. In reviewing the trial judge's ruling that Greene had been denied a fair trial and was entitled to a new trial, it becomes this court's duty to determine if the judge acted improvidently or thoughtlessly without due consideration. This court further is guided by the controlling principle that a showing of a judge's abuse of discretion in this respect is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996). And finally, this court gives deference to the trial judge in these new-trial matters because the judge has heard all the testimony and was in a position far superior to ours to know whether the proof was so nearly balanced that the misconduct of a witness and juror might have tipped the scales one way or another. *Moody Equip. & Sup. v. Union Nat'l Bk., Adm'r*, 273 Ark. 319, 619 S.W.2d 637 (1981). As Justice George Rose Smith stated in *Moody*, "It is fundamental that the latitude of the trial judge's discretion increases proportionately as the situation presents to him a question that cannot equally be presented to us by the printed record."

Here, Dr. Friedman's credentials are impeccable, and the importance of his testimony cannot be overstated. Again, he not only served to bolster Dr. Suen's theory of the case that Suen did not commit malpractice, Friedman also attacked the medical testimony and opinions given by Greene's doctors. When he refused to answer questions on cross-examination, plaintiff's counsel was denied any opportunity to test Friedman's opinions and other damaging remarks.

Even defense counsel recognized the import of Friedman's appearance and testimony before the jury when they, too, moved for mistrial after the trial judge struck Friedman's testimony. In this connection, defense counsel argued that, without Dr. Friedman's testimony, defendant was deprived of a fair trial. Although defense counsel was likely correct in this regard, the trial judge in granting plaintiff a mistrial recognized the corresponding effect and prejudice to plaintiff when plaintiff was denied the opportunity to test Friedman's direct testimony. In these circumstances, the trial judge was clearly in the best position to hear the defendant's expert witnesses and to observe the impact of their continuing misconduct before the jury. The trial judge made a fair decision and should be affirmed.

In short, the majority is in an impossible position to weigh and determine the impact Friedman's remarks had on the jury; nor is this court positioned to balance the testimonies of all the expert witnesses and how the trial's outcome could have been affected by Friedman's testimony after it was stricken. To ask the jury to forget and not consider such prejudicial testimony was a worthless admonition. To his credit, the trial judge reached that conclusion when confronted with the issue on Greene's new-trial motion.

In conclusion, I note that the majority mentions that Greene did not renew his motion for mistrial after Friedman's testimony was stricken. However, I want to make it clear that the majority does not conclude Greene waived his objections, nor does it cite cases in support of such an idea. Greene twice moved for mistrial, and twice his motions were denied. He was not required

again to move for mistrial. The majority reference in this respect is irrelevant.

For the foregoing reasons, I would affirm.

NEWBERN and IMBER, JJ., join this dissent.

Albert BESHEARS *v.* STATE of Arkansas

CR 96-738 947 S.W.2d 789

Supreme Court of Arkansas
Opinion delivered July 14, 1997

Dale E. Adams, for appellant.

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

PER CURIAM. The appellant, Albert Beshears, entered a conditional plea of guilty to possession of a controlled substance with intent to deliver. He was sentenced to forty years in prison. In the direct appeal, we affirmed the Trial Court's denial of Beshears's motion to suppress. *Beshears v. State*, 320 Ark. 573, 898 S.W.2d 49 (1995). Beshears subsequently filed a petition for postconviction relief pursuant to A.R.Cr.P. Rule 37.

In the petition, Beshears alleged that his counsel was ineffective because he misled Beshears about the existence of an offer of a negotiated plea; because he failed to file a motion asking the trial judge to recuse; and because he represented a conflicting interest that adversely affected the defense. Beshears also alleged that his counsel was ineffective for participating, without his clients' permission, in the division of monies seized by forfeiture.

In addition to his claims for relief under A.R.Cr.P. Rule 37, Beshears filed a motion asserting that the trial judge should recuse from the postconviction proceeding. In the following order, the Trial Court denied the motion to recuse and Beshears's request for postconviction relief:

> Following a hearing held on this day, 21 March 1996, after considering the petitions, the testimony of the witnesses and the arguments of counsel, makes the following orders:
>
> 1. The motion for recusal is hereby denied; and
>
> 2. The request for relief pursuant to Rule 37 is also denied.

Beshears now appeals that order. We reverse and remand because the order does not contain written findings of fact and conclusions of law as required by A.R.Cr.P. Rule 37.3(c).

On appeal, Beshears contends that the Trial Court erred in denying relief on his claim that his counsel was ineffective because he represented a conflicting interest at the same time he represented Beshears. Specifically, he argues that his attorney also represented his brother, Eddie, on an unrelated charge; and that during that representation, Eddie made a statement that exculpated Beshears. Beshears contends that his attorney's choice not to use this statement on his client's behalf made his guilty plea involuntary and unintelligent. Beshears also makes a two-part argument concerning the recusal of the trial judge. He contends that the trial judge erred in denying his motion to recuse from the postconviction proceeding; and that it was error to deny relief on his claim that his counsel was ineffective for failing to file a motion to recuse prior to Beshears's conviction.

[redacted] We cannot reach the merits of the arguments concerning the alleged conflict of interest and trial counsel's failure to file a motion to recuse because the Trial Court did not enter written findings of fact and conclusions of law as required by A.R.Cr.P. Rule 37.3. We have held without exception that this rule is mandatory and requires written findings. *Williams v. State*, 272 Ark. 98, 612 S.W.2d 115 (1981). Therefore, we reverse and remand the case to the Trial Court for written findings of fact and conclusions of law on Beshears's claims for postconviction relief.

We can, however, reach the merits of the argument concerning the Trial Court's denial of the motion to recuse from the postconviction proceeding. Beshears argues that the trial judge should have recused from considering his Rule 37 petition because the trial judge, before he assumed the bench, prosecuted him on an unrelated matter ten years prior to the filing of the charges on which he is presently incarcerated. He also argues that the trial judge gained additional knowledge about Beshears when he represented him on a civil matter, and that the judge played a role in Beshears's return from the Act 309 program in Lawrence County. Beshears contends that these circumstances warranted

the trial judge's recusal in order to avoid the appearance of impropriety. The State argues that the Trial Court did not abuse its discretion in denying the motion to recuse. We agree.

Article 7, Section 20, of the Arkansas Constitution and Canon 3(c) of the Arkansas Code of Judicial Conduct provide that judges must refrain from presiding over cases in which they might be interested and avoid all appearances of bias. *Matthews v. State*, 313 Ark. 327, 854 S.W.2d 562 (1994). A trial judge's decision not to recuse from a case is a discretionary one and will not be reversed on appeal absent an abuse of that discretion. *Bryant v. State*, 323 Ark. 130, 913 S.W.2d 257, (1996). To decide whether there has been an abuse of discretion, we review the record to determine if prejudice or bias was exhibited. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994).

Beshears has not pointed to, nor can we find, any exhibition of bias or prejudice by the trial judge during the Rule 37 proceeding. Therefore, the trial judge did not abuse his discretion in denying the motion to recuse.

Reversed and remanded.

GLAZE, J. dissents.

TOM GLAZE, Justice, dissenting. Returning this case for the trial court to place its findings in an order is a total waste of judicial time. In rendering its decision in this matter, the trial court made its rulings and findings from the bench, and those findings were reported and are now found in the record before us. This court returns this case to the trial court and directs it to take the findings it made earlier (presently set out in the written record), incorporate those findings in an order, and return that order for this court to make a decision. How requiring the trial court to perform this useless function is going to help this court decide appellant's case escapes me.

I would affirm.

Robert D. STANDRIDGE *v.* STATE of Arkansas

CR 96-1468 951 S.W.2d 299

Supreme Court of Arkansas
Opinion delivered September 11, 1997

John Joplin, for appellant.

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

W.H."DUB" ARNOLD, Chief Justice. Appellant was tried and found guilty of first-degree murder and sentenced to life imprisonment. Appellant raises four points for reversal in this appeal. We affirm.

On August 6, 1995, appellant met Rick Vaughan, Phillip Mitchell and Doug Gillespie at a bar in Fort Smith. The three men had spent most of the day drinking together at Glen Vaughn's house, and they invited appellant to return there with them. The men drank at the house for approximately an hour and decided to go to a bar. After calling a cab, the men waited on the front porch

for the cab to arrive. At some point, appellant and Doug Gillespie began arguing on the porch. Rich Vaughn and Phillip Mitchell witnessed Gillespie and appellant rush toward each other. When the two men separated, both Phillip Mitchell and Rick Vaughn noticed that Doug Gillespie had been stabbed. At that time, appellant and Phillip Mitchell left the house on foot and walked through an alley to a local convenience store.

The Fort Smith Police Department was called to investigate the stabbing. The victim, Doug Gillespie, had been taken to the hospital where he later died from the wound. Detective Jeff Barrows interviewed Rick Vaughn who informed him that appellant had stabbed Gillespie and had left the scene on foot along with Phillip Mitchell. Vaughn provided a description of appellant.

Officer Rodney Reed began patrolling the area and noticed two people walking, one of whom matched the description of the suspect. The officer stopped the two men and asked appellant if his name was Bobby Standridge. Appellant answered in the affirmative; the officer told the men to place their hands on the police car; immediately, appellant told the officer that his companion, Phillip Mitchell, "had nothing to do with it. . . ." The officer arrested both men for public intoxication; both men were then taken into custody and transported to the police department where they were separated. Officer Reed testified that, although it was evident that appellant had been drinking, he was functional, he could walk and talk without hesitation, he was aware of his surroundings, and there was no stammer in his voice when he talked.

Detective Barrows testified that he apprised appellant of his *Miranda* rights and that he presented appellant with a waiver form that contained a series of five questions regarding whether the recipient understood his rights. Appellant was asked each question and he answered affirmatively each time that he understood his rights. The detective wrote the answer "yes" following each question that appellant answered in the affirmative; appellant then signed his initials beside each "yes" answer. Appellant indicated that he had completed fourteen (14) years of schooling and was able to read and write. Appellant then was questioned about the

incident. The interview was taped and made a part of the record. During the interview, appellant indicated both that he did stab the victim and that he did not stab the victim.

During one portion of the interview, the following exchange occurred:

DETECTIVE BARROWS:	Okay. Bobby, what I'd like you to do is I'd like to hear your side of the story. I've, I've interviewed two other people so far and have heard some incriminating things about you, and Bobby, as we've discussed before, there's reasons to do everything and there's reasons that, that uh things are done good and bad and I know what happened tonight. There was a reason behind that. What I want to know is what your involvement was there at. . . .
APPELLANT:	I, I ain't ready to talk.
OFFICER:	. . .at 623 North 18th.
APPELLANT:	It's my fault, I ain't got any reason.

Following this exchange, appellant continued answering questions. Several times, he indicated that he stabbed Gillespie. He described the knife to the detective and indicated that he stabbed Gillespie in the stomach. He then told the detective that he did not have a knife and that he did not stab Gillespie.

Appellant challenges the trial court's admission of the statement based upon the contention that he had requested the questioning to stop and that his statement saying he wasn't ready to talk invoked his *Miranda* rights. Additionally, he challenges the statement contending that it was involuntary due to his intoxication.

During the trial, Phillip Mitchell and Rick Vaughn testified that they had witnessed the altercation between appellant and Gillespie, but neither actually saw appellant with a knife. During Phillip Mitchell's testimony, he indicated that he left the scene with appellant because he was scared that appellant would stab him if he did not go with him. Appellant contends a question posed by the prosecutor to Mitchell presented the jury with impermissi-

ble character evidence that was prejudicial to him and warrants reversal.

Appellant proffered the expert testimony of Dr. Joe Alford of the Arkansas Department of Human Services, Division of Mental Health Services, who was to testify on the affects of alcohol on a person's mental ability to reason and form intent. In a proceeding held in chambers out of the hearing of the jury, appellant argued that the expert testimony should be admitted because such evidence was necessary to show that he did not have the requisite intent for the charge of murder. The trial court did not allow such testimony, and appellant contends that the exclusion of this testimony violated his right to due process.

Appellant also challenges a jury instruction submitted that reads: "Voluntary intoxication is not a defense to any criminal offense in Arkansas." Appellant contends that this jury instruction violates his right to due process and that by offering this instruction, the trial court improperly commented on the evidence in the case.

I. Custodial Statement

Appellant claims his statement "I ain't ready to talk" effectively invoked his right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). During custodial questioning, an individual may cease all questions by indicating that he wishes to remain silent. We have held that custodial statements are presumed to be involuntary and the burden of proof is placed on the State to show that they are not. *Noble v. State*, 319 Ark. 407, 892 S.W.2d 477 (1995). We independently review the "totality of the circumstances" to determine whether there was coercion and whether a statement was made in a knowing and intelligent manner. *Thomas v. State*, 315 Ark. 504, 868 S.W.2d 483 (1994).

In this instance, we must examine whether appellant made a clear waiver of his rights or whether he invoked his right to remain silent by his statement that he wasn't ready to talk. Does appellant's statement amount to an invocation of his right to

remain silent? Perhaps so, but we must also determine if any subsequent statements implied a waiver of those rights.

In *Bowen v. State*, 322 Ark 483, 911 S.W.2d 555 (1995), we discussed *Davis v. United States*, 512 U.S. 452 (1994), in which the Supreme Court held that the invocation of the right to counsel must be made with specificity. In *Bowen*, we held that there was "no distinction between the right to counsel and the right to remain silent with respect to the manner in which it must be effected." 322 Ark. at 504, 922 S.W.2d at 565. Following *Bowen*, the right to remain silent must be made unequivocally, and answering questions following a statement that attempts to invoke the right to remain silent may waive that right by implication. *Id.*, *see also Bryant v. State*, 314 Ark. 130, 862 S.W.2d 215 (1993); *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992); *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

Appellant acknowledged that he understood that he had the right to remain silent. The detective then began questioning him. He once interrupted the detective in the middle of a question with the statement that he wasn't ready to talk. The detective completed his question, and appellant immediately answered it. Appellant continued answering questions for a lengthy period of time following that exchange. Never again did appellant indicate that he did not want to continue the interview, nor did he attempt to invoke his right to remain silent. Therefore, the statement by appellant that he wasn't ready to talk did not constitute an unequivocal invocation of his right to remain silent. Instead, it implied that he would be ready to talk at some point. This distinction becomes less important when coupled with the fact that appellant continued to answer questions after making the statement. By continuing with the interview, appellant waived his right to remain silent.

Appellant secondly challenges the custodial statement on the ground that the statement was not voluntary because appellant was intoxicated. In *Kemp v. State*, 324 Ark. 178, 198, 919 S.W.2d 943, 953, *cert. denied*, 117 S.Ct. 436, 136 L.Ed.2d 334 (1996), the appellant challenged the admissibility of a custodial statement based upon the contention that it could not have been

voluntary because he was "so intoxicated that he did not knowingly, intelligently, and voluntarily waive his rights." We held that "whether an accused had sufficient mental capacity to waive his constitutional rights, or was too incapacitated due to drugs or alcohol to make an intelligent waiver is a question of fact for the trial court to resolve." *Id.* at 198, *citing Phillips v. State*, 321 Ark. 160, 900 S.W.2d 526 (1995). Additionally, in *Kemp*, we held that intoxication goes to the credibility of a statement, not its admissibility. *Id.*

In this case, appellant contends that he was so intoxicated that he could not knowingly and intelligently waive his right to remain silent. Following *Kemp*, appellant's argument is meritless. We affirm the trial court's admission of the statement.

II. Jury Instruction

Appellant contends that the trial court erred in submitting a jury instruction which reads: "Voluntary intoxication is not a defense to any criminal offense in Arkansas." Appellant claims that this instruction denied him due process of law and that this instruction was an improper comment on the evidence.

In *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986), we determined that the common-law rule allowing the use of voluntary intoxication as a defense no longer applies in Arkansas, thus voluntary intoxication is not a valid defense to any criminal charge in this state. First, appellant attempts to distinguish the fact that while voluntary intoxication is not a defense, it should be considered as a factor in the mental state of a defendant when a defendant is charged with a specific intent crime. Appellant argues that his due process rights were violated by the trial court's instruction that voluntary intoxication is not a defense to the specific-intent crime, first-degree murder. In *White*, we discussed courts' attempts to distinguish between "knowing" crimes and "purposeful" crimes in the application of the voluntary intoxication rule. We declared that voluntary intoxication is not a defense to any criminal prosecution and determined that the distinction between specific-intent crimes and other crimes was of "no con-

sequence because th[e] defense is no longer available" 290 Ark. at 137.

Appellant's attempt to distinguish specific-intent crimes from other crimes is analogous to the argument utilized by the appellant in *Spohn v. State*, 310 Ark. 500, 837 S.W.2d 873, 874 (1992). Spohn attempted to distinguish specific-intent crimes from purposeful-conduct crimes and contended that the *White* decision did not apply to specific-intent crimes. We held that the *White* decision applies to all crimes, regardless of the requisite intent, and that the defense of voluntary intoxication is not available. *Spohn, id.*, at 874. The argument by appellant is clearly negated by the *White* and *Spohn* decisions, and we affirm the trial court.

Secondly, appellant contends that the jury instruction regarding voluntary intoxication was an impermissible comment on the evidence by the trial court. Appellant contends the trial court erred in submitting this instruction in reliance on the court of appeals decision in *Gilkey v. State*, 41 Ark. App. 100, 848 S.W.2d 439 (1993). Appellant further contends that the court of appeals erroneously applied *White* in *Gilkey*.

In *Gilkey*, appellant challenged the trial court's instructing the jury that voluntary intoxication is not a defense to first-degree murder or battery claiming that such an instruction was an improper comment on the evidence. The court of appeals held that the jury instruction was proper and well within the boundaries established by the *White* decision. The court of appeals noted that there had been evidence about appellant's drinking on the day of the shooting, and that under those circumstances, the "State was entitled to an instruction informing the jury of the law regarding evidence of intoxication so as to avoid any confusion." *Id.* at 104. The court of appeals was correct in its application of *White*.

In the case before us, there was evidence relating to appellant's drinking on the day of the stabbing. The trial court was correct in including an instruction to educate the jury on the rule of law regarding voluntary intoxication. The instruction was straightforward, and it properly stated the law. In no way did the

trial court comment on whether the defendant actually was intoxicated, nor did the court comment on the mental capacity of the defendant. The trial court merely instructed the jury on the rule of Arkansas law that voluntary intoxication is not a defense. We find no error in the trial court's jury instructions.

III. Expert testimony

Appellant contends that he was denied due process by the trial court's excluding the testimony of Dr. Joe Alford regarding the effect alcohol can have on an individual's ability to think clearly. Appellant claims this testimony was crucial to negate the existence of the requisite mental state.

In *Spohn v. State, supra,* we examined the admissibility of evidence relating to voluntary intoxication. The appellant in *Spohn* challenged the exclusion of testimony regarding blackouts resulting from his alcoholism because he contended that he could not form the intent to commit murder. We upheld the trial court's exclusion of such testimony based upon the fact that evidence regarding voluntary intoxication is "irrelevant in light of our decision in *White.*" 310 Ark. at 502.

Following *Spohn,* the expert testimony proffered by appellant is clearly irrelevant, so there is no merit to the contention that the trial court abused its discretion in this ruling.

IV. Motion for a Mistrial

Appellant's final argument is that the trial court erred in denying his motion for a mistrial. This motion was made based on the contention that prejudicial character evidence was offered during the testimony of Phillip Mitchell. Mitchell testified that he was present during the altercation between appellant and Gillespie; he stated that he noticed that the victim had been stabbed, although he did not see appellant holding a knife. He claimed that he left the scene with the defendant because he was scared of him. The prosecutor then asked if he had ever seen the defendant with a knife before.

Prior to the witness answering the question, defense counsel objected and a sidebar was conducted out of the hearing of the jury. The question was withdrawn, and the questioning of the witness continued. During the sidebar, defense counsel motioned for a mistrial, but did not request an admonishment to the jury regarding the question.

Appellant contends that a mistrial should have been declared because this question entered evidence of his character for the purpose of proving that he acted in conformity therewith in violation of Ark. R. Evid. 404(a). Appellant contends that this question resulted in manifest prejudice.

A trial court has wide discretion in granting or denying a mistrial. A ruling denying a mistrial will not be disturbed absent a showing of an abuse of discretion or manifest prejudice to the moving party. *Wilkins v. State*, 324 Ark. 60, 918 S.W.2d 702 (1996); *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994). In *Banks v. State*, 277 Ark. 28, 639 S.W.2d 509 (1982), a question was asked to which the defense counsel objected and moved for a mistrial. The question was not answered, and the trial court denied the motion for a mistrial based upon the fact that there was no inference to the jury since the question was not answered. We upheld the trial court's ruling because "the jury received absolutely no prejudicial information." *Id.* at 32.

This case is analogous to *Banks*. The question was asked which could have led to a prejudicial comment; however, it was never answered. There is no evidence that appellant has been prejudiced in any manner. In fact, the jury received no potentially prejudicial information. There is no evidence to suggest that the trial court abused its discretion by ruling on this motion.

Also, there is no evidence that the defense counsel requested an admonition to the jury to disregard the question. In *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996) we held that a "mistrial is an extreme remedy which should only be granted when justice cannot be served by continuing the trial." *Id.* at 659, *citing Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995). In *Owens*, the defendant moved for a mistrial during the sentencing phase of a trial when the prosecutor mentioned that the defendant had

been found guilty of possession of a controlled substance. The defense contended that the prosecution impermissibly brought up a prior conviction; however, the prosecution maintained that it was referring to the underlying offense being sentenced. The trial court denied the motion for a mistrial but instructed the prosecutor to clarify to the jury that he was referring to the conviction for the underlying offense.

Owens allows trial courts discretion to correct prejudicial statements in order to avoid the "extreme remedy" of a mistrial. In the case before us, the defense counsel did not request an admonition or clarification; the witness did not actually answer the question, thus there was no prejudicial information before the jury. There is no merit to the contention that the trial court abused its discretion in denying the motion for a mistrial.

In accordance with Ark. Sup. Ct. 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.

Affirmed.

Richard O. GOODEN, Jr. *v.* STATE of Arkansas

CR 97-123 950 S.W.2d 461

Supreme Court of Arkansas
Opinion delivered September 11, 1997
[Petition for rehearing denied October 16, 1997.]

Kenneth G. Fuchs, for appellant.

Marcus Vaden, Deputy Prosecuting Att'y, for appellee.

RAY THORNTON, Justice. This case arises from an order of contempt out of Faulkner County. The Faulkner County Circuit Court denied appellant's motion to recall and vacate an order that set aside a previously issued order holding Faulkner County in contempt of court. It is from that denial that appellant brings this appeal.

Appellant, Richard Gooden, seeks a review of the February 27, 1996, action of the Faulkner County circuit court in setting aside its order of February 26, 1996, which had imposed a penalty of $200.00 per day on Faulkner County to run from February 23, 1996, until such time as Faulkner County paid appellant the sum

of $22, 309.35. The court had previously ordered that sum to be paid on or before February 23, 1996.[1]

On June 19, 1996, 112 days later, appellant filed his motion to set aside the February 27 order. We have determined that the challenge to the February 27 order was not filed within the ninety-day limitation period of Ark. R. Civ. P. 60, and therefore was not timely.

Appellant alleges that Faulkner County perpetrated fraud on the court by representing itself as the State in several filed documents. It appears that the authority of the prosecuting attorney of Faulkner County was addressed to the court as Faulkner County, which is a political subdivision of the State of Arkansas. Appellant does not argue that the limitations period was tolled by fraudulent concealment; furthermore, there are no allegations of factual circumstances that could be interpreted as fraud. *See*, Ark. R. Civ. P. 60(c)(4). Under our rules, the trial court did not err in declining to set aside the February 27 judgment.

Appeal dismissed.

[1] While the earlier order is not before us for review, the record shows that the $22, 309.35 had not been paid on February 23, and that on that date a Faulkner County prosecuting attorney had filed a notice of appeal, and also requested a stay. These pleadings were brought to the attention of the trial court promptly after the entry of the February 26 order, and the trial court set aside the February 26 order on the next day, February 27. The record also indicates that the $22, 309.35 has been paid.

Brian John WHITE *v.* STATE of Arkansas

CR 96-1232 951 S.W.2d 556

Supreme Court of Arkansas
Opinion delivered September 11, 1997
[Petition for rehearing denied October 16, 1997.*]

Sam Sexton III, for appellant.

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

RAY THORNTON, Justice. Bryan John White, appellant, appeals from a January 25, 1996, judgment revoking his probation

* CORBIN, J., not participating.

and sentencing him to serve six years concurrently on each of four felony charges to which he had pleaded guilty in February of 1993. He contends that the trial court erred in failing to dismiss the petitions for revocation pursuant to Ark. Code Ann. § 5-4-310 (Repl. 1993), that he received an illegal sentence, and that his constitutional right to a speedy trial under Ark. R. Crim. P. 28.1 was violated. The first two arguments are meritless, and the third is not preserved for our review. We affirm the judgment of the trial court.

We first address appellant's argument regarding dismissal under Ark. Code Ann. § 5-4-310. The relevant facts surrounding the argument are as follows. The supervised probation imposed in February of 1993 was revoked on October 12, 1993, and punishment imposed for violations of probation. The probationary term was extended by one year, by order entered November 5, 1993.

On July 10, 1994, appellant was arrested and charged with the June 24, 1994, rape of a twelve-year-old girl. This felony charge resulted in a revocation petition, but the record does not disclose if or when appellant was arrested on the revocation petition. The record does show that he fled to Texas and California but was returned to Arkansas. Appellant was ultimately tried on the rape charge and the probation revocation on January 23, 1996. He argues that the trial court should have dismissed the probation revocation under Ark. Code Ann. § 5-4-310, which provides in pertinent part:

> (b)(1) A suspension or probation shall not be revoked except after a revocation hearing.
>
> (b)(2) The revocation hearing shall be conducted by the court that suspended imposition of sentence on defendant or placed him on probation within a reasonable period of time, not to exceed sixty (60) days, after the defendant's arrest.

Id. § 5-4-310(b)(2).

The record reveals that at a hearing on October 17, 1994, the court asked appellant's counsel if he wanted to go ahead with the revocations on that date or to reset them to track the substantive charge. It was agreed at this time that the revocations would track the substantive charge. Appellant changed attorneys before his

trial. On January 23, 1996, the date that appellant was ultimately tried, appellant's new counsel moved to dismiss the revocations under the sixty-day provision of the statute, because appellant had been continually incarcerated for more than sixty days prior to trial. The trial court denied the motion, noting that, "from almost the onset of this matter it was understood that the hearings on the probation violations would track the substantive charge."

We agree with the trial court that appellant waived his argument for dismissal by asking that the revocation hearing track the substantive proceedings. When a defendant prefers that the revocation matter be deferred until disposition of an underlying charge, he cannot then turn around and complain of delay. *Barnes v. State*, 294 Ark. 369, 742 S.W.2d 369 (1988). Further, we note that at a hearing held on December 7, 1995, appellant's new counsel, in seeking to separate the revocation matter from the underlying charge, stated to the court that he believed the January trial date to be within the sixty-day time frame.

Appellant's illegal-sentence argument can be disposed of quickly. He contends that he was not sentenced according to the requirements of Ark. Code Ann. § 16-93-303 (Supp. 1995), which provides that the court enter a judgment and commitment order. However, the record shows that the trial court entered such an order on January 25, 1996, on the charges for which he had received probation. Appellant's argument is meritless, as it lacks a factual basis.

His final argument is that his constitutional right to a speedy trial was violated due to the delay in hearing the revocation petition. He argues on appeal that the provisions of Ark. R. Crim. P. 28.1 apply to revocation hearings. However, we have no basis upon which to address this argument because he never received a ruling on the applicability of Ark. R. Crim. P. 28.1 to a revocation proceeding from the trial court. *See Beasley v. Graves*, 315 Ark. 663, 869 S.W.2d 20 (1994). We have repeatedly held that in order to have the argument addressed on appeal, it is incumbent upon a movant to obtain a ruling below. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997). Appellant's argument on this issue is procedurally barred from our review.

Affirmed.

CORBIN, J., not participating.

Senaca Maurice BOGAN *v.* STATE of Arkansas

CR 97-842 949 S.W.2d 893

Supreme Court of Arkansas
Opinion delivered September 11, 1997

James P. Massie, for appellant.

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

PER CURIAM. Senaca Maurice Bogan, by his attorney, has filed a motion for rule on the clerk.

The motion admits that the record was not timely filed and that it was no fault of the appellant.

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. 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.

The present motion for rule on the clerk is denied.

Jack Gordon GREENE *v.* STATE of Arkansas

CR 96-362 949 S.W.2d 894

Supreme Court of Arkansas
Opinion delivered September 11, 1997

William M. Pearson, for appellant.

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

PER CURIAM. This is appellant's fourth motion to withdraw his appeal from his death sentence. The first motion was denied because it was held to be equivocal. *Greene v. State*, 326 Ark. 179, 929 S.W.2d 157 (1996). The second motion was unequivocal and was remanded to the trial court for a determination of whether apellant Greene's waiver was knowing and intelligent. *Greene v.*

State, 326 Ark. 823, 933 S.W.2d 392 (1996). The matter was remanded a second time so that an evaluation could be conducted by State Hospital personnel and for further hearing to be held by the trial court. *Greene v. State*, 327 Ark. 511, 939 S.W.2d 834 (1997). The motion to withdraw the appeal was ultimately denied because appellant refused to cooperate in a competence examination and said that he would continue to refuse to do so. *Greene v. State*, 328 Ark. 218, 941 S.W.2d 428 (1997). A third motion to withdraw the appeal was denied by order entered June 17, 1997, and appellant's counsel was directed to file the appellant's brief by July 16, 1997.

On July 14, 1997, appellant filed the instant *pro se* motion again asking to withdraw the appeal and seeking a writ of habeas corpus. Counsel for appellant subsequently obtained an extension of time to file the brief and filed a motion requesting instruction on whether to file the brief in light of appellant's *pro se* motion.

Appellant states that he is now willing to submit to the psychological examination which he refused before. The State urges this court to deny the *pro se* motion, asserting that appellant has forfeited his right to waive appeal by his failure to cooperate with this court's past orders. The State also notes that the motion is *pro se* and argues that appellant is not entitled to be heard both *pro se* and by counsel.

[redacted] We first deny that part of the motion seeking a writ of habeas corpus. Appellant offers no grounds for issuance of the writ.

[redacted] The request to withdraw the appeal is also denied. The appellant's brief is due for filing October 1, 1997.

Motion denied.

Melvin GRIFFIN *v.* STATE of Arkansas

CR 97-843 949 S.W.2d 892

Supreme Court of Arkansas
Opinion delivered September 11, 1997

Claudell Woods, for appellant.

No response.

PER CURIAM. Melvin Griffin, by his attorney, has filed a motion for rule on the clerk. His attorney, Claudell Woods, admits in his 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.

Vincent HOPES *v.* STATE of Arkansas

CR 96-1263 949 S.W.2d 895

Supreme Court of Arkansas
Opinion delivered September 11, 1997

The Clay Law Firm, by: *Alvin Clay*, for appellant.

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

PER CURIAM. On July 30, 1997, Alvin Clay, counsel for appellant Vincent Hopes moved to be relieved as counsel. In support of his motion, he sets out part of the history of this case but presents no grounds to warrant the relief requested.

On September 14, 1995, the federal district court issued an order stating that unless the appellant was allowed to prosecute A.R.Cr.P. Rule 36.4 proceedings in Pulaski County Circuit Court and a state appeal, if necessary, with benefit of counsel, a federal writ of habeas corpus would issue. An attorney other than Mr. Clay was appointed on October 26, 1995, by Circuit Judge Marion Humphrey. A hearing before the circuit court was had on the appellant's Rule 36.4 motion for a new trial on April 10, 1996. Judge Humphrey denied the motion on April 18, 1996. On April 30, 1996, the appellant's appointed counsel was relieved as counsel. The appellant then filed a notice of appeal *pro se* on May 3, 1996. The transcript in this matter was filed on October 17, 1996.

On February 7, 1997, Judge Humphrey appointed Mr. Clay to represent the appellant in his appeal from the denial of his Rule 36.4 motion. On May 29, 1997, Mr. Clay moved for a belated

appeal which we considered moot in light of the fact that appellant's appeal was already pending. Counsel may, however, desire to file a belated brief.

There is no basis to relieve Mr. Clay as counsel. The motion is denied.

Dan Chris IVY *v.* STATE of Arkansas

CR 97-835 949 S.W.2d 892

Supreme Court of Arkansas
Opinion delivered September 11, 1997

No response.

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

PER CURIAM. In granting the State's motion to release the transcript, we refer to our per curiam order of March 19, 1997, in *Ivy v. State*, 327 Ark. 683, 939 S.W.2d 843 (1997), in which we denied Mr. Ivy's request to unseal the records, but allowed references to be made to them in a Rule 37 petition that we required to be submitted under seal. The State is also bound by this procedure and should be allowed access to the transcript of the hearing for the purposes of preparing its brief, subject to the provision of our March 19 order that the records and references to

them not be released to anyone other than the Court, the parties to this appeal, and the parties' attorneys.

Edward G. PARTIN II *v.* STATE BOARD OF LAW EXAMINERS

97-683 950 S.W.2d 460

Supreme Court of Arkansas
Opinion delivered September 11, 1997

Petitioner, pro se.

Kaplan, Brewer & Maxey, by: *Philip E. Kaplan*, for respondent.

PER CURIAM. Petitioner Edward G. Partin II has filed a petition for admission to the bar of Arkansas and a motion for

consideration of previous record and briefs and request for oral argument.

Petitioner sought admission to the Bar of Arkansas in 1993. He had completed the necessary educational requirements and had passed the Arkansas bar examination. The Board of Law Examiners refused to recommend his admission on the ground that he was not morally qualified. The Board concluded that Petitioner's efforts at rehabilitation were not complete in view of what members perceived as his lack of candor. On appeal, this court affirmed the Board's decision. *Partin v. Bar of Arkansas*, 320 Ark. 37, 894 S.W.2d 906 (1994).

Petitioner again seeks admission to the bar of Arkansas and alleges that he has completed the necessary educational requirements and that he has passed the Arkansas Bar examination and the Multistate Professional Responsibility examination. Petitioner further alleges that he was admitted to the bar of Louisiana on April 25, 1995.

Rule XIII of the Rules Governing Admission to the Bar requires that any application for initial admission shall be submitted to the Executive Secretary of the Board and that the determination of eligibility shall be made by the Board in accordance with Rule XIII. In the event the Board denies eligibility, the applicant may appeal the Board's decision to this court for review de novo upon the record.

The Board's decision to deny Petitioner's previous application for admission to the bar of Arkansas was affirmed by this court in 1995. *Partin v. Bar of Arkansas, supra.* Pursuant to Rule XIII of the Rules Governing Admission to the Bar, Petitioner must first submit any application for initial admission to the Board for determination of eligibility. This court does not have original jurisdiction of petitions for admission to the bar of Arkansas. Rather, this court's jurisdiction in connection with applications for admission to the bar is solely for appellate review of the Board's decisions. Rule XIII of the Rules Governing Admission to the Bar.

The petition for admission to the bar of Arkansas is, therefore, dismissed for lack of original jurisdiction. The motion for consideration of previous record and briefs and request for oral argument is, therefore, moot.

BROWN, J., not participating.

Michael Sherman PHILLIPS *v.* STATE of Arkansas

CR 97-814 949 S.W.2d 894

Supreme Court of Arkansas
Opinion delivered September 11, 1997

Joel O. Huggins, for appellant.

No response.

PER CURIAM. Michael S. Phillips, by and through his attorney, has filed a motion for a rule on the clerk. His attorney, Joel O. Huggins, admits in his 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.

Basilio REYES and Rogelio Reyes *v.* STATE of Arkansas

CR 96-1385 954 S.W.2d 199

Supreme Court of Arkansas
Opinion delivered September 11, 1997

Thomas Travis, for appellants.

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

PER CURIAM. On July 14, 1997, Thomas Travis, counsel for appellants Basilio Reyes and Rogelio Reyes, moved this court to appoint him as counsel *nunc pro tunc* from November 31, 1995. He states in his motion that "he has not been compensated for his past or future representation in this case." He further states that his clients refused to sign an affidavit of indigency, and he, accordingly, has attached his own affidavit to his motion attesting to his clients' indigency. The appeal in the appellants' case was submitted to this court for consideration on September 11, 1997.

The history of counsel's representation of the Reyeses on appeal can be gathered from the Supreme Court file in this case. On January 21, 1997, the Reyeses, who are incarcerated, filed their motion for substitution of counsel and attached two affidavits of indigency showing no assets. On February 6, 1997, Thomas Travis moved to withdraw as their counsel and set out in his motion that he had been paid only $3,000 for trial representation and that $2,000 was still owed him plus $1,000 which he paid for the trial transcript. Both motions were denied by this court. Mr. Travis's motion to be appointed as counsel due to his clients' indigency was then filed on July 14, 1997.

[redacted] Though we question the diligence of Mr. Travis in filing his appointment motion, our file in this matter does show that the Reyeses have filed the proper affidavits of indigency in connection with their own motion to substitute counsel. Because the clients' affidavits establishing indigency have been filed in this appeal, we grant Mr. Travis's request to be appointed, but only with respect to the appeal. His motion as it relates to appointment *nunc pro tunc* for representation at trial is denied. It is clear that Mr. Travis was retained for his trial work and compensated in part for that representation.

Robin K. SCHLESIER *v.* STATE of Arkansas

CR 97-399 949 S.W.2d 892

Supreme Court of Arkansas
Opinion delivered September 11, 1997

Gruber Law Firm, by: *Wayne A. Gruber*, for appellant.

No response.

PER CURIAM. Appellant Robin K. Schlesier, by his attorney, Wayne A. Gruber, has filed a motion for extension of time, and for further instruction.

On May 27, 1997, Appellant filed a Petition for Writ of Certiorari to complete the record. By *Per Curiam* Order dated June 16, 1997, Appellant's Petition for Writ of Certiorari was granted. The Writ of Certiorari was issued to the Monroe County Circuit Clerk and to the Court Reporter, Nila J. Keels, returnable on July 16, 1997.

On July 17, 1997, the Monroe County Circuit Clerk filed an affidavit in which she averred that the court reporter, Nila J. Keels,

failed to file the record of testimony in her office as commanded in the Writ of Certiorari.

We find that the court reporter's failure to comply with the Writ of Certiorari issued on June 16, 1997, is good cause to grant Appellant's motion for extension of time to file the record of testimony.

The motion is, therefore, granted until such time as the court reporter complies with the Writ of Certiorari issued on June 16, 1997.

Nila J. Keels is also ordered to appear before this court on the 25th day of September, 1997, at 9:00 a.m. to show cause why she should not be held in contempt of this court for her failure to comply in a timely manner with the command of the Writ of Certiorari issued on June 16, 1997.

Sam STEWART *v.* STATE of Arkansas

CR 97-942 949 S.W.2d 893

Supreme Court of Arkansas
Opinion delivered September 11, 1997

Irwin Law Firm, by: *Robert E. Irwin*, for appellant.

No response.

PER CURIAM. The appellant, Sam Stewart, has filed a motion styled, "Motion to File Belated Appeal and for a Rule on the Clerk." Mr. Stewart's attorney, Robert E. Irwin, admits that the notice of appeal was untimely filed due to negligence on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to treat this motion as one for belated appeal and 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.

Wake WILLIAMS *v.* STATE of Arkansas

CR 97-952 949 S.W.2d 894

Supreme Court of Arkansas
Opinion delivered September 11, 1997

George J. Stone, for appellant.

No response.

PER CURIAM. Appellant, Wake Williams, by his attorney, George J. Stone, has filed a motion for rule on the clerk. His attorney admits that the record was tendered late due to an error 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 per curiam order dated February 5, 1979. *In re: Belated Appeals in Criminal Cases*, 265 Ark. 964; *Terry v. State*, 272 Ark. 243, 613 S.W.2d 90 (1981).

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

Gregory Lamont CHILDRESS *v.* The Honorable Marion HUMPHREY, Circuit Judge, Pulaski County Circuit Court

CR 97-1055 950 S.W.2d 220

Supreme Court of Arkansas
Opinion delivered September 16, 1997

Wallace & Hamner, by: *H.C. Martin*, for petitioner.

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

PER CURIAM. The petitioner, Gregory Lamont Childress, filed a motion for an expedited appeal to hear the issue presented in his Petition for a Writ of Mandamus. The State does not contest this motion, and accordingly it is granted.

The petitioner also filed a motion for a writ of mandamus asking us to compel Judge Marion A. Humphrey of the Pulaski County Circuit Court to set bail pending his trial on criminal charges. In *Henley v. Taylor*, 324 Ark. 114, 918 S.W.2d 713 (1996), we held that certiorari is the proper remedy to review a circuit court's determination of the availability of bail. Thus, we will treat Childress's petition for a writ of mandamus as a petition for a writ of certiorari.

The Arkansas Constitution declares that "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption is great." Ark. Const., art. 2, § 8. Accordingly, we grant the Childress's petition for a writ of certiorari, and direct Judge Humphrey to hold a hearing and to set a reasonable bond.

Motion for Expedited Appeal granted.

Petition for a Writ of Certiorari granted.

CORBIN, J., would deny.

ARKANSAS STATE HIGHWAY COMMISSION
v. Raymond L. FRISBY and Virginia H. Frisby

96-1360 951 S.W.2d 305

Supreme Court of Arkansas
Opinion delivered September 18, 1997

Robert L. Wilson, Chief Counsel, and *Barbara A. Griffin*, *Lawrence W. Jackson*, and *Maria L. Schenetzke*, Staff Att'ys, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *William I. Prewett*, for appellees.

DAVID NEWBERN, Justice. This is an eminent domain case. For the purpose of widening U.S. Highway 167 from two to four lanes in Union County, the Arkansas State Highway Commission ("the Commission") condemned the .97 acres constituting the highway frontage of a 6.3-acre tract of land belonging to Raymond L. and Virginia H. Frisby. With its condemnation complaint, the Commission deposited $57,550 into the registry of the Circuit Court as compensation. The Frisbys requested a jury trial to determine the value of the land. A judgment, based on a jury determination, awarded the Frisbys $86,050. The Commission has appealed, arguing that the Frisbys failed to update discovery responses with respect to the proposed testimony of their expert appraiser. We agree that the Commission was entitled to have an updated response and that the two-hour continuance granted by the Trial Court on the day of trial was inadequate to remedy the problem. We also agree that the testimony of Raymond L. Frisby

should have been stricken and that the Frisbys' expert gave improper evidence concerning comparable sales. The judgment is thus reversed and remanded.

1. Discovery violation

As we said in *Arkansas State Highway Comm'n v. Barker,* 326 Ark. 403, 405, 931 S.W.2d 138, 140 (1996), "There are three recognized formulas for measuring just compensation in partial-taking cases: (1) the value of the part taken; (2) the value of the part taken plus the damages to the remainder; (3) the before- and after-value rule. *Young v. Arkansas State Highway Comm'n,* 242 Ark. 812, 415 S.W.2d 575 (1967); *see also Arkansas State Highway Comm'n v. Jones,* 256 Ark. 40, 505 S.W.2d 210 (1974)."

The 6.3-acre tract owned by the Frisbys was the site of a truck stop composed of a service station, store, and restaurant. The Commission requested that it be supplied with information forming the basis of expert testimony to be presented by the Frisbys. In response, the Frisbys furnished a "preliminary report" compiled by Ron Robinson, the expert who was to testify. The Commission thereafter took Mr. Robinson's deposition in which he was examined with respect to his preliminary-report conclusion, applying the before-and-after value rule, that the 6.3 acres was worth either $113,000 or $117,000 prior to the taking. One figure was based on the "cost" method, and the other on the "income capitalization" method of evaluating the before and after values.

At the trial, Mr. Robinson gave his pre-taking evaluation as $158,000 and the value of the property remaining as $32,000. During cross-examination of Mr. Robinson, counsel for the Commission noted that Mr. Robinson was testifying from a document labeled "final report" containing facts and figures which had not been furnished to the Commission. Mr. Robinson discussed comparable sales, of which Commission counsel were unaware, in the process of establishing his opinion as to the value of the Frisbys' land before and after the taking.

Counsel for the Commission informed the Trial Court that, in view of the fact that the report as to which Mr. Robinson had

been deposed was labeled "preliminary," she had, by letter, asked the Frisbys' counsel to supply any additional reports to be made. She also informed the Trial Court that the Frisbys' counsel had responded in a letter stating that there would be no further reports and that the deposition testimony would be sufficient. The Frisbys' counsel did not contest those remarks by the Commission's counsel.

Although there was a reference to a mistrial, counsel for the Commission moved, in lieu thereof, for a continuance sufficient to allow investigation of the new information. Counsel for the Frisbys said that he was not introducing Mr. Robinson's final report, which he too had received the day of the trial, into evidence and that it should be sufficient to allow counsel for the Commission to cross-examine Mr. Robinson with respect to his testimony.

The Trial Court granted a two-hour continuance, which amounted to an extended lunch break, to allow Commission counsel to examine Mr. Robinson's final report.

■ ■ According to Ark. R. Civ. P. 26(e)(1), a party is under a duty to supplement a discovery response, "in the case of expert witnesses, [with] the subject matter on which he is expected to testify, and the substance of his testimony." When a party complains about failure to update discovery, the matter lies within the discretion of the trial court. *See Banks v. Jackson,* 312 Ark. 232, 848 S.W.2d 408 (1993). In this instance, there was an obvious violation of Rule 26(e)(1) to the prejudice of the Commission. The two-hour continuance was hardly sufficient to allow examination and investigation of new facts and figures contained in Mr. Robinson's final report; thus we hold that the Trial Court's response amounted to an abuse of discretion sufficient to cause reversal and remand of the case.

2. Owner's testimony

■ ■ Another point of appeal has to do with the testimony of Raymond L. Frisby who was allowed, after he had described improvements on the property, to express his opinion that the pre-taking value was $250,000. No doubt an owner of property is allowed that privilege, but the testimony must be

grounded in evidence of market value. *Arkansas State Highway Comm'n v. Highfill,* 248 Ark. 541, 452 S.W.2d 846 (1970). During cross-examination, Mr. Frisby said he had not established a per acre value and that his $250,000 figure was based solely on his "feeling" or what he would have asked for the land and not on any facts or figures in Mr. Robinson's report. The Commission's motion to strike Mr. Frisby's testimony should have been granted.

3. Business profits

The *Highfill* decision is also relevant to the Commission's point, which is well taken, that Mr. Robinson's testimony should have been stricken because, with respect to comparable sales of business properties he used to establish the value of the Frisbys' property, he could not say that he had discounted "good will" and profit potential elements of the sales prices. Although it is appropriate to ascertain the highest and best use of the land, whether considering the property condemned or comparable properties that have been sold, it is important to separate "business value," such as profit potential from a particular business, from the market value of the property. *See Arkansas State Highway Comm'n v. Wallace,* 247 Ark. 157, 444 S.W.2d 685 (1969); *Hot Spring County v. Bowman,* 229 Ark. 790, 318 S.W.2d 603 (1958).

In conclusion, the Commission has argued that the verdict and judgment are not supported by substantial evidence. This is not a case in which the Commission's liability for compensation is in issue; rather, the issue is the amount. We need not consider the sufficiency argument in view of our decision to reverse and remand on the other points mentioned.

Reversed and remanded.

Michael WATSON *v.* STATE of Arkansas

CR 97-204 951 S.W.2d 304

Supreme Court of Arkansas
Opinion delivered September 18, 1997

Alvin Schay, for appellant/cross-appellee.

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

DAVID NEWBERN, Justice. Michael Watson was convicted of two counts of first-degree battery, one count of felon in possession of a firearm, and one count of terroristic threatening. The evidence showed that Mr. Watson shot and injured Kenyon Coleman and Jonathan Young and pointed his pistol at Tremmel Prudhomme outside a fraternity house in Arkadelphia while a party was in progress. He was sentenced to 102 years in prison. Mr. Watson's sole point of appeal relates to the battery convictions. He contends the Trial Court erred in refusing to instruct the jury on the lesser-included offense of second-degree battery. We affirm because no such instructions were proffered to the Trial Court.

On numerous occasions, most recently in *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997), and *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996), we have restated the rule that an appellant who seeks reversal based on the failure to instruct the jury as requested by the appellant must present a record showing a proffer of the requested instruction. The record in this case does not contain any such proffer; thus, we must affirm on the point without further consideration.

The State has cross-appealed from a directed verdict or dismissal granted in Mr. Watson's favor with respect to a charge of terroristic act. Ark. Code Ann. § 5-13-310(a)(2) (Repl. 1993). The statute prohibits shooting "with the purpose to cause injury to persons or property at an occupiable structure." As abstracted by Mr. Watson, it appears that the Trial Court granted a directed-verdict motion but in the course of doing so said the charge was "dismissed" because Mr. Watson was shooting at a person rather than at an occupiable structure.

Whether the charge was dismissed due to a technical defect or resulted in no conviction because of insufficiency of the evidence, it is apparent that the language of the allegation is significant. We have no idea what the allegation was because neither Mr. Watson nor the State has abstracted an information or amended information charging Mr. Watson with a terroristic act. It is an appellant's, in this case a cross-appellant's, duty to present a record to the Court sufficient to permit review of the error it asserts. Failure to abstract a critical document precludes this Court from considering issues concerning it. *Jackson v. State,* 316 Ark. 509, 872 S.W.2d 400 (1994); *Porchia v. State,* 306 Ark. 443, 815 S.W.2d 926 (1991).

Affirmed on appeal and affirmed on cross-appeal.

ARNOLD, C.J., not participating.

Belynda Faye GOFF *v.* STATE of Arkansas

CR 97-135 953 S.W.2d 38

Supreme Court of Arkansas
Opinion delivered September 18, 1997
[Petition for rehearing denied October 23, 1997.]

[redacted]

[redacted]

Vowell & Atchley, P.A., by: *Stevan E. Vowell* and *Hatfield & Lassiter*, by: *Jack T. Lassiter*, for appellant.

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

TOM GLAZE, Justice. Appellant Belynda Faye Goff was convicted of first-degree murder of her husband and sentenced to life in prison. She raises four points for reversal.

[redacted] Ms. Goff first argues the trial court erred in denying her motion for directed verdict because the State failed to prove she purposely caused the death of her husband Stephen. The State's case was premised on circumstantial evidence, but as this court has previously and consistently held, evidence, whether direct or circumstantial, is sufficient to support a conviction if the evidence is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). In determining the sufficiency of the evidence, we need only ascertain that evidence most favorable to the appellee; it is permissible to consider only that testimony which supports the verdict of guilty. *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993).

In reviewing the record, it is clear the Goffs had had marital problems for some time prior to as well as at the time of Mr. Goff's death. Ms. Goff related that her husband had been unfaithful to her, and had affairs with at least two women. Anita Bellefeuille, a friend of Ms. Goff, testified that, about one year before Mr. Goff's murder, Ms. Goff said next time her husband was unfaithful she would "bash his head in." In December of 1993, Ms. Goff used an empty apartment in the complex where the Goffs lived so she could spy on Mr. Goff. In fact, at the time Mr. Goff was killed, Ms. Goff suspected he was having another affair because, when the telephone would ring, the caller would hang up when Ms. Goff answered, but when Mr. Goff answered, he would talk with the caller. On the evening of June 11, 1994, only hours before Mr. Goff's murder, he had received a call and left the

apartment. He told Goff that he was going for a pack of cigarettes, even though the store was closed and he had already purchased cigarettes that day.

Ms. Goff testified she went to bed between 10:00 and 10:30 p.m. on June 11 after Mr. Goff left, and claimed she heard no noises except a door shutting some time during the night. However, the Goffs' upstairs neighbor testified that, around 2:00 a.m. on June 12, she had heard three knocks on the Goffs' door and the door open. The neighbor further said that one to two minutes later she heard five or six loud "bangings," as if someone was banging a broomstick on the ceiling. She added that the banging was so loud she was afraid that it would awaken her six-month-old daughter. Dr. Charles Kokes, who performed the autopsy on Mr. Goff, testified that everything regarding the condition of Mr. Goff's body at the time he was found was consistent with a time of death around 2:00 a.m.

Ms. Goff testified that she slept through the night, got up about nine minutes after the alarm went off at 4:30 a.m., and found her husband's body shortly thereafter. However, Jay Thomas, a paramedic for North Arkansas Medical Center, testified that, when he first arrived at the scene, Ms. Goff was fairly calm, and all the lights were off, both of which he found very strange. He also testified Ms. Goff was dressed in nightclothes which consisted of a camisole and tight blue pants, that she did not appear groggy or sleepy, and that her hair was not "messed up," as would be consistent with someone who had just awakened. Mr. Thomas further testified that when he got there he could only open the door about six inches because Mr. Goff's body was lying against the door. Ms. Goff and her son were only able to get out of the apartment after the door was forcibly opened about eight inches. Mark Forsee, who answered the emergency call Ms. Goff made when she allegedly discovered Mr. Goff's body, testified that during the nine-minute conversation he had with Ms. Goff before the ambulance arrived, she told him there was blood everywhere and that it was her husband's; yet, she did not exhibit any concern or fear that the police might need to be there or that anybody else might be in the apartment.

Lt. Archie Rousey, who investigated the murder scene, testified that, when he arrived at the scene, Mr. Goff's body was lying directly behind the door, fully clothed, with his head slightly elevated in the corner against the door where it hinges and a wall that extends at a right angle. He testified that there were massive amounts of blood under Mr. Goff's head. Lt. Rousey stated that there was also a large amount of blood just above his head and the splattering arched upward in a V-shape-type manner up to and on the ceiling. He testified that there was brain matter on the floor in front of Mr. Goff's feet approximately six feet away, a piece of his skull fragment on top of the television set immediately to his right, and another piece of skull fragment approximately twelve feet away from his foot, out into the living room next to the couch. Just above his head approximately eighteen inches there was a scraping on the sheetrock wall which appeared to be in a downward direction toward Mr. Goff's head. There was another scrape on the wooden door trim just above and to the left of his head.

Except for the area surrounding Mr. Goff's body, everything in the apartment seemed to be intact, and there were no signs of a struggle or a forced entry. Further investigation led police officers to find traces of blood in the Goffs' bathtub drain. That blood was tested and was determined consistent with Mr. Goff's DNA profile. In addition, the bathtub, shower curtain, and toilet plunger were wet. A pile of fourteen towels and one washcloth were found in the master bedroom under another pile of dry dirty clothes and next to a clothes basket that was almost empty. Four of the towels and the washcloth were extremely wet and the rest of the towels were damp. One of the towels had blood on it.

Dr. Kokes testified that Mr. Goff died as a result of blunt-force injuries to the head. He stated that Mr. Goff had various injuries to the back and top of his head and that in his opinion, the injuries to the back of the head occurred first, followed by the injuries to the top of the head. Kokes opined that, after being hit in the back of the head, Mr. Goff would have collapsed. He further testified that the injuries to the top of Mr. Goff's head indicated that Mr. Goff had been hit repeatedly at least six times, after he had been rendered incapacitated. Mr. Goff also had injuries on his right hand, which Dr.Kokes testified appeared to be sustained

in a defensive manner, such as an attempt to ward off blows. He also testified that the injuries to Mr. Goff's head were caused by an object, such as a hammer, having a curved to oval shape measuring approximately five-eights to three-quarters of an inch in diameter. Two hammers were found in a box in the Goffs' kitchen. Tom Bevel, a forensic consultant who assisted in the investigation, testified that the attacker was right-handed. The proof showed that Ms. Goff is right-handed.

Ms. Goff reported Mr. Goff's death to his life insurance company and told the company that her husband had "appeared to have been severely beaten somewhere in Carroll County and returned to home and left in doorway." However, the evidence clearly reveals that Mr. Goff had been murdered in his own apartment. First, there was blood on the inside of the door, not on the outside. Second, Mr. Bevel testified that, given the pattern of blood on the wall, Mr. Goff received the majority of the blows to his head in the corner in which his body was found, with the attacker either straddling him or standing to his side. It was also Dr. Koke's opinion that Mr. Goff was lying in the corner where his body was found when he was hit on the top of the head. The scrapes on the wall also indicated that Mr. Goff was attacked while lying in that corner.

[redacted] In summary, we first point out that this court has often stated that a defendant's false and improbable statements explaining suspicious circumstances are admissible as proof of guilt. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993); *Bennett v. State*, 297 Ark. 115, 754 S.W.2d 799 (1988). Such improbable statements were made by Ms. Goff in this case. Contrary to Ms. Goff's version of occurring events, the evidence clearly indicates that her husband had been beaten to death while present in the couple's apartment, and given the position of Mr. Goff's body, the undisturbed blood stains on the inside doorknob, and the undisturbed windows, Mr. Goff's attacker did not leave the apartment. Further, the hammers found in the kitchen are consistent with the type of weapon that would inflict the wounds that caused Mr. Goff's death. Mr. Goff's blood was found on the bathtub drain, and a large pile of wet towels — one with blood on it — was found in the master bedroom. Such evidence indicates

that someone in the apartment had attempted to "clean up" the crime scene. Ms. Goff and her three-year-old son were the only people in the apartment when Mr. Goff's body was found. In addition, although Ms. Goff claims to have gotten up about nine minutes after the alarm went off at 4:30 a.m., her emergency call was actually made at 4:18 or 4:19 a.m., before she claims she actually woke up. When the paramedics arrived at the scene, Ms. Goff initially appeared calm and was not disheveled or groggy as if she had just woken up. Finally, the timing of Mr. Goff's death and their marital difficulties provides an opportunity and a motive for Ms. Goff to kill her husband. We conclude the evidence was more than sufficient to establish that Ms. Goff murdered her husband. Thus, the trial court properly denied Ms. Goff's motion for a directed verdict.

[redacted] Ms. Goff's second point concerns the trial court's ruling permitting Dr. Marcia Eisenberg to testify concerning DNA profiling evidence of the blood found in the Goffs' bathroom. Ms. Goff argues that the testimony had been performed by technicians under the supervision and control of Richard A. Guerrieri, who had prepared the DNA report. She argues that it was objectionable hearsay to allow Eisenberg to testify concerning the test results and opinions in Guerrieri's report. In brief, Dr. Eisenberg, using Guerrieri's report, opined at trial that the blood from the bathtub drain was consistent with the known sample from the victim and inconsistent with the known sample from Ms. Goff and her children.

Ms. Goff relies on *Llewellyn v. State*, 4 Ark. App. 326, 630 S.W.2d 555 (1982), where the court of appeals held that, under Rule 803(8) of the Uniform Rules of Evidence, a drug-laboratory supervisor's testimony was inadmissible because he was not present when the substance was delivered to the lab, and he had no personal knowledge of the receipt or testing of the substance.[1] The

[1] Rule 803(8) in pertinent part provides:

. . . The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) *factual findings resulting from special investigation of a particular*

facts and legal argument in *Llewellyn* differ from those presented here. First, factually, Dr. Eisenberg testified that not only did she supervise Guerrieri, she also independently reviewed his test results. She related that under standard operating protocol, all testing is done under her supervision and she must approve all results and conclusions that are reached. Also, as pointed out by the State, under Ark. R. Evid. 703 (not discussed in *Llewellyn*), and pertinent case law, an expert can render an opinion based on facts and data otherwise inadmissible, including hearsay, as long as they are of a type reasonably relied upon by experts in the field. Eisenberg was qualified without objection as an expert in the field of DNA testing, and she testified that it was "quite common" for DNA experts to examine case files and protocols and decide whether the DNA testing in a particular case is accurate. She said that she did so in this case. *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). In addition, when an expert's testimony is based on hearsay, this court has held that the lack of personal knowledge on the part of the expert does not mandate the exclusion of the testimony, but instead it presents a jury question as to the weight of the testimony. *See Id.*; *Scott v. State*, 318 Ark. 747, 888 S.W.2d 628 (1994). Because this court does not reverse the trial judge's ruling on a hearsay question absent an abuse of discretion, we find no such abuse here and affirm on this point. *Ferrell*, 325 Ark. at 462.

[redacted] Next, relying on *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986), Ms. Goff submits the trial court erred by admitting into evidence six autopsy photographs she claims were intended to inflame the jury. This court has often stated that the admission and relevancy of photographs is a matter within the sound discretion of the trial court, and the mere fact that photos are inflammatory will not render them inadmissible. *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). Even the most gruesome photos may be admissible if they tend to shed some light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to

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complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate a lack of trustworthiness. (Emphasis in original.)

testify more effectively, or enable the jury to better understand testimony. *Jones v. State*, 329 Ark. 62, 947 S.W.2d 339 (1997). Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered. *Id.*

[redacted] Here, the disputed photos revealed the position of Mr. Goff's body when found, and aided in the explanation he had been attacked while inside the apartment. They further served as aids to Dr. Kokes when explaining to the jury the nature and extent of the victim's injuries. The photographs, too, supported Kokes's opinion that the weapon used in Mr. Goff's murder had a circular or oval hard surface like the hammer found in the Goffs' apartment. Finally, the challenged photographs, in depicting the nature and extent of Mr. Goff's wounds, helped the prosecution prove Ms. Goff had acted purposefully — a required element in proving first-degree murder, the crime with which she was charged. *See* Ark. Code Ann. § 5-10-102(a)(2) (Repl. 1993). Because the six photographs were shown to have enabled Kokes to testify more effectively and to enable the jury to understand just how and where Mr. Goff was killed, the trial court did not abuse its discretion in allowing them into evidence.

Ms. Goff's final argument requests her sentence be reversed and remanded for a new sentencing because the trial judge improperly entered the jury room and communicated with the jurors during their deliberations. We agree.

While the jury was deliberating on Ms. Goff's sentence, the jury sent the judge a message raising the following three questions: (1) Whether the jury had to impose a fine and whether that fine could be zero; (2) What would happen if it could not agree on a sentence; (3) Whether insurance money was always considered pecuniary gain. The judge proposed answering each question as follows: (1) No; (2) He expected the jury to come to a verdict; (3) The question of whether insurance money was pecuniary gain was for the jury to decide. The judge then suggested he could bring the jury into the courtroom to answer their questions or he could go into the jury room to answer them — whichever the attorneys wanted. The prosecutor and defense counsel said, "That will be

satisfactory with us, Judge." The record reflects the judge went into the jury room, remained there for eight minutes, then returned. No record apparently was made of the judge's appearance in the jury room, nor does the record reflect he disclosed to the attorneys what had been discussed with the jurors. Two minutes after the judge returned from the jury room, the jury returned with a sentence of life imprisonment.

[redacted] For reversal, Ms. Goff relies on Ark. Code Ann. § 16-89-125(e) (1987), which provides as follows:

> (e) After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties.

Ms. Goff contends that the language in § 16-89-125(e) mandates that a jury which is in deliberation must be brought into open court before any information may be given to it, that noncompliance with this statutory provision gives rise to a presumption of prejudice, and the State has the burden of overcoming that presumption. This court has held as much in prior cases. *See Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995); *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993); *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986). In *Tarry*, the court held the State had not met its burden and held that the trial court's violation of § 16-89-125(e), by answering questions of law in the jury room, must be deemed prejudicial. However, in *Martin v. State*, 254 Ark. 1065, 497 S.W.2d 268 (1973), this court held that strict compliance had been waived where the attorneys went with the judge to the jury room, everything that happened was reported in the record, and there was no possibility of prejudice. In the present case, like in *Tarry* and *Davlin*, the State did not meet its burden of showing what occurred during the judge's visit to the jury room, so the trial judge's violation of § 16-89-125(e) must be deemed prejudicial to Ms. Goff.

[redacted] The State argues that cases such as *Tarry* and *Davlin* should be overruled to the extent that they do not require an

objection or a showing of prejudice in order for an appellant to raise and prevail on a § 16-89-125(e) argument on appeal. The State correctly contends that the general rule in Arkansas, with few exceptions, is that a contemporaneous objection must be made in the trial court in order to raise an argument on appeal. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). The State asserts that an objection would have brought the violation to the judge's attention, and he could have easily remedied that violation by instructing the jury in open court. In a twofold argument, the State also cites *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985), where this court held that prejudicial error would no longer be presumed and that, in order to prevail, appellants must show prejudice, which Ms. Goff failed to do here.[2]

The State first expounds, citing *Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997), that even a statutory mandate requires a litigant to object at trial in order to raise claims on appeal about the trial court's failure to comply with them. However, *Jefferson* involved Ark. Code Ann. § 16-89-118 (1987), which requires the trial court to instruct, under oath, the officer (bailiff), taking the jury for viewing, to keep the jurors from communicating with others about the case. There, this court, citing *Berna*, concluded that, although the trial judge did not fully comply with § 16-89-118, his error did not affect the basic fairness of the trial, thus the *Jefferson* court rejected the defendant's argument that the trial judge's error required reversal.

The *Jefferson* court further explained that, while a trial court's failure to give an officer the special oath under § 16-89-118 might result in some misconduct or prejudicial error, such error does not encompass the type of fundamental or structural right this court

[2] The court of appeals rejected this *Berna* argument in *Huckabee v. State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990). In *Huckabee*, after the jury began its deliberations, the trial judge gave an unrecorded answer to a juror regarding an evidentiary question. The *Huckabee* court held that, although the supreme court's ruling in *Tarry* was not consistent with the line of cases beginning with *Berna*, which require that the appellant demonstrate prejudice, it is clear that the Arkansas Supreme Court has chosen to apply the earlier rule which presumes prejudice with respect to error resulting from noncompliance with § 16-89-125(e).

sought to protect and ensure in *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995), and *Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992). For example, in *Grinning*, the court stated that the denial of the right to trial by jury in a criminal case, without the requisite waiver in accordance with the law, is a serious error for which the trial court should intervene, and is therefore an exception to the contemporaneous-objection rule. *See Wicks*, 270 Ark. 781, 606 S.W.2d 266.

We conclude such a fundamental right is present here, since the trial court's failure to comply with § 16-89-125(e) resulted in both Ms. Goff and her counsel being absent when a substantial step was taken in Ms. Goff's case. *See Kentucky v. Stincer*, 482 U.S. 730 (1987) (Court stated that a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to the outcome if his presence would contribute to the fairness of the procedure); *see also Davlin*, 313 Ark. 218, 853 S.W.2d 882 (1992) (court, in discussing noncompliance by trial judge of § 16-89-125(e), stated that it is a basic principle of both our state's and our nation's criminal procedure that a defendant has the right to be present in person and by counsel when a substantial step is taken in his case). Thus, we hold the trial court's error in failing to comply with § 16-89-125(e) deprived Ms. Goff of a fundamental right which required protection, and as such, is an exception to the contemporaneous-objection rule. Moreover, because the State failed to rebut the presumption of prejudice required by case law where a trial judge fails to comply with § 16-89-125(e), we must reverse and remand this cause for resentencing.

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record has been examined in its entirety and no other rulings adverse to Ms. Goff involving prejudicial error were found.

Michael HENDERSON *v.* STATE of Arkansas

CR 97-53 953 S.W.2d 26

Supreme Court of Arkansas
Opinion delivered September 18, 1997
[Petition for rehearing denied October 16, 1997.]

William C. McArthur, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Michael Henderson was found guilty of capital murder for the shooting death of Billy Little; attempted capital murder of the victim's brother, Arley Little; and aggravated robbery. He was sentenced to life in prison without parole for capital murder.[1] He appeals on grounds of (1) insufficiency of the evidence; (2) trial court error in not suppressing his statement to police officers; and (3) trial court error in allowing hearsay statements from an uncharged co-conspirator. Henderson raises a fourth issue of trial court error in not giving a manslaughter instruction, but he concedes in his brief that our case law renders this issue either moot or harmless error. We agree with him that his statement to deputy sheriffs should have been suppressed, and we reverse and remand for further proceedings.

The events in question occurred on May 7, 1994. At trial, Arley Little testified that he and his brother, Billy Little, owned a used furniture store and that it was common for them to be carrying large amounts of cash. He stated that on May 7, 1994, he and Billy Little met with Larry Harris, who had purchased a refrigerator from them and wanted a refund because the appliance did not function properly. Little explained that he and his brother picked up the refrigerator and loaded it on their truck, refunded the money to Larry Harris, and left for an auction in DeValls Bluff. Arley Little estimated that on that date he and his brother were carrying about $16,000 to $20,000 in cash.

Little further testified that they left the auction in DeValls Bluff and drove into Pulaski County on Highway 70 after 9:00 p.m. At that time, he heard a loud noise and saw that his brother had been shot in the jaw. He testified that a small white car passed them, continued down the road, turned, came back, and fired

[1] The jury verdict at sentencing was life without parole for capital murder and six years for attempted capital murder. The judgment and commitment contains only the conviction for capital murder and a sentence of life imprisonment without parole.

again at the truck. On the white car's second pass, his brother was shot in the head and collapsed on his shoulder. He testified that he took control of the truck and continued to drive along Highway 70 when the white car approached from behind and came alongside the truck for a third time. Arley said that shots were again fired into the truck and that the white car continued ahead of them until it took an entrance ramp onto Interstate 40. Arley Little survived the incident without serious injury, but he could not identify any occupants of the white car and was unable to testify as to the precise number of shots fired into the truck. Billy Little died as a result of the gunshot wounds to his head.

Corporal Terry Ward of the Pulaski County Sheriff's Department testified that he spoke with Larry Harris at the sheriff's department on September 27, 1994, and that Larry told him where he could find the gun that was used in the crime. The weapon, a .380 semiautomatic pistol, was retrieved in Lonoke County. Ronald Andrejack, a firearms and toolmark examiner with the Arkansas State Crime Lab, opined that the three bullets retrieved from Billy Little's truck and the shell casings retrieved from Highway 70 were fired from the .380 semiautomatic pistol found by the investigating officers.

The issue of who fired the shots at the Little truck was contested at trial. Corporal Ward introduced a taped statement given by Henderson to Pulaski County deputy sheriffs on September 28, 1994. In that statement, Henderson explained that on May 7, 1994, he and Gary Harris, his cousin and the brother of Larry Harris, planned to rob the Littles. He stated that Gary Harris drove his white Nissan Maxima with Henderson as a passenger and they followed the Little truck after the Littles left the auction in DeValls Bluff. Henderson stated that they pulled alongside the truck to order it to pull over when the truck swerved at them. Henderson explained in his statement: "[H]e swerved at us, things got out of hand, and we passed him after I pulled the trigger the first time, and then, then I freaked out and ah, of course, I didn't want no witnesses, you know, or anything like that, saying that we did it[.]" He stated that Gary Harris drove the vehicle but did not do any of the shooting.

Gary Harris testified at trial for the prosecution and acknowledged that he pled guilty to first-degree murder, attempted capital murder, and attempted aggravated robbery and received a sentence of 80 years' imprisonment for his involvement in the crime. He testified that Henderson and Larry Harris, his brother, planned the robbery and that he only learned of the plan to rob the Littles the day the crime occurred. He stated that his job was to drive his car, the white Nissan Maxima. He admitted that he owned the .380 semiautomatic pistol used in the crime. He stated that they made three passes at the Little truck, and Henderson fired all of the shots.

In his own defense, Henderson testified that he turned 18 on May 4, 1994, and that he was celebrating three days later on the day of the murder by drinking alcohol and taking crystal methamphetamine when Gary and Larry Harris came to him with the idea to rob the Littles. During the robbery attempt, when their car pulled up beside the Little truck, Henderson stated that Gary Harris swerved and the gun "went off." Henderson testified that from that point he "was just freaking out and telling Gary to go on and leave and go[.]" According to Henderson, the remaining shots, which were the fatal shots, were fired by Gary Harris. Henderson maintained at trial that he "did not personally kill Mr. Little."

Also testifying for the defense was Jennifer Collier, Henderson's former girlfriend, who stated that Gary and Larry Harris came to Henderson with the plan to rob the Littles. She testified that she heard Gary Harris say later that he had "shot a round and it felt good."

I. Sufficiency of the Evidence

We first address Henderson's contention that the evidence against him was insufficient. We do so because the double-jeopardy clause precludes a second trial when a judgment of conviction is reversed for insufficient evidence. *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996); *Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996).

At trial, Henderson moved for a directed verdict on all three counts against him on the sole ground that, while there was sufficient evidence of his intent to rob the Littles, there was no proof that he actually attempted to commit the robbery. Henderson maintains that because the charge was for capital felony murder, which requires the element of a killing in the furtherance of an enumerated felony, proof of attempted robbery was critical. Ark. Code Ann. § 5-10-101(a)(1) (Repl. 1993).

We decline to reach the merits of this issue. Compared to the relatively narrow motion for directed verdict made by Henderson which was limited to the State's failure to prove an actual robbery attempt, Henderson now contends that the State's evidence was insufficient as a matter of law because his conviction rested on two untrustworthy items of evidence: (1) the testimony of an accomplice, Gary Harris, who was also charged in this matter; and (2) his statement to police officers, which should not have been admitted into evidence due to an illegal arrest. Because of this, the State urges that Henderson has changed his sufficiency argument on appeal. We agree.

[redacted] It is blackletter law that a party cannot change his grounds for an objection or motion on appeal and that parties are bound by the scope and nature of their arguments made at trial. *Evans v. State*, 326 Ark. 279, 923 S.W.2d 872 (1996); *Campbell v. State*, 319 Ark. 332, 891 S.W.2d 55 (1995). In this regard, specific arguments in support of a directed-verdict motion are waived if not made to the trial court and may not be raised for the first time on appeal. *Id.* Following *Evans v. State, supra*, we refuse to consider Henderson's arguments of insufficient evidence made for the first time on appeal.

II. Illegal Arrest and Suppression of Statement

Prior to trial, Henderson moved to suppress his statement to Pulaski County deputy sheriffs as the fruit of the poisonous tree. His point in part was that the underlying arrest was illegal because it was made by deputies from the Pulaski County Sheriff's Department while in Lonoke County, which was outside their territorial

jurisdiction. The trial court denied his motion, and he makes the same argument on appeal.

At the suppression hearing prior to trial, Corporal Terry Ward testified about the circumstances leading up to Henderson's arrest and his statement to Pulaski County deputy sheriffs. He testified that Gary Harris, after confessing to his involvement in the murder, volunteered to wear a body mike in order to implicate Henderson. Corporal Ward testified that he contacted Ernest Bush, who was a member of the Pulaski County Sheriff's Department and who was also a member of the Metropolitan Little Rock Violent Crimes Joint Task Force (MetRock). Detective Bush had been deputized both as a special agent with the F.B.I. and as a U.S. Marshal. He testified that his MetRock duties often caused him to act in an official capacity outside of Pulaski County, and, thus, he had been deputized throughout the state. Detective Bush testified that he acquired a body recording device from the F.B.I. and received permission to do so from his supervisor, F.B.I. Special Agent Peatross. He testified that he was not told by his supervisor to make an arrest; rather, he was given permission to use the recording device. However, he stated that Special Agent Peatross knew that he would be involved in the investigation of the crime.

Corporal Ward testified that the decision was made to arrest Henderson without a warrant in Lonoke County after overhearing his conversation with Gary Harris. It was made, after discussing the matter with a deputy prosecuting attorney, because Henderson told Harris that he would not be taken alive and that there would be a shootout if the police came to his house. Corporal Ward testified that Henderson was taken into custody due to safety considerations. Shortly after his arrest, Henderson waived his *Miranda* rights and gave the statement that was the subject of the suppression motion, wherein he admitted doing all of the shooting. His statement to the deputy sheriffs contradicted his testimony at trial because he placed the blame for the fatal shots on Gary Harris.

The central issue presented by this point is what effect, if any, the presence of Detective Bush, who was also a MetRock deputy and U.S. Marshal, had on the legality of a warrantless arrest by

deputies of the Pulaski County Sheriff in Lonoke County. The State, citing *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979), argues that the arrest was legal because Detective Bush, who was deputized across the state, participated in Henderson's arrest.

In *Logan*, a Crittenden County deputy sheriff sought to arrest Logan on charges of aggravated robbery while he was in St. Francis County. In order to effect the arrest, deputy sheriffs from Crittenden County requested the assistance of a St. Francis County deputy sheriff. After the arrest, Logan confessed to the crime and consented to a police search of his apartment. At the suppression hearing and on appeal, Logan sought to exclude his confession and the items seized as the fruit of an illegal arrest. This court dismissed the argument in summary fashion: "We need not discuss these contentions, because it is a fair inference from Davis's testimony that Sam Hughes, the St. Francis County deputy, participated in the arrest." *Logan v. State*, 264 Ark. at 922, 576 S.W.2d at 205.

In the instant case, the State argues that, as in *Logan*, Detective Bush participated in the arrest, thus avoiding any illegality. The State also cites this court to the standard of review, which carries a presumption in favor of the trial court's determination that the arrest was legal, with the burden of proving error resting on the appellant. *See Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997); *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989). Henderson, however, directs this court's attention to *Perry v. State*, 303 Ark. 100, 102, 794 S.W.2d 141, 142-43 (1990), where we stated the blackletter law:

> A local peace officer acting without a warrant outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend an offender, unless he is authorized to do so by state statute. (Citing authority.)

Id. After citing *Davis v. Mississippi*, 394 U.S. 721 (1969), this court went on to conclude that evidence obtained as a direct result of an illegal detention was subject to the exclusionary rule.

In *Perry*, this court also listed the four instances where the General Assembly had delegated the authority for law enforcement officers to make an arrest outside of their jurisdictions: (1)

"fresh pursuit" cases under Ark. Code Ann. § 16-81-301 (1987); (2) when the police officer has a warrant for arrest, as provided by Ark. Code Ann. § 16-81-105 (1987); (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction, as stated in Ark. Code Ann. § 16-81-106(3)-(4) (Supp. 1995); and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of drug laws pursuant to Ark. Code Ann. § 5-64-705 (Repl. 1993). *Perry v. State*, 303 Ark. at 103, 794 S.W.2d at 143. None of those situations applies to the instant case.

At the time of Henderson's arrest, three things are certain: (1) no federal offense was involved; (2) Detective Bush was not involved in a MetRock operation; and (3) Detective Bush was not given explicit permission by Special F.B.I. Agent Peatross to effect an arrest. While we can infer that he "participated" in the arrest under the reasoning of *Logan v. State, supra*, absent a federal crime or specific authority from his F.B.I. supervisor to make the arrest, Detective Bush had no authority to arrest Henderson for a state crime in Lonoke County. Hence, the arresting officers only had the authority to arrest that is granted a private citizen. *Perry v. State, supra.*

Though we hold that Henderson's arrest was illegal, we still must examine whether that ultimately decides the matter. Before Henderson gave his incriminating statement to the deputy sheriffs in Pulaski County one hour after his arrest in Lonoke County, he was given his *Miranda* warnings. Thus, the question arises whether the *Miranda* warnings salvage a statement made by an accused irrespective of the illegality of the arrest. Though neither Henderson nor the State addresses the case of *New York v. Harris*, 495 U.S. 14 (1990), we feel constrained to do so.

In *New York v. Harris, supra*, police officers entered Harris's home without an arrest warrant, transported him to the police station, read him his *Miranda* rights, and took an incriminating statement. The New York Court of Appeals suppressed the state-

ment as the fruit of a Fourth Amendment violation, and the Supreme Court reversed regardless of the fact that the arrest was made in Harris's home without a warrant in violation of *Payton v. New York*, 445 U.S. 573 (1980). The Court stated:

> We hold that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.

New York v. Harris, 495 U.S. at 21.

The case before us is not a *Harris* situation where the sanctity of the home was at issue. While probable cause clearly existed for Henderson's arrest before his statement was given, comparable to the circumstances in *Harris*, the arresting officers had no authority to make an arrest in a different jurisdiction — Lonoke County. To hold otherwise would countenance a procedure where an arresting officer could, with impunity, effect an arrest outside of his county, bring the accused back to his jurisdiction, and take an incriminating statement so long as the arresting officer advised the accused of his *Miranda* rights before obtaining the statement. We do not believe that *Harris* goes that far, and we decline to sanction police arrests beyond their territorial borders. The policy considerations behind our decision are significant. As we said in *Perry v. State*, supra:

> The traditional concept of territorial jurisdiction for peace officers is a sound one since a local community is best served by the requirement that local officers familiar with local neighborhoods make arrests in the community. *People v. Hamilton*, 666 P.2d 152 (Colo. 1983). If such a concept were not followed a Pocahontas policeman could make an arrest in Paragould, a Texas Ranger could make an arrest in Fordyce, and a K.G.B. agent could make an arrest in Fort Smith. Such a "practice would lead to more violence than it would suppress." *McCaslin v. McCord*, 116 Tenn. 690, 94 S.W. 79 (1906).

Perry v. State, 303 Ark. at 103, 794 S.W.2d at 143.

We hold that the statement of Michael Henderson given to deputy sheriffs in Pulaski County shortly after an illegal

arrest in Lonoke County must be excluded. It was, therefore, error to receive it into evidence. Nor can we subscribe to the State's alternative argument that sufficient evidence remained at trial irrespective of Henderson's statement to the deputy sheriffs to support a guilty verdict and the sentence. Without Henderson's statement that he alone fired the fatal shots, the jury would be left with a "swearing match" between Gary Harris and Henderson as to who was the trigger man. Though under his own scenario, Henderson was an accomplice to the killing, we cannot say that his status as the actual killer did not influence the jury's verdict of capital murder as opposed to first-degree murder or second-degree murder as well as his sentence of life without parole. We reverse and remand this matter for further proceedings.

There is one final matter that may reoccur on retrial. The prosecutor attempted to have Gary Harris testify about what Larry Harris told him about the plan to rob the Littles. Defense counsel objected on hearsay grounds and because the co-conspirator exception did not apply since Larry Harris had not been charged. We agree with the State that statements by a co-conspirator are not hearsay, if made during the course of and in furtherance of a conspiracy. *See* Ark. R. Evid. 801(d)(2)(v). Moreover, we agree that Rule 801(d)(2)(v) applies when a conspiracy is proved at trial by evidence independent of the statement regardless of whether the declarant is charged as a conspirator. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993), *cert. denied*, 510 U.S. 1197 (1994); *Smithey v. State*, 269 Ark. 538, 602 S.W.2d 676 (1980).

Reversed and remanded.

ARNOLD, C.J., GLAZE, and THORNTON, JJ., dissent.

W.H. "DUB" ARNOLD, Chief Justice, dissenting. I respectfully disagree with the majority opinion that the arrest of appellant was illegal and that the statement made after being apprised of his *Miranda* rights should have been suppressed. First, it is my opinion that the arrest was a lawful arrest. Secondly, even if the arrest was illegal, the statement made by Henderson should not have been suppressed.

Detective Ernie Bush testified that he is a detective with the Pulaski County Sheriff's Department, a deputized U.S. Marshall, and a Deputized Special Agent with the F.B.I. Detective Bush is assigned to MetRock, the Metropolitan Little Rock Violent Crimes Task Force. He further testified that often his duties take him out of Pulaski County, so he was deputized with authority to act throughout the state.

In this case, Special Agent Peatross of the F.B.I., Detective Bush's supervisor, authorized him to use a body recording device on Gary Harris in Lonoke County. Detective Bush was present with other Pulaski County officers in Lonoke County when the device was used and appellant was arrested. At the time of the arrest, Deputy Bush was a duly sworn law enforcement officer with the authority to arrest appellant in any county in Arkansas. He was authorized by his supervisor to participate in the investigation, and his presence along with the Pulaski County officers made the arrest legal following *Logan v. State*, 264 Ark. 920, 576 S.W.2d 203 (1979).

According to *Logan*, the mere presence of an officer with a commission entitling him to make an arrest legitimizes an arrest even if that officer is not the person who actually makes the arrest. The presence and acquiescence of a duly authorized officer is the key to determining whether an arrest is authorized. In this case, Detective Bush was duly commissioned to make arrests in any county in Arkansas. As the majority noted, his presence and participation in Henderson's arrest certainly give an inference that he participated in the arrest. This inference validates the arrest and makes it a permissible arrest pursuant to *Logan*.

Secondly, even if the arrest was unlawful, the statement given by Henderson should not be suppressed. Before Henderson gave any statement, he was advised of his *Miranda* rights at least an hour after his arrest. Henderson then gave the incriminating statement that he fired the gun that killed Billy Little.

In *New York v. Harris*, 495 U.S. 14, 18 (1990), discussed *supra* by the majority, the United States Supreme Court based its ruling upon the fact that the police had probable cause to arrest Harris, so he was not unlawfully in custody when he was taken to the

police station, given his *Miranda* warnings, and interrogated. The Court noted that the existence of probable cause was the defining factor in whether evidence should be suppressed as fruits of an illegal search.

In *Harris*, the Court noted:

> 'We have declined to adopt a 'per se' or 'but for' rule that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest.'

citing United States v. Ceccolini, 435 U.S. 268, 276 (1978). Additionally, the Court concluded that *Payton v. New York*, 445 U.S. 573 (1980) "was designed to protect the physical integrity of the home . . . not to grant criminal suspects . . . protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime." *Harris*, 435 U.S. at 17. Once officers have probable cause to arrest, a suspect is not unlawfully detained when taken into custody, regardless of whether the actual arrest was legal. *Id.* at 18.

In *Harris*, the Court examined the cases of *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); and *Taylor v. Alabama*, 457 U.S. 687 (1982) and determined that these cases stand for the proposition that "indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality." *Harris*, 435 U.S. at 19. Such a close relationship occurs when the police wrongly have control of a defendant's person in the absence of probable cause. In an instance where probable cause exists prior to arrest, the police have justification to question a suspect prior to arrest, so "subsequent statement[s] [are] not an exploitation of an illegal entry" into a home or an exploitation of an illegal arrest. *Id.* at 19.

It is undisputed that Henderson was given his *Miranda* warnings and waived those rights. In the case before us, the police did have probable cause to detain Henderson. There is no evidence that the detention violated his Fourth Amendment rights. The majority bases the suppression of Henderson's statement on the fact that the police should not be sanctioned in effectuating arrests

beyond their territorial borders. Despite the fact that I disagree with the majority's conclusion that the arrest was illegal, this should not affect the legitimacy of a statement made once Henderson was in custody. The statement made while Henderson was in custody was not the outcome of an exploitation of his rights guaranteed by the Fourth Amendment.

For the foregoing reasons, I respectfully dissent from the majority opinion and contend that the judgment of the trial court should be affirmed.

GLAZE, J., joins.

THORNTON, J., joins to the extent that the opinion expresses that Henderson's arrest was lawful.

Rogelio REYES and Basilio Reyes *v.* STATE of Arkansas

CR 96-1385 954 S.W.2d 199

Supreme Court of Arkansas
Opinion delivered September 18, 1997

[redacted]

Thomas Travis, for appellants.

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

ROBERT L. BROWN, Justice. Appellants Rogelio Reyes and Basilio Reyes appeal from judgments for possession of cocaine with intent to deliver, possession of drug paraphernalia, and possession of marijuana. Rogelio Reyes, as a habitual offender, was sentenced to life in prison, 30 years in prison, and one year in prison, respectively, for each of the convictions plus fines totaling $11,000. Basilio Reyes was sentenced to prison time of 40 years, 10 years, and one year, respectively, for each of his convictions plus fines of $11,000. The trial court ordered all sentences for prison time to run concurrently.

The Reyeses now appeal and assert two grounds: (1) the search of a vehicle at police headquarters was an illegal search and it was error not to suppress the items seized; and (2) it was error for the court not to order the prosecutor to divulge the identity of the confidential informant. We affirm the trial court on both points.

The State's case relied almost exclusively on the testimony of Fort Smith Police Detective Dennis Alexander. Detective Alexander testified that during the early morning hours of April 8, 1995, a warrant was obtained to search Room 28 of the Capri Motel located in Fort Smith. He explained that prior to getting the warrant, a confidential informant engaged in a controlled buy in that room and exchanged marked money for a bag of crack

cocaine. Detective Alexander testified that once the warrant was received, he and Fort Smith Police Detective Wayne Barnett entered Room 28 with the search warrant and found the Reyeses alone in the room.

Detective Alexander testified to several items of contraband found in the motel room, including a bag containing 10 rocks of crack cocaine found in a white sock in the bed's headboard; a bag of powder cocaine found in the same white sock in the bed's headboard; a bag containing marijuana and rolling papers found in a brown sock in the bed's headboard; digital scales and a vinyl case located on the dresser; $590.00 in cash taken from Basilio Reyes's wallet; and $123.00 from the wallet of Rogelio Reyes, which included five marked bills given to the confidential informant. Detective Alexander estimated conservatively that the street value of the seized crack cocaine was about $5,000 and the value of the powder cocaine was about $3,600.

Detective Alexander also testified that he found car keys on the table that were linked to a tan 1987 Ford sedan parked on the motel parking lot near the door of the room. He stated that the confidential informant told him the vehicle belonged to the Reyeses. He testified that upon searching the vehicle, the police officers discovered a box of baking soda in the trunk, while a narcotics dog led them to a large test tube found between the battery and firewall under the car's right front fender. The test tube contained a colored residue later identified as having a cocaine base. The drug paraphernalia and test tube were not tested for fingerprints.

On cross-examination, Detective Alexander admitted that the room was rented by a person named Carl Jones, who was not arrested in connection with the drug offenses. When asked his reason for seizing and searching the Ford sedan, he explained that it was not uncommon to find additional drugs and paraphernalia in automobiles identified under these circumstances because drug dealers rarely keep their entire supply together in case of an encounter with police. Detective Alexander added that the Capri Motel was one of Fort Smith's cheaper motels; that it was located

in a high-crime area of town; and that he had executed many search warrants at that motel in the past.

At the close of the State's case, the Reyeses proffered into the record a subpoena for Carl Jones and Carl Jones's rap sheet, which contained numerous offenses. Basilio Reyes then testified in his own defense through the use of an interpreter. He explained that he and his brother had stopped at a bar in Fort Smith, when a tall man asked them if they wanted to "be with" a woman. They agreed and followed the man to the Capri Motel, where he had a room. The man said that he would go get the woman and some pizza, and Rogelio Reyes gave him $100 for the pizza. The man later returned with pizza and beer but no woman. The man explained he was still trying to get the woman or women. Shortly after he left, according to the testimony, the Fort Smith police officers barged into the room and arrested them.

I. Sufficiency of the Evidence

We first consider the Reyeses' argument regarding insufficiency of the evidence because the double-jeopardy clause precludes a second trial when a judgment of conviction is reversed for insufficient evidence. *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996); *Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996). The Reyeses argue that the prosecution failed to link them to the contraband found in the motel room. Insufficiency of the evidence is raised at trial by a motion for directed verdict. Counsel for the Reyeses, however, made only a general motion for directed verdict at the close of the State's case and then failed to renew the motion at the close of all the evidence. These lapses make it clear that this point is procedurally barred. *See* Ark. R. Crim. P. 33.1; *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996); *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996).

II. Suppression of Vehicular Search

Prior to trial, the Reyeses moved to suppress the items seized from the Ford sedan because the search occurred without a warrant. At the suppression hearing, Detective Alexander testified

that he employed a first-time confidential informant who told him that the Reyeses were in Fort Smith to distribute cocaine. He testified that when he executed the warrant, he saw the car that had also been described by the confidential informant sitting in the Capri Motel parking lot. After the arrests, the car was removed by police officers from the motel parking lot because it was located in a high-crime area and taken to the Fort Smith Police Department for the search.

On cross-examination, Detective Alexander stated that he was able to connect Rogelio Reyes to the automobile by calling in the license-plate number over the police radio and doing an NCIC search. He admitted that both Reyeses were in custody and incapable of gaining access to their car when it was searched.

a. Standing.

[redacted] The Reyeses' first task is to prove that they have standing to challenge the legality of the search. This court will not reach a Fourth Amendment argument where a defendant has failed to show that he has an expectation of privacy in the object of the search. *See McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996); *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). Only Rogelio Reyes was tied to the Ford sedan by Detective Alexander's NCIC search. Basilio Reyes, however, proved no connection with the vehicle, and, therefore, his expectation of privacy is deficient.[1] *See, e.g., Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997)(passenger lacked standing to challenge search of pickup truck); *McCoy v. State, supra* (driver without possessory interest in vehicle lacked standing to challenge its search). We conclude that Basilio Reyes has no standing to challenge the search of the car. The remaining discussion under this point will only apply to Rogelio Reyes.

[1] At one point, Basilio Reyes referred to "his car" through an interpreter on cross-examination, but the NCIC search belies this assertion.

b. Rule 14.1

In reviewing the denial of a motion to suppress evidence, this court makes an independent determination based on the totality of the circumstances and reverses only if the decision is clearly contrary to the preponderance of the evidence. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997), *supp. op. denying reh'g*, 327 Ark. 576-A, 940 S.W.2d 440 (1997); *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997). This court views the evidence in the light most favorable to the State. *Id.*

When police officers conduct a search without a warrant, we begin our review with the basic premise that a warrantless search is unauthorized. *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996); *Cook v. State*, 293 Ark. 103, 732 S.W.2d 462 (1987). However, exceptions to the warrantless search rule have been recognized, including the exigency exception under Rule 14.1 of the Arkansas Rules of Criminal Procedure. Rule 14.1(a) provides in part:

> An officer who has reasonable cause to believe that a moving or readily moveable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:
>
> (i) on a public way or waters or other area open to the public[.]

Ark. R. Crim. P. 14.1(a).

Reasonable cause, as required by Rule 14.1, exists when officers have trustworthy information which rises to more than mere suspicion that the vehicle contains evidence subject to seizure and a person of reasonable caution would be justified in believing an offense has been committed or is being committed. *Bohanan v. State, supra*; *Willett v. State*, 298 Ark. 588, 769 S.W.2d 744 (1989). On these facts, reasonable cause is supported by the following: (1) the Ford sedan was found parked near the motel room to be searched; (2) a large amount of contraband was found in the motel room as were the Reyeses and the car keys; (3) Rogelio Reyes was linked to the car by the confidential informant and

by the NCIC search and had marked bills from the controlled buy on his person; and (4) Detective Alexander asserted that in his experience it was common to find items of contraband in the car of a dealer when the dealer is captured in possession of controlled substances at another location. Based on these facts, it was entirely reasonable for police officers to believe that contraband would also be found in Rogelio Reyes's car.

[redacted] Moreover, we have no doubt that the car was parked in an "area open to the public," as Rule 14.1 requires, since it was on the motel parking lot. *Compare Haygood v. State*, 34 Ark. App. 161, 807 S.W.2d 470 (1991)(holding that the parking lot of an apartment complex was an area open to the public even though the apartment complex was privately owned).

[redacted] The remaining question is whether the Ford sedan was "moving or readily movable," so as to qualify for the Rule 14.1 exception. This court has observed, as has the United States Supreme Court, that an automobile does not enjoy the same constitutional protection a home does because of an automobile's mobility and because one does not have the same expectation of privacy in an automobile. *Vinston v. State*, 274 Ark. 452, 625 S.W.2d 533 (1981), *cert. denied*, 459 U.S. 833 (1982), *citing Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). In this same vein, we held in *Bohanan v. State, supra,* that a vehicle located on a street was readily movable despite the fact that the car had a flat tire, the rationale being that the tire could have been changed in a matter of minutes. *See Bohanan v. State, supra.*

[redacted] In the instant case, it is uncontroverted that the Reyeses were in custody at the time the vehicle was removed to the police department. The State argues, however, that the threat the car would be removed by a third party still existed. We agree. We reached the same conclusion in *Vinston v. State, supra,* when we said:

> The seizure of a vehicle is justified when confederates or others might remove a vehicle. *U.S. v. 1972 Chevrolet Nova*, 560 F.2d 464 (1st Cir. 1977); *See* W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS, § 11.3 (1980).

274 Ark. at 456, 625 S.W.2d at 536.

We are further aware of the fact that the United States Supreme Court recently reversed the Pennsylvania Supreme Court in two cases on this very issue. *See Pennsylvania v. Labron*, 116 S. Ct. 2485 (1996)(per curiam), *rev'g Com. v. Kilgore*, 677 A.2d 311 (Pa. 1995); *Com. v. Labron*, 669 A.2d 917 (Pa. 1995). In *Labron*, the respondent was arrested after police officers saw him sell narcotics taken from the trunk of a car parked on a public street. The Pennsylvania Supreme Court determined that the subsequent search of the trunk was unlawful because the vehicle was stationary and was not supported by exigent circumstances. In *Kilgore*, a confidential informant gave respondent's accomplice money for drugs in a parking lot. The accomplice drove to a farmhouse and obtained the drugs from Kilgore. Once the delivery occurred, the police arrested Kilgore and searched his truck, which was parked in the driveway of the farmhouse, and found cocaine. The Pennsylvania Supreme Court again determined that no exigent circumstances existed.

The Supreme Court, however, reversed and explained:

> If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more. As the state courts found, there was probable cause in both of these cases: Police had seen respondent Labron put drugs in the trunk of the car they searched, and had seen respondent Kilgore act in ways that suggested he had drugs in his truck. We conclude the searches of the automobiles in these cases did not violate the Fourth Amendment.

Pennsylvania v. Labron, 116 S. Ct. at 2487 (internal citation omitted). In both of these cases, the cars were parked and the vehicles were searched *after* those accused were placed under arrest. Thus, the ability of the defendant to move the car was not the pivotal factor. Indeed, in *Kilgore* the *suggestion* that drugs were in the truck was enough to satisfy probable cause.

The weight of authority appears to support the conclusion that an exigent circumstance exists when a car is readily

movable by any person and not just the defendant. *See United States v. Brazel*, 102 F.3d 1120 (11th Cir. 1997); *United States v. Sinisterra*, 77 F.3d 101 (5th Cir. 1996); *United States v. Reed*, 26 F.3d 523 (5th Cir. 1994), *cert denied*, 115 S. Ct. 1116 (1995); *People v. Lee*, 914 P.2d 441 (Colo. App. 1995); *Jones v. State*, 681 A.2d 1190 (Md. App. 1996); *Reyes v. State*, 910 S.W.2d 585 (Tex. App. 1995). *But see State v. Harnisch*, 931 P.2d 1359 (Nev. 1997). Two state appellate courts looked, in addition, to factors such as location of the car in a high-crime area, potential for theft, and potential movement by family or friends as important considerations in determining exigency. *See People v. Lee, supra; Reyes v. State, supra.*

[redacted] Likewise, in the case at hand the Reyes brothers could not have moved the car because they were in custody. But that is not to say that a third party, either a confederate or thief, could not have done so. The car sat in the parking lot of a motel in a high-crime area during the early morning hours. The fact of the Reyeses' arrest would certainly have been known to people at the motel. Under such circumstances, for the police to have left the vehicle unattended would have been foolhardy. Moreover, a search warrant for the motel room had been obtained and executed. For one officer to have watched the car while another officer obtained a second search warrant directed at the car, given these facts, appears unnecessary and impractical. *See Chambers v. Maroney, supra.* We decline to hold that the trial court erred in refusing to suppress the test tube and baking soda taken from the car.

III. Identity of the Confidential Informant

Prior to trial, the Reyeses moved the trial court to require disclosure of the name and address of the confidential informant used for the controlled buy because this knowledge was essential to the preparation of an adequate defense. The trial court took the motion under advisement and asked for briefs. No ruling was made.

At trial, defense counsel in opening statement referred to the "frame job" by the confidential informant who had rented the

room. He then renewed his motion during his cross-examination of Detective Alexander. When counsel began asking Detective Alexander about Carl Jones's involvement in the crime, the prosecution objected to any questions pertaining to whether he was the confidential informant. The record reflects the following colloquy in a sidebar conference:

> PROSECUTOR: I think the Officer is going to state in response to that question that the investigation determined it was not Carl Jones' cocaine, and that he had denied that he had placed the cocaine in there. We have no objections to that question being asked and being answered like that, but I do not want to get into a rule 509 issue about his actual identity, the informant, so with the Court's permission, with the defense being present, I'd like to go over and tell the officer to answer that question with a truthful answer, that they did interview him and that he denied that he'd placed the cocaine.
>
> DEFENSE COUNSEL: I have no doubt he denied it.
>
> THE COURT: I'm going to let you ask him, but I want you to stay away from this confidential aspect, but you can ask him.
>
> DEFENSE COUNSEL: Then, I would like to renew my motion for disclosure of confidential informant. This has very great bearing on the defense of my clients. I'd like to renew my motion.
>
> PROSECUTOR: I'm going to let him ask questions, and there'll be honest answers, but I'm not going to let him get in to reveal who the informant is.
>
> THE COURT: O.K., go ahead.

The motion to disclose was never made again.

The first question presented is whether this point is barred from appellate review. It is blackletter law that the appealing party must obtain a ruling in order to preserve an argument for appeal and that the failure to do so constitutes a waiver of the issue. *See, e.g., Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997); *Burton v. State*, 327 Ark. 65, 937 S.W.2d 634 (1997). We conclude that while the trial court's ruling could have been more

precise, the issue before the trial court was obvious, and the trial court decided it adversely to the Reyeses.

[redacted] Turning to the merits, we discussed the confidential informant privilege in *Hill v. State,* 314 Ark. 275, 280, 862 S.W.2d 836, 839 (1993):

> [D]isclosure shall not be required of an informant's identity where his identity is a prosecution secret, and a failure to disclose will not infringe upon the constitutional rights of the defendant. *Rovario v. United States*, 353 U.S. 53 (1957). "When the disclosure of the informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 61-62. In determining whether the privilege shall prevail, the trial court must balance the public interest in getting needed information against the individual's right to assert a defense. The trial court must consider the crime charged, the possible defenses, the significance of the informant's testimony, and any "other relevant factors." *Id.* at 61. The burden is upon the defendant to show that the informant's testimony is essential to his defense. *West v. State*, 255 Ark. 668, 501 S.W.2d 771 (1973).

Id. See also Ark. R. Crim. P. 17.5(b); Ark. R. Evid. 509.

[redacted] This court has held repeatedly that trial courts do not abuse their discretion in denying requests to reveal the identity of a confidential informant when the defendant is merely charged with possession of a controlled substance, and when the informant's involvement supplied only a lead to the officers and provided information leading to the issuance of a search warrant. *See, e.g., Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994); *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986); *Toland v. State*, 285 Ark. 415, 688 S.W.2d 718 (1985), *cert. denied*, 474 U.S. 945 (1985); *Jackson v. State*, 283 Ark. 301, 675 S.W.2d 820 (1984); *Robillard v. State*, 263 Ark. 666, 566 S.W.2d 735 (1978); *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977).

In the case before us, the Reyeses were not charged with delivery of a controlled substance which would have directly involved the confidential informant who bought the cocaine with marked bills, but only with possession with intent to deliver.

Hence, the confidential informant did not directly participate in the crime though his involvement led to the search warrant. Still, the Reyeses maintain that knowing the identity of the confidential informant was essential to their defense that Carl Jones, who had reserved Room 28, had framed them.

The facts in *Hill v. State, supra,* are instructive. There, Hill was charged with manufacturing or possessing with intent to manufacture a controlled substance. Hill's defense was that he was entrapped by an individual named Ronnie Prescott, who purportedly offered him $10,000 to manufacture an illegal chemical and who, he suspected, was the confidential informant. Evidence elicited at trial from law enforcement officers proved that Prescott was working generally for them as an informant though that work was never tied specifically to the Hill case. The trial court declined to order the prosecution to reveal the name of the confidential informant, and this court concluded as follows:

> In sum, the trial court's rulings regarding disclosure of whomever might have been the informant were correct. However, the ruling was in error when appellant's counsel limited the request to disclosure of whether Ronnie Prescott was the informant and it had already been shown that disclosure might be a substantial factor in his defense.

Hill v. State, 314 Ark. at 281, 862 S.W.2d at 839.

The case at hand is distinguishable from *Hill v. State, supra,* in that the proper motion was never made by the defense. Here, there was evidence before the jury that Carl Jones reserved Room 28 in his name and the testimony by Basilio Reyes indicating that the "tall man" had orchestrated the brothers' arrest. Indeed, defense counsel argued to the jury that Carl Jones was the true culprit in all of this. We have some doubts that additional evidence establishing Carl Jones as the confidential informant was a substantial factor in the Reyeses' defense when possession of contraband with intent to deliver was the charge. But, more importantly, the Reyeses failed to move for disclosure that Carl Jones was the confidential informant. This they were required to do under *Hill v. State, supra.* Because the proper motion was never made, we find no error by the trial court on this point.

With regard to Rogelio Reyes, the record has been reviewed pursuant to S. Ct. Rule 4-3(h) for other reversal error, and none has been found.

Affirmed.

GLAZE, J., joins in the opinion but concurs on point III.

Dexter ROSEBY *v.* STATE of Arkansas

CR 97-122 953 S.W.2d 32

Supreme Court of Arkansas
Opinion delivered September 18, 1997

Willard Proctor, Jr., for appellant.

Winston Bryant, Att'y Gen., by: *Kelly K. Hill*, Deputy Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. The appellant, Dexter Roseby, was sentenced to life imprisonment without parole for the capital murder of Lee Andrew Byrd, Jr. Roseby raises four arguments on appeal. Finding no reversible error, we affirm.

On January 8, 1996, Officer Timothy Hobbs discovered the body of Lee Andrew Byrd, Jr., in the snow-covered woods behind the Pilgrim Rest Baptist Church in Woodson. Byrd had been shot once in the back of his left thigh, and bled to death. A jury found Dexter Roseby guilty of the capital murder of Byrd under Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1995), which states that a person commits capital murder if he or she kills another person with a "premeditated and deliberate purpose." Because the State did not seek the death penalty, the court imposed the sentence of life imprisonment without parole. From his judgment and commitment order, Roseby filed a timely notice of appeal.

I. Sufficiency of the Evidence

Roseby challenges the sufficiency of the evidence to support his conviction of capital murder. When an appellant challenges the sufficiency of the evidence, we address the issue prior to all others. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996); *cert. denied*, 117 S. Ct. 436 (1996); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), *cert. denied*, 117 S.Ct. 246 (1996). On appeal, Roseby claims that his conviction must be reversed because the State failed to present sufficient evidence that he killed Lee Andrew Byrd with a "premeditated and deliberate purpose" as required by Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1995).

We have held on numerous occasions that Ark. R. Crim. P. 33.1 requires a criminal defendant to make a specific motion for a directed verdict that apprises the trial court of which element of the crime the State has failed to prove. *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997); *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997); *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997); *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997). Specifically, in *Webb* we refused to consider the appellant's argument that the State failed to prove that he killed the victims in a premeditated and deliberate manner because the appellant failed to raise this issue in his motion for directed verdict. *Webb, supra.*

At the conclusion of the State's case, Roseby made a motion for a directed verdict stating that the State had failed to

present direct evidence linking Roseby to the crime. Roseby did not mention in his motion that the State failed to prove the "premeditated and deliberate" element of capital murder. Hence, we conclude that Roseby has not preserved this issue for appeal.

II. Motion for a Continuance

For his second argument, Roseby contends that the trial court erred when it denied his request for a continuance so that he could obtain another attorney. It is well settled that the right to counsel of one's choice is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995); *Leggins v. State*, 271 Ark. 616, 609 S.W.2d 76 (1980). Hence, it is within the trial court's discretion to grant a continuance so that a criminal defendant may obtain a new attorney, and this decision will not be reversed absent an abuse of discretion. *Edwards, supra*; *Cooper v. State*, 317 Ark. 485, 879 S.W.2d 405 (1994). In *Edwards*, we further explained that in making this determination, the trial court may consider the following factors: 1) the reasons for the change, 2) whether other counsel has already been identified, 3) whether the defendant has acted diligently in seeking the change, and 4) whether the denial is likely to result in any prejudice to defendant. *Edwards, supra.*

In this case, Roseby's attorney announced on the morning the trial was to begin that his client wanted him to withdraw from the case so that he could obtain another attorney. Roseby then explained to the judge that he wanted a continuance because he and his attorney were not prepared for trial. Roseby further alleged that his attorney rushed him into a decision regarding his trial, and that he did not adequately discuss the case with him. Roseby, however, did not disclose whether he had already obtained substitute counsel.

The trial court found that Roseby's attorney was competent and had diligently filed several pretrial motions on Roseby's behalf. Moreover, the judge was greatly influenced by the fact that Roseby's attorney had been working for him for approxi-

mately eight or nine months, yet Roseby waited until the day of the trial to ask for new attorney. Based on these facts, we cannot say that the trial court abused its discretion when it denied Roseby's motion. Accordingly, we also affirm on this point.

III. Use of Peremptory Challenges

[redacted] Next, Roseby argues that the State used its peremptory challenges at trial to exclude African-Americans from the jury in violation of the Equal Protection Clause of the Fourteenth Amendment as construed in *Batson v. Kentucky*, 476 U.S. 79 (1986). In making this determination, we apply the following three-step analysis. First, the defendant must make a *prima facie* case that racial discrimination is the basis for excluding the juror. Second, if the court concludes that the defendant has made this showing, the State must provide a racially neutral explanation for striking the juror. The trial court must then determine from all the relevant circumstances the sufficiency of the offered explanation. Finally, if the court is not satisfied with the State's explanation, it must conduct a sensitive inquiry, and the defendant must explain how the State's racially neutral explanation is merely a pretext. *See*, *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997); *Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996), *cert. denied*, 117 S. Ct. 979 (1997).

[redacted] As the United States Supreme Court recently noted in *Purkett v. Elem.*, 514 U.S. 765 (1995), "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Moreover, we accord great deference to the trial court's determination of whether the peremptory strike was exercised in a discriminatory manner, and we reverse that decision only if it is clearly against the preponderance of the evidence. *Sonny*, *supra*.

According to the above analysis, we must first determine whether Roseby established a *prima facie* case of discrimination. After asking a juror a couple of questions, the State asked the judge to excuse the juror, and the following colloquy occurred:

> ROSEBY: I understand the State has struck an African-American Juror who from — after asking basically one question.

> There's a question in my mind as to what they could've [sic] gleaned from — his demeanor was similar to that of the other witnesses. There was nothing about what he said, so we would ask that he be reseated under *Batson v. Kentucky* because there doesn't seem to be any sort of legitimate reason for striking him, other than his race.
>
> STATE: Your honor, he failed to make eye contact. He was unresponsive to my questions. I've sat other African-Americans on the panel and did not strike those individuals. There's still African-American potential jurors out in the gallery.
>
> COURT: Well, I think out of the eleven different remaining, there's three black folks on the jury. So I just don't think there's any systematic exclusion. I don't think that the State should have to respond to that at this point. If I see that there is something systematic, I'll require it then.

On appeal, the State argues that the preliminary inquiry of whether Roseby made a *prima facie* case is not moot because the State proceeded to offer a racially neutral explanation instead of addressing whether a *prima facie* case had been established. We have previously held that the *prima facie* determination is moot on appeal when the trial court skipped this step and ruled upon the second issue of whether the State had provided a racially neutral explanation. *Wooten, supra*; *Cleveland v. State*, 326 Ark. 46, 930 S.W.2d 316 (1996); *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996). However, it is the court's failure to render a ruling on the *prima facie* determination, and not the State's decision to offer a racially neutral explanation instead of attacking the establishment of a *prima facie* case, that renders the issue moot. *See Wooten, supra*; *Cleveland, supra*; *Prowell, supra*.

In this case, the State offered a racially neutral explanation instead of attacking the defendant's *prima facie* case. However, unlike *Wooten*, *Cleveland*, and *Prowell*, we find that the trial court ruled on the *prima facie* issue when it declared that there was no evidence of systematic discrimination. Hence, the issue is not moot, and we must determine if the trial court's ruling in this regard is clearly against the preponderance of the evidence.

A *prima facie* case of the discriminatory use of peremptory challenges may be established by: 1) showing that the totality

of the relevant facts gave rise to an inference of discriminatory purpose, 2) demonstrating total or seriously disproportional exclusion of African-Americans from the jury, or 3) showing a pattern of strikes, questions, or statements by a prosecutor during voir dire. *Bragg, supra*; *Wooten, supra*; *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996).

[redacted] In this case, three of the eleven seated jurors were African-American, and there were several other African-Americans remaining in the gallery. Although this is not the end to our inquiry, we have previously held that this is a very persuasive challenge to the establishment of a *prima facie* case. *Bragg, supra*; *Cleveland, supra*. Additionally, Roseby did not present any evidence that the prosecutor made racial statements or asked racial questions. Finally, Roseby did not present any other evidence or factors that might have allowed the court to infer that the State was using its peremptory challenges in a discriminatory manner. Based on these facts, we cannot say that the trial court's ruling that Roseby failed to establish a *prima facie* case was clearly against a preponderance of the evidence. Accordingly, we affirm on this point.

IV. Hearsay

Finally, Roseby argues that the trial court violated Ark. R. Evid. 613 when it allowed the State to impeach Lynette Daniels with questions about a prior unsworn statement. During the trial, the State called Lynette Daniels to the stand and asked her a series of questions regarding her contact with the defendant in early January. Daniels explained that she saw Roseby at a liquor store early that afternoon, and that he drove her to her grandmother's home which was next door to the victim's house. Daniels then denied seeing Roseby approach the victim's home, and denied that he made any statements to her about the victim. At this point, Daniels admitted that several people had threatened to kill her if she testified in court. The State then asked Daniels if she recalled giving an unsworn statement to Detective Ward on January 11, 1996, and Daniels answered in the affirmative. When the State attempted to ask Daniels about statements she made to Detective Ward, Roseby promptly objected claiming that the State could not

impeach her because she had not yet made an inconsistent statement.

The State then asked Daniels to review her unsworn statement to refresh her memory. Daniels replied, "I don't remember telling him this because I was under the influence of drugs. I can't remember." Daniels then reviewed the statement and again declared, "I just don't remember telling him all this; I don't." The State then asked Daniels the following series of questions over Roseby's objections:

> STATE: Did you tell Detective Ward that Dexter told you he —
> DANIELS: I don't remember.
> STATE: — was looking for Junior?[1]
> DANIELS: I don't remember. I don't remember.
> STATE: Did you tell Detective Ward that they went to Junior's house looking for him?
> DANIELS: I don't remember telling him that either.
> . . . .
> STATE: Did you tell Detective Ward that they said they were going to kill him?
> DANIELS: No, I don't remember telling him that.

On appeal, Roseby claims that the above testimony was allowed into evidence in violation of Ark. R. Evid. 613(b) which states that:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

We find that this argument fails for several reasons.

First, Roseby argues that the State should not have been allowed to impeach Daniels with her unsworn statement to Detective Ward because she declared that she could not remember instead of directly contradicting her prior statements. We have

[1] The victim, Lee Andrew Byrd, Jr., was also known as "Junior" and "Junior Byrd."

previously explained that an "inconsistent statement" as used in Rule 613, is not limited to those instances in which diametrically opposite assertions have been made. *Truck Ctr. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992); *Flynn v. McIlroy Bank & Trust Co.*, 287 Ark. 190, 697 S.W.2d 114 (1985). Rather, we have adopted Judge Weinstein's view that a witness's prior statement is admissible whenever a reasonable person could infer on comparing the whole effect of the two statements that they have been produced by inconsistent beliefs. *Truck*, *supra*; *Flynn*, *supra*.

Of particular applicability to this case is our holding in *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981). As in this case, in *Chisum* a hostile witness, who was the defendant's sister, claimed that she had forgotten what she had told the police in a prior unsworn statement. *Id.* The State then allowed the witness to review her prior statement in an effort to refresh her recollection. *Id.* After reviewing the statement, the witness again claimed that she did not recall any of her prior statements implicating the defendant. *Id.* We found her statements that she "forgot" were sufficiently inconsistent to allow the introduction of her prior sworn statement. We have reached this same conclusion in numerous cases where a witness claimed to have forgotten a prior statement that is unfavorable to the defendant. *Hughey v. State*, 310 Ark. 721, 840 S.W.2d 183 (1992); *Flynn*, *supra*; *Humpolak v. State*, 175 Ark. 786, 300 S.W.2d 426 (1927); *Billings v. State*, 52 Ark. 303, 12 S.W. 574 (1889).

[redacted] As in *Chisum*, Daniels was the defendant's relative and she was clearly hostile to the State. In addition, Daniels claimed that she had been threatened by several people not to testify. In *Hughey*, *supra*, we clarified that considerable discretion must be given to the trial court when determining where to draw the line in the impeachment of a hostile witness. In light of these facts, we cannot say that the trial court abused its discretion when it found that Daniels's assertions that she could not recall her statements to Detective Ward were sufficiently inconsistent to allow her to be impeached with her prior statement under Rule 613(b).

[redacted] Additionally, we find no error because the trial court properly instructed the jury as follows:

> Evidence that a witness previously made a statement which is inconsistent with his testimony at trial, may be considered by you for the purpose of judging the credibility of the witness but may not be considered by you as evidence of the truth of the matters set forth in that statement.

During deliberations, the jury sent a note to the judge asking if they could consider the statements Lynette Daniels made to Officer Ward, and the trial court repeated its prior instruction. Thus, the jury was given the proper cautionary instruction not once, but twice, and we can assume that the jury heeded the court's admonishment. *See Hughey, supra.*

Moreover, we do not agree with Roseby's assertion that our decision in *Roberts v. State*, 278 Ark. 550, 648 S.W.2d 44 (1983), is controlling. In *Roberts*, an eyewitness gave an unsworn statement to the police implicating the defendant in the murder of the defendant's wife. *Id.* The witness later gave the police two additional statements in which he admitted that his original statement was untrue. *Id.* At trial, the State called the witness to the stand and impeached him with his initial statement that implicated the defendant. *Id.* We held that such impeachment was "a mere subterfuge" for the State's true intention of introducing the hearsay statement as substantive evidence of the defendant's guilt. *Id.* We also found that the limiting instruction to the jury directing them to consider the statements for impeachment only did not cure this error. *Id.*

In this case, there was no evidence that the State knew that Daniels would contradict her earlier statement to Detective Ward. Thus, we do not find that the State called Daniels for the sole purpose of introducing inadmissible hearsay under the guise of impeachment. Thus, as with Roseby's other three arguments on appeal, we find no reversible error.

V. Arkansas Supreme Court Rule 4-3(h)

In accordance with Ark. S. Ct. R. 4-3(h), the record has been reviewed for rulings decided adversely to Roseby but not argued on appeal, and no reversible errors were found.

Affirmed.

Randy ALLEN *v.* STATE of Arkansas

CR 97-998 950 S.W.2d 220

Supreme Court of Arkansas
Opinion delivered September 18, 1997

Stuart Vess, for appellant.

No response.

PER CURIAM. Appellant, Randy Allen, by and through his attorney, has filed a motion for a rule on the clerk. We treat this motion as a motion for belated appeal. His attorney, Stuart Vess, admits in his 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.

Neal HALL *v.* STATE of Arkansas

CR 96-875 951 S.W.2d 557

Supreme Court of Arkansas
Opinion delivered September 18, 1997

[redacted]

William M. Pearson, for appellant.

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

PER CURIAM. The appellant, Neal Hall, was convicted of rape and kidnapping and was sentenced to prison for forty years and five years, respectively. The Trial Court ordered that the terms be served concurrently. Hall filed a motion for a new trial in which he alleged that the prosecutor failed to disclose, pursuant to a discovery request, that a material witness had a felony conviction. We affirmed the Trial Court's denial of that motion in *Hall v. State*, 306 Ark. 329, 812 S.W.2d 688 (1991). Hall subsequently sought habeas corpus relief in federal court on a claim of ineffective assistance of counsel. The United States District Court for the Eastern District of Arkansas ordered that a writ of habeas corpus would issue unless Hall was allowed to file a motion for a new trial pursuant to A.R.Cr.P. Rule 36.4 in state court. The Trial Court held a hearing and denied Hall's motion for a new trial. Hall now appeals that order. We affirm.

On appeal, Hall argues that the Trial Court erred in denying relief on his ineffective assistance of counsel claim. Specifically, he contends that his counsel failed to move to suppress evidence that was seized from his residence and his car pursuant to a faulty nighttime search warrant. Hall argues that if his attorney had filed the motion, the evidence seized pursuant to the warrant would have been suppressed and the outcome of the trial would have been different.

[redacted] To prevail on a claim of ineffective assistance of counsel, the petitioner must show first 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 petitioner by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the defense,

which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. In making a determination on a claim of ineffectiveness, the totality of the evidence before the judge or jury must be considered. *Strickland v. Washington*, 466 U.S. 668 (1984).

The facts surrounding the incident that led to Hall's conviction and the execution of the search warrant are these. Early in the morning on October 18, 1989, the eleven-year-old victim was walking to school when she was approached by a man driving a white older model car. The victim described the man to police as a young man in his early twenties who had dirty-blond shoulder-length hair. She also stated that the man was wearing a blue baseball cap, light pants, a jean jacket, and boots. The victim stated she got into the car because the man flashed a gun at her.

Two other witnesses saw the victim get into the white car. Gladys Franklin, who was acquainted with both Hall and the victim, positively identified Hall as the driver of the white car. Mike Modica, a school bus driver, also stated that he saw a young girl matching the victim's description get into a white car that was driven by a man with blond hair "that was longer than normal for a man."

During the trial, the victim testified that her assailant drove her to a remote location where he raped her vaginally, orally, and anally. Additionally, the victim made an in-court identification of the appellant as her attacker.

Based on the information received from the victim and other witnesses, the police identified Hall as a suspect in the rape and

went to his home to make an arrest. Hall was arrested at 7:00 p.m., and a search of his vehicle and residence was executed at 8:58 p.m.

In this appeal, Hall argues that the affidavit was not sufficient to justify a nighttime search, and that a challenge to the warrant would have lead to the suppression of evidence that corroborated the victim's description of her attacker and the vehicle. The State argues that even if the evidence seized pursuant to the warrant had been suppressed, there was still sufficient evidence to convict Hall, and for that reason, Hall did not suffer prejudice as a result of his attorney's alleged error. We agree.

The victim testified that her attacker drove an older model white car, and that he had blond shoulder length hair. Gladys Franklin testified that she was acquainted with Neal Hall for about two years, and that she saw the victim talking to him as he sat in the driver's seat of an older model white car. Ms. Franklin stated that on the morning of October 18, 1989, Hall had close to shoulder-length hair. Ms. Franklin also testified that she saw Hall driving the same car in the parking lot of her apartment complex earlier that morning. As indicated above, Mike Modica, the school bus driver, saw a young girl matching the victim's description talking to the driver of an older model white car. Mr. Modica also described the driver as having long hair. Two other witnesses, Veronica Mathis and Brooks Evance, testified that they saw a car similar to Hall's vehicle parked at the location where the victim alleged that she was raped.

[redacted] Furthermore, the victim testified concerning the circumstances of the rape and made an in-court identification of Hall as her attacker. According to the abstract, the reliability of that identification was not challenged, and Hall does not raise any issue regarding a failure to challenge that identification in this appeal. We have often held, moreover, that the uncorroborated testimony of a rape victim may constitute substantial evidence to sustain a conviction of rape. *See Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995). Accordingly, Hall was not prejudiced by his attorney's alleged failure to suppress evidence that served to corroborate the victim's testimony.

Affirmed.

Anthony SANDERS *v.* STATE of Arkansas

CR 97-961 950 S.W.2d 220

Supreme Court of Arkansas
Opinion delivered September 18, 1997

Jerry Larkowski, for appellant.

No response.

PER CURIAM. Appellant Anthony Sanders was convicted on December 5, 1996. No timely notice of appeal was filed. In a motion for belated appeal, Sanders asserts he had instructed his trial attorney, Mark Jesse, to file an appeal, but Jesse failed to do so. Sanders's new attorney, Jerry Larkowski, now files a motion for belated appeal, stating Sanders has been denied his right to effective assistance of counsel.

We remand this matter to the trial court to conduct a hearing to determine if Sanders had requested his counsel, Mark Jesse, to file an appeal, and direct the trial court to make its findings and remand them to this court within thirty days.

Albert DIRICKSON *v.* STATE of Arkansas

CR 97-224 953 S.W.2d 55

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Lajeana Jones, Public Defender, by: *Deborah R. Sallings*, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. The appellant, Albert Allen Dirickson, was convicted of three counts of attempted capital murder and single counts of attempted rape and residential burglary. He was sentenced to a total of 140 years' imprisonment for the offenses. Naked, intoxicated, and armed with a hunting knife, appellant unlawfully entered the home of Lyndell and Nedra Martin in DeQueen, Arkansas, on September 5, 1995, and stabbed Mrs. Martin and her eleven-year-old and sixteen-year-old sons. On appeal, the appellant contends that the trial court erred in denying his motions for funds to hire a neuropsychologist and for a continuance to obtain an additional mental evaluation to more fully investigate his diagnosed congenital abnormality, "agenesis of

the corpus callosum." We hold that the trial court did not abuse its discretion in denying appellant's requests and affirm.

[redacted] We recently reviewed the guidelines to which we adhere in determining whether the denial of a continuance is error in *Miller v. State*, 328 Ark. 121, 124, 942 S.W.2d 825, 827 (1997):

> The grant or denial of a continuance is within the sound discretion of the trial court, and the decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Turner v. State*, 326 Ark. 115, 931 S.W.2d 86 (1996). . . A.R.Cr.P. Rule 27.3 provides:
>
>> The court shall grant a continuance only upon a showing of good cause and only for so long as necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.
>
> The following factors are to be considered by the trial court in deciding a continuance motion: (1) The diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. *Turner*, 326 Ark. 115, 931 S.W.2d 86.

The pertinent facts to this appeal are as follows. The felony information was filed in appellant's case on September 5, 1995. On September 11, 1995, the defense filed a motion giving notice that they intended to raise the defense of mental disease or defect. On this same date, the trial court entered an order committing appellant to the state hospital for a mental evaluation.

While in jail awaiting trial, appellant began complaining of headaches and was seen by Dr. Richard Ridlon, who ordered a CAT scan that was conducted on October 9, 1995. Dr. John Pestaner interpreted the CAT scan and opined that appellant had a dysgenetic corpus callosum. Dr. Pestaner suggested that appellant be evaluated by a neurologist.

On November 22, 1995, the defense filed a motion for continuance on the ground that the mental evaluation had not been completed. On March 1, 1996, the original trial date, the trial court granted the defense motion and set a new trial date of July 1, 1996. Subsequently, on March 27, 1996, appellant was admitted to the state hospital for evaluation.

In a letter dated May 1, 1996, Drs. Michael J. Simon and O. Wendall Hall III of the state hospital announced their conclusions that, at the time of the commission of the alleged offenses, appellant did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, had the capacity to have the culpable mental state to commit the offenses charged, and was capable of cooperating with an attorney in the preparation of his defense. According to Dr. Simon, a clinical psychologist, despite appellant's attempts to exaggerate his problems, appellant's alcohol problem was the most significant factor in his alleged criminal behavior. While in the state hospital, appellant underwent a magnetic resonance imaging scan of the brain, an electroencephalogram, and a full neurological evaluation. The letter further indicated that a neurologist, Dr. Reginald J. Rutherford, had conducted a forensic evaluation of appellant and had determined that he had an "agenesis of the corpus callosum," an "incidental congenital abnormality" that, in his opinion, would not influence appellant's mental state or behavior and had "no connection" to his alleged criminal behavior.

At a June 20, 1996, pretrial hearing, appellant's trial counsel admitted to having received a copy of the state hospital's May 1, 1996, letter "a few days" afterwards. However, it was not until June 6, 1996, that counsel asked the trial court to order the state hospital to send supporting documents from the mental evaluation for her review. On June 12, 1996, the trial court granted the request.

On June 13, 1996, the defense filed a motion for continuance for the purpose of obtaining and examining appellant's records from the state hospital. On June 25, 1996, the defense filed another motion for continuance for the purpose of having Dr.

Michael Gelbort, a neuropsychologist from Chicago, Illinois, evaluate appellant. On June 26, 1996, the defense filed a motion requesting funds to help pay Dr. Gelbort's $3,750.00 fee. On June 28, 1996, the defense filed yet another motion for continuance, this time for the purpose of allowing an Arkansas neuropsychologist, Dr. Ronald Huisman, to examine and evaluate appellant. In support of the motions, appellant submitted the affidavits of both physicians. Dr. Gelbort averred that very serious behavioral disorders and discontrol syndromes can occur with agenesis of the corpus callosum. Dr. Huisman averred that appellant had not been adequately evaluated and needed a neuropsychological evaluation. According to Dr. Huisman, there are multiple syndromes associated with appellant's condition, and approximately one-half of patients with this condition have seizure disorders or mental retardation. The trial court denied appellant's requests, stating that appellant's abnormality appeared to have been negated by his intoxicated condition, that Dr. Gelbort had a financial interest in being paid for his opinion, and that it was in the best interests of society for the case to proceed.

[redacted] Appellant contends that the trial court's rulings in his case violated the principles espoused in *Ake v. Oklahoma*, 470 U.S. 68 (1985), in which the Supreme Court held that when a defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that the State assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. In Arkansas, the statutory procedures to be followed when the defense of mental disease or defect is raised are found in Ark. Code Ann. § 5-2-305 (Repl. 1993). We have repeatedly held that a defendant's right to examination under *Ake* is protected by an examination by the state hospital as provided by this statute. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992), *cert. denied* 115 S.Ct. 1126 (1995); *Day v. State*, 306 Ark. 520, 816 S.W.2d 852 (1991); *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348, *cert. denied* 502 U.S. 829 (1991); *Wainwright v. State*, 302 Ark. 371, 790 S.W.2d 420, *cert. denied* 499 U.S. 913 (1990); *Branscomb v. State*, 299 Ark. 482, 774 S.W.2d 426 (1989). An evaluation performed

under this section does not normally require a second opinion, *Richmond v. State*, 320 Ark. 506, 899 S.W.2d 64 (1995), and further evaluation is discretionary with the trial court. *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995). Stated simply, the State is not required to pay for a defendant to shop from doctor to doctor until he finds one who will declare him incompetent to proceed with his trial. *Brown v. State*, 316 Ark. 724, 875 S.W.2d 828 (1994). In the present case, appellant was examined at the state hospital, and, thus, the requirements under *Ake* were satisfied.

Appellant maintains that the State's own experts, particularly a Dr. Knight, a psychologist at UAMS, evaluated appellant and recommended that he see a neuropsychologist. However, appellant has not abstracted any records that indicate that he was seen by a Dr. Knight, much less any recommendation by a State's expert that appellant needed to be evaluated by a neuropsychologist. As we have said many times, the record on appeal is confined to that which is abstracted. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997). Moreover, there is nothing in the record to indicate that a Dr. Knight made such a recommendation. It is the appellant's burden to bring up a record sufficient to show that the trial court erred. *Winters v. Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996). For these reasons, we will not consider this portion of appellant's argument.

Appellant further relies on two cases from the Eighth and Eleventh Circuits; however, a review of the facts in those cases reveals that they are clearly distinguishable. In *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994), Starr had been previously placed in institutions for the mentally retarded and had been diagnosed as mildly to moderately retarded. In that case, the Eighth Circuit held that an additional opinion may be justified when it has been shown that further examination could aid the defense. In *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991), Cowley had been previously committed to mental institutions some 16 times and had been diagnosed as a schizophrenic. While the appellants in *Starr* and *Cowley* had significant histories of mental illness, appellant's mental history in the case at bar began only after he was jailed for the present offenses. As Dr. Rutherford observed, appellant's

abnormality had gone undiscovered for some twenty-eight years. Thus, appellant's argument is unpersuasive.

Even if we were to hold that appellant's evaluation at the state hospital was insufficient, it was appellant's burden to prove the existence of a mental disease or defect. *See Miller*, 324 Ark. at 124. He could have attempted to do so as early as October of 1995, when he complained of headaches and his condition was discovered. As in *Miller*, the defense chose to employ the strategy of waiting to see what the State's doctors would find before seeking to obtain their own experts for an evaluation. Moreover, appellant's trial counsel admitted to having received the state hospital's report "a few days" after it was written on May 1, 1996. However, she waited over one month to request supporting documents on June 6, 1996. In sum, appellant was not diligent in attempting to secure the necessary information on which to build a defense of mental disease or defect. *Miller*, 328 Ark. at 129.

[redacted] Appellant has also failed to show that the probable effect of Drs. Gelbort's and Huisman's testimony would be to establish that appellant's condition prevented him from appreciating the criminality of his conduct. *See Miller, supra.* According to appellant's trial counsel, Dr. Gelbort was concerned about appellant's blood alcohol level because it affects the abnormality. The state hospital report indicated that appellant's alcohol problem was the most significant factor in his criminal behavior. Under these circumstances, the probable effect of Dr. Gelbort's testimony would have been of little benefit to appellant's defense.

Based on the foregoing, we hold that the trial court did not abuse its discretion in denying appellant's motions for expert funds and a continuance.

Affirmed.

GLAZE, IMBER, and THORNTON, JJ. dissent.

ANNABELLE CLINTON IMBER, J., dissenting. I must disagree with the majority's conclusion that appellant is not entitled to an additional expert evaluation under the principles enunciated by the United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Based upon rulings by this court in *Richmond v. State*, 320 Ark. 506 899 S.W.2d 64 (1995), and by the Eighth Circuit Court of Appeals in *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994), our review of this case should begin with the following inquiries: 1) did appellant show that sanity at the time of the offense was likely to be a significant factor, 2) did appellant make a showing that an independent expert would have aided in his defense and 3) would a denial of such assistance result in an unfair trial. I would find that all the above inquiries should be answered in the affirmative.

With regard to the first inquiry, the court's order for a mental evaluation was sufficient to show that appellant's sanity at the time of the offense was likely to be a significant factor. With regard to the second inquiry, the facts support appellant's contention that an expert would have aided in his defense. It is undisputed that a CAT scan performed at DeQueen Regional Hospital in October of 1985 revealed that the appellant suffered from a brain abnormality known as *agenesis* of the *corpus callosum*.

Following this initial evaluation, appellant spent thirty-five days at the state hospital and was examined by Dr. Reginald J. Rutherford, a neurologist, who confirmed the brain abnormality, but opined that the abnormality would not influence appellant's mental state or behavior. Appellant then arranged for Michael Gelbort, Ph. D. neuropsychologist, to review and evaluate his medical records. Dr. Gelbort opined that appellant's condition was a "rare and significant condition," with which "serious behavior disorders and discontrol syndromes can occur," and recommended further evaluation by a neuropsychologist or behavioral neurologist.

Furthermore, Ronald Huisman, Ph.D. neuropsychologist, testified that appellant's medical records included a recommendation by Dr. Armani, a neurologist at the University of Arkansas Medical Center, that appellant be further examined by a neuropsychologist. Because a neuropsychological examination was never performed, Dr. Huisman concluded that appellant had "not been adequately evaluated" and that further evaluation was necessary to assess the "degree to which this man is impaired."

The above facts indicate that appellant made a more than adequate showing that an "independent expert would have aided in his defense." *Starr, supra.* It is clear from the information presented to the court that further evaluation by a neuropsychologist would help determine the true nature of the effects of appellant's brain abnormality and thereby aid in his defense. Without the assistance of further evaluation, appellant was left without the ability to determine whether he had a viable defense based on mental defect. "The right to psychiatric assistance . . . means the right to use the services of a psychiatrist in whatever capacity the defense counsel deems appropriate — including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment." *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990).

The trial court denied appellant's request for funds to hire an expert witness based upon the opinion of the state's neurologist that the brain abnormality would not influence appellant's mental state or behavior, especially in light of the appellant's intoxication at the time of the crime. Although there was *some* evidence that appellant's brain abnormality would have no effect on his mental state or behavior, appellant introduced evidence to show that such a determination was premature, because appellant had never been evaluated by a neuropsychologist as recommended by not only Drs. Gelbort and Huisman, but also by Dr. Armani at the University of Arkansas Medical Center. Given such an incomplete evaluation, the trial court should have appointed a competent neuropsychologist to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake, supra.* "The validity of the defense should then have been for the jury to decide." *Cowley v. Stricklin*, 929 F.2d 640, 643 (9th Cir. 1991). Considering the above points, it is clear that appellant made an adequate showing that a denial of expert assistance resulted in an unfair trial, especially in light of the fact that a defense of mental disease or defect was appellant's only viable defense.

The majority attempts to distinguish the Eighth Circuit's ruling in *Starr, supra,* by suggesting that the appellant in *Starr* had a significant history of mental illness, whereas appellant's mental his-

tory in this case began only after he was jailed for the present offenses. The majority's distinction ignores appellant's history of headaches and blackouts, and a below average I.Q. score (80).

The majority further states that "the state is not required to pay for a defendant to shop from doctor to doctor until he finds one who will declare him incompetent to proceed with his trial." I must respectfully disagree with that characterization of appellant's actions. After the trial court denied appellant's original request for funds to hire an out-of-state neuropsychologist, appellant tried to find a qualified expert in Arkansas. Appellant's counsel attempted to procure an expert from the V.A. hospital in Little Rock, but that expert did not do "criminal work." Ultimately, appellant's counsel hired a neuropsychologist in Arkansas to review appellant's medical records. Considering these attempts by appellant's counsel to locate an expert, it is clear that appellant was not "expert shopping" for a second opinion. Rather, appellant was merely attempting to obtain the neuropsychological evaluation that had never been done, notwithstanding recommendations by several experts that such an evaluation was necessary.

For the above reasons, I must respectfully dissent.

GLAZE AND THORNTON, JJ., join in this dissent.

STATE of Arkansas *v.* Frankie E. HART

CR 97-168 952 S.W.2d 138

Supreme Court of Arkansas
Opinion delivered September 25, 1997

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

Dunham & Faught, P.A., by: *James Dunham*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. The State brings this interlocutory appeal under Ark. R. App. P.—Crim. 3(c), asserting the ground that the circuit court improperly suppressed items seized from appellee Frankie E. Hart's home. The Attorney General contends, as it is required to do under the rule, that the correct and uniform administration of justice requires our review of

the circuit court's ruling. Because we disagree that the correct and uniform administration of justice is at issue here, we dismiss the appeal.

The undisputed facts in this case are as follows. On April 17, 1995, at approximately 9:15 a.m., Arkansas State Trooper Bill Glover was driving west on Highway 64 near London, Arkansas, when a white Corvette bearing Oklahoma tags pulled out in front of him. Having seen the vehicle several times in the area for over one month, Trooper Glover decided to follow it for the purpose of checking to see that its tags were properly registered. When the officer observed the vehicle make a sudden right turn into a parking lot without activating a signal, he approached the driver and asked for his license. Shortly after Trooper Glover identified the driver as appellee, Trooper James Stephens arrived at the scene with his narcotics dog. Despite the fact that both troopers repeatedly instructed appellee to keep his hands out of his pockets, he refused to do so. Trooper Stephens eventually requested appellee to empty his pockets. When appellee failed to completely empty one of his pockets, Trooper Stephens felt the pocket and removed a leather pouch containing a vial of what was later identified as methamphetamine. Appellee was placed under arrest. His car was searched, but no other narcotics were found.

Later that same day, the troopers contacted Officer Stephen Brown, coordinator of the Fifth Judicial Drug Task Force, who had information that appellee was dealing in narcotics. Officer Brown prepared a sworn affidavit and obtained a search warrant for appellee's residence from Judge Benny E. Swindell. Officer Brown and others executed the warrant later in the afternoon and discovered over three pounds of methamphetamine, various items of drug paraphernalia, marijuana, and various firearms. Appellee was charged with improper use of tags, possession of a controlled substance with intent to deliver, simultaneous possession of a controlled substance and firearms, and possession of drug paraphernalia. Appellee filed a pretrial motion to suppress the items seized from his residence. Following a hearing, the circuit court ruled that the search warrant was invalid because Officer Brown's affidavit contained conclusory allegations as well as references to confidential and anonymous sources with no factual indications of

reliability. In ruling that the evidence seized from appellee's home would be suppressed, the circuit court refused to apply the good-faith exception to the exclusionary rule enunciated in *United States v. Leon,* 468 U.S. 897 (1993), in which the Supreme Court held that objective good-faith reliance by a police officer on a facially valid search warrant will avoid the application of the exclusionary rule in the event the magistrate's assessment of probable cause is found to be in error.

The sole point raised in the State's appeal is whether the circuit court erred by not applying the good-faith exception to the exclusionary rule. Before addressing this issue, we must first decide whether this interlocutory appeal is properly before us under Rule 3(c). Particularly, we must decide whether the correct and uniform administration of justice requires us to review this question.

The circuit court's refusal to apply the good-faith exception in this case necessarily depended upon its assessment of whether Officer Brown acted in good faith in relying on the issuing magistrate's determination that the affidavit for search warrant demonstrated probable cause. In answering this question, the circuit court was required to apply an objective standard, which requires officers to have a reasonable knowledge of the Arkansas Rules of Criminal Procedure. See *Richardson v. State,* 314 Ark. 512, 863 S.W.2d 572 (1993). Thus, the circuit judge was called upon to decide whether an objective, reasonable officer with Officer Brown's training and experience would have had the good-faith belief that the affidavit established probable cause to search appellee's residence. The circuit court viewed both the facts and the law and determined that the good-faith exception did not apply.

[redacted] Because the issue presented in this appeal involves a mixed question of law and fact, an interpretation of our rules with widespread ramifications is simply not at issue here. See *State v. Harris,* 315 Ark. 595, 868 S.W.2d 488 (1994). We have similarly held:

> Where the trial court acts within its discretion after making an evidentiary decision based on the facts on hand or even a mixed question of law and fact, this court will not accept an

> appeal under Ark. R. Crim. P. 36.10 (now Ark. R. App. P.—Crim. 3(c).

State v. Harris, 315 Ark. At 597; *State v. Mazur,* 312 Ark. 121, 123, 847 S.W.2d 715 (1993); *quoting State v. Edwards*, 310 Ark. 516, 838 S.W.2d 356 (1992). We only accept appeals by the State when our holding would establish a precedent that would be important to the correct and uniform administration of justice. *State v. Rice* 329 Ark. 219, 947 S.W.2d 3 (1997); *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1995). Because the circuit court's decision in the present case required him to review unique circumstances and decide mixed question of law and fact, we must conclude that the correct and uniform administration of justice is not at issue. Accordingly, we dismiss the appeal.

Appeal dismissed.

GLAZE, IMBER, and THORNTON, JJ. dissent.

Douglas Martin CATES *v.* STATE

CR 97-263 952 S.W.2d 135

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Michael L. Allison, for appellant.

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

DAVID NEWBERN, Judge. Douglas Cates was convicted of first-degree murder and sentenced to life in prison. He contends the evidence against him was insufficient to have been permitted to go to the jury; thus, his motion for directed verdict should have been granted. He also contends the Trial Court erred in rejecting his contention that he was being tried in the wrong county. As Mr. Cates presented no positive evidence that the crime did not occur in Conway County, and as the evidence against him was

clearly sufficient to overcome his motion for a directed verdict, the conviction is affirmed.

Mr. Cates gave two tape-recorded statements in which he admitted killing Lynn Neeley. According to Mr. Cates, he and Mr. Neeley entered the locomotive cab of the second engine of a freight train in North Little Rock at approximately 8:00 p.m. on February 12, 1996. While on the train, the two men drank whiskey and eventually began arguing. After telling Mr. Cates that he could kill him, Mr. Neeley pulled out a knife. Mr. Cates took the knife away from Mr. Neeley, pushed him against the wall, and stabbed him in the back. When the knife broke, Mr. Cates forced Mr. Neeley to the floor so that Mr. Neeley was lying on his stomach. Mr. Cates then grabbed a hatchet from his pack and hit Mr. Neeley in the head several times as he stood over him. Then, Mr. Cates, who was unable to get off the moving train, drank more liquor and passed out.

Mr. Cates was charged by information on February 14, 1996, in the Conway County Circuit Court with first-degree murder and with being an habitual offender. At a probable-cause hearing held that day, the Trial Court found that the Conway County Circuit Court had jurisdiction of the matter because "the best and only information we have is this [crime] occurred in Conway County."

During the trial, Charles Norman, the engineer who worked on the train where the homicide occurred, testified that on February 12, 1996, he saw Mr. Neeley's body and Mr. Cates in the cab when the train stopped between Ozark and Mulberry. He testified that the victim's skull was visibly crushed.

Jim Freeman, Mulberry Chief of Police, met the train in Mulberry and took Mr. Cates into custody. He testified that the victim was covered in an "extreme amount of blood," and that he removed from the victim's body a hatchet which appeared to be covered with fresh blood and hair. A knife blade was also found on the train. Dr. Frank Peretti, who performed the autopsy, testified that the cause of Mr. Neeley's death was twenty-one multiple shock-force head injuries.

1. *Sufficiency of the evidence*

[redacted] A motion for directed verdict is a challenge to the sufficiency of the evidence. *Carter v. State*, 324 Ark. 395, 398, 921 S.W.2d 924, 925 (1996). In considering whether a conviction is supported by sufficient evidence, we need only consider the evidence that supports the guilty verdict, and we view the evidence in the light most favorable to the State and affirm if there is substantial evidence to support the verdict. *Martin v. State*, 328 Ark. 420, 426, 944 S.W.2d 512, 515 (1997); *Hicks v. State*, 327 Ark. 652, 658, 941 S.W.2d 387, 391 (1997). Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other and permits the trier of fact to reach a conclusion without having to resort to speculation or conjecture. *McGehee v. State*, 328 Ark. 404, 410, 943 S.W.2d 585, 588 (1997).

The first-degree murder statute provides as follows: "(a) A person commits murder in the first degree if . . . (2) With the purpose of causing death of another person, he causes the death of another person." Ark. Code Ann. § 5-10-102 (Repl. 1993).

[redacted] The confession, the engineer's testimony, and the medical testimony as to the cause of death were beyond question sufficient to permit the matter to go to the jury.

2. *Jurisdiction*

[redacted] Although sometimes referred to as a venue question, the issue of a court's authority to try a person for a crime is more properly characterized as one of territorial jurisdiction. *See Webb v. State*, 323 Ark. 80, 83, 913 S.W.2d 259, 261 (1996). "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which a crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found . . ." Ark. Const. art. 2, § 10; *State v. Webb*, 323 Ark. at 83; 913 S.W.2d at 261. Pursuant to Ark. Code Ann. §16-88-105(b) (Repl. 1993), "[t]he local jurisdiction of circuit courts . . . shall be of offenses committed within the respective

counties in which they are held." At a criminal trial, the State is not required to prove the court's jurisdiction unless positive evidence is admitted that affirmatively shows it to be lacking. Ark. Code Ann. § 5-1-111(b) (Repl. 1993); *Nicholson v. State*, 319 Ark. 566, 571, 892 S.W.2d 507, 510 (1995); *Findley v. State*, 307 Ark. 53, 59, 818 S.W.2d 242, 246 (1991). In *Higgins v. State*, 317 Ark. 555, 558, 879 S.W.2d 424, 425 (1994), we noted that § 5-1-111(b) created a presumption in favor of jurisdiction in the place where the charge is filed by the State.

The train carrying Mr. Cates and Mr. Neeley was traveling west, from North Little Rock to Van Buren. Mr. Cates was unsure when the argument between him and Mr. Neeley began. In his first statement, Mr. Cates said that he did not know if the argument began when the train was in North Little Rock, but that the last thing that he remembered was going through the tunnel on the west side of Conway. In a later statement, he said that the argument began after the train had passed through the tunnel. Mr. Cates agreed that the argument may have started about ten minutes after the train passed through the tunnel. At trial, there was testimony that the tunnel is located in Faulkner County, approximately three miles east of the Conway County-Faulkner County line.

Mr. Cates presented no positive evidence that the offense occurred anywhere other than in Conway County. Mr. Cates's jurisdictional claim is thus without merit.

3. Ark. Sup. Ct. R. 4-3(h).

In accordance with Ark. Sup. Ct. R. 4-3(h), the record has been reviewed for erroneous rulings prejudicial to Mr. Cates, and none has been found.

Affirmed.

Nobia BENEDICT *v.* NATIONAL BANK OF COMMERCE

96-1339 951 S.W.2d 562

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Depper Law Firm, by: *Robert L. Depper, Jr.* and *Robin J. Carroll*, for appellant.

Compton, Prewett, Thomas & Hickey, P.A., by: *William I. Prewett*, for appellee.

TOM GLAZE, Justice. Appellant Nobia Benedict brought this lawsuit against National Bank of Commerce after her house and lot, including a pin oak tree, sustained damages as a result of fire. Benedict's house and lot adjoined the Bank's property, which contained a dilapidated structure. The Bank gave written permission to the El Dorado Fire Department to conduct a "controlled burn" of the structure on its property, and the department agreed to burn the structure as a training exercise.[1] Although the department established a "water curtain" between Benedict's and the Bank's adjoining properties, Benedict's house sustained damages to one of her windows, to some melted shingles on its roof, and she also suffered loss of an oak tree and some other vegetation.

Because Benedict concluded that she could not successfully sue the City of El Dorado for its fire department's negligence, she brought her action solely against the Bank, alleging absolute liability on the Bank's part, asserting the Bank had engaged in ultrahazardous activity by "ordering the burning." The parties' respective cases were tried to the court, and the court issued a letter opinion, holding in the Bank's favor and dismissing Benedict's complaint with prejudice. On appeal, Benedict contends the trial court erred in refusing to hold that the Bank's use of fire was a hazardous activity for which the Bank bore absolute liability. However, we are unable to address the merits of Benedict's argument because Benedict failed to file a timely notice of appeal.

We first note that the trial court issued its letter opinion on June 27, 1996, and filed it on June 28, 1996. Before the trial court entered its order dismissing Benedict's complaint, Benedict filed on July 3, 1996 a pleading captioned "Petition for Rehearing." Without ruling on Benedict's "Petition," the trial court entered its order on July 11, 1996, and Benedict delayed in filing her notice of appeal until August 15, 1996 — outside the thirty-day period required for filing a notice of appeal under Ark. R. App. P. 4(a).

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[1] The Bank's property had been listed for sale, and the real estate broker handling the Bank's property determined the property would sell better without the structure. Thus, the broker made arrangements with the El Dorado Fire Department to burn the structure.

Benedict argues that, under Ark. R. App. P. 4(b), her time of appeal was extended because she had filed a petition for rehearing which in substance was a motion for new trial as provided in Rule 59 of the Arkansas Rules of Civil Procedure.[2] The Civil Appellate Rule 4(b) provides that a motion for new trial under ARCP Rule 59(b) may extend the time for filing a notice of appeal if such a timely motion is filed in trial court, and provision (c) of Civil Appellate Rule 4 further provides the time for appeal shall run from the entry of the order granting or denying a new trial. If the trial court neither grants nor denies the new-trial motion within thirty days of its filing, the motion will be deemed denied as of the thirtieth day, and the moving party then must file a notice of appeal within thirty days from when the parties' motion was deemed denied. *See* Ark. R. App. P. 4(c).

Even if we were to agree with Benedict that her "Petition for Rehearing" was in essence a new-trial motion and, as such, could possibly extend her time for filing a notice of appeal, Benedict failed to file such a motion no later than ten days *after* the entry of judgment as is required by ARCP Rule 59(b).[3] *See Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995) (where party filed motion for new trial before the judgment was entered, court held motion was untimely and ineffective under ARCP Rule 59 and Ark. R. App. P. 4(b)); *Guinn v. State*, 323 Ark. 612, 917 S.W.2d 529 (1996) (court held that to be effective, a motion for new trial under ARCP Rule 59 must be filed within ten days after the entry of the judgment); *see also Jackson v. Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992).

Here, Benedict failed to file her motion within the ten-day period provided in ARCP Rule 59(b), so it was ineffective. Consequently, her motion failed to extend her time to file a notice of appeal. In these circumstances, Benedict was required to

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[2] We need not decide whether Benedict's "Petition for Rehearing" should be considered a motion for new trial for Rule 59(a) purposes, because, even assuming it is a new-trial motion, it was filed untimely, was therefore ineffective, and failed to extend her time for filing a notice of appeal.

[3] The Reporter's Note to Rule 59 underscores Section (b) and marks a significant departure from Arkansas practice, stating that, under this section, a motion for new trial must be filed within ten days after the entry or filing of the judgment.

file her notice of appeal thirty days after entry of the trial court's July 11, 1996 order, and having failed to do so, we must dismiss her appeal as untimely.

Jerry SHERRILL *v.* STATE of Arkansas

CR 97-335 952 S.W.2d 134

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Joe Kelly Hardin, for appellant.

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

TOM GLAZE, Justice. Appellant Jerry Sherrill appeals his convictions for the rape of his two biological daughters, R., age 12, and L., age 7. On appeal, he contends the trial court erred in denying his motions for directed verdict concerning each daughter,[1] and in doing so, he argues that, in both cases, there is a lack of credible evidence concerning the element of penetration. Sherrill also asserts the trial court erred in denying his request for a hypnotist. We affirm.

Regarding his first contention, Ark. Code Ann. § 5-14-103(a)(3) (Repl. 1993) provides in pertinent part that a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. Deviate sexual activity and sexual intercourse are defined in Ark. Code Ann. § 15-14-101(1)(A) and (B) and (9) (Repl. 1993) as follows:

> (1) "Deviate sexual activity" means any act of sexual gratification involving:
>
> (A) the penetration, however slight, of the anus or mouth of one person by the penis of another person; or
>
> (B) the penetration, however slight, of the vagina or anus of one person by any body member or foreign instrument manipulated by another person.
>
> * * *
>
> (9) "Sexual intercourse" means penetration, however slight, of a vagina by a penis.

[1] Although Sherrill failed to abstract his directed-verdict motions and the trial court's rulings on them, Ark. Sup. Ct. R. 4-3(h) requires our court to review adverse rulings that appear to involve prejudicial error. Therefore, we consider the merits of Sherill's directed-verdict arguments.

Sherrill argues the evidence was insufficient to prove the rape charges, particularly the key element of penetration, because there was no medical or adult testimony to corroborate the testimonies of R. and L. As a consequence, he claims the jury could only speculate regarding whether penetration occurred.

[redacted] This court, of course, has repeatedly held that the testimony of a rape victim does not have to be corroborated by other testimony. *See Puckett v. State*, 324 Ark. 81, 918 S.W.2d 707 (1996); *Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994). In *Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995), this court held that the testimony of a child rape victim, showing penetration, need not be corroborated, nor is scientific evidence required. Here, both children testified in vivid detail how their father, appellant Sherrill, fully penetrated their vaginas with his penis, and how he required them to perform oral sex on his penis, as well. R. said that her father commenced such activity when she was about five years old, and as she grew older, he asked her to perform sexually with him at least once a day. The girls' brother also testified that on a number of occasions, he had witnessed their father performing sexual acts with his sisters. In sum, the evidence presented at trial was overwhelming and unrebutted, and clearly supported the rape convictions the jury rendered in this case. The trial court's rulings denying Sherrill's motions for directed verdict were correct.

Next, Sherrill argues that the trial court erred in refusing to appoint a hypnotist to assist in his defense. He based his request on the claim that it is highly likely that he was under the influence of hypnotic suggestions and not responsible for his actions.

[redacted] At trial, Sherrill's counsel abandoned Sherrill's request in this respect as having no merit, and defense counsel did so even before the trial court denied Sherrill's request. In any event, a litigant may not agree with a ruling by the trial court and then attack that ruling on appeal. *Hudson v. State*, 303 Ark. 637, 799 S.W.2d 529 (1990). Thus, Sherrill is precluded from arguing this point on appeal. Furthermore, Sherrill cites no authority nor makes a convincing argument in support of this issue and for this

reason, too, we decline to reach the merits of Sherrill's second argument.

For the reasons above, we affirm.

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record has been examined in its entirety and no other rulings adverse to Mr. Sherrill that appear to involve prejudicial error were found.

Joe Willie GRAYDON *v.* STATE of Arkansas

CR 97-271 953 S.W.2d 45

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Maxie G. Kizer, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Joe Willie Graydon appeals the judgment of the Jefferson County Circuit Court convicting him of rape and second-degree battery and sentencing him to a term of life imprisonment and six years' imprisonment, respectively. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Appellant's sole assignment for reversal is that the trial court erred in excluding evidence of prior sexual

conduct between himself and the victim, which he offered as evidence of the victim's consent. We find no error and affirm.

The record reflects that the crimes occurred on September 4, 1995, in Pine Bluff, under a bridge on the Arkansas River. The victim, an eighteen-year-old girl, was taken to the hospital emergency room that same date and later admitted to the hospital with injuries to her face and back, consisting of bruising, swelling, lacerations, and abrasions. There was massive swelling on one side of the victim's face, such that her eyes were swollen shut, her lips were swollen, and she had blood on her head and face. The victim also sustained a broken cheek bone and a cracked bone in her sinus area. Her injuries required sutures on her right temple, above her right eye, and below her chin. Additionally, officers observed bruised areas on each side of her neck that were consistent with finger impressions.

Prior to trial, Appellant filed a motion pursuant to Ark. Code Ann. § 16-42-101 (Repl. 1994) requesting that the trial court set a hearing to determine the admissibility of evidence that he and the victim had been lovers for a period of time before the date of the alleged incident. Appellant asserted that this evidence was relevant to the issue of consent. A hearing was held, during which both Appellant and the victim testified. Appellant stated that he had been engaged in a sexual relationship with the victim, whom he referred to as "Pee Wee," for about four months prior to the time of the offense. He stated that every time they had sexual intercourse, the victim was a willing participant. He stated that they would sneak off together and that no one knew about their relationship because he was living with another woman at the time and the victim was much younger than he was. The victim, on the other hand, testified that she did not know Appellant at all until the day of the rape. She stated that she had never had sexual intercourse with Appellant. She stated further that no one calls her "Pee Wee."

Monica Hadley, the victim's sister, testified that she and her sister were living together at the time of the crime. She indicated that they were close and that her sister would talk about her boy-

friends. She stated that she had never heard her sister mention Appellant's name or that anyone called her "Pee Wee."

Wilda Chadick, a teacher at Pine Bluff High School, testified that she had been tutoring the victim after school and that she would often give the victim a ride home after the sessions. She stated that during those rides, she and the victim would talk. She also indicated that she would see the victim every day and would visit with her at ball games and other times. She stated that she had never heard of Appellant until the day of the incident and that she had never heard anyone call the victim "Pee Wee."

According to the probable-cause statement, which was admitted as an exhibit at the hearing, the victim reported the attack to police while she was in the hospital. She told the police that she had been walking home after work when a vehicle pulled up alongside her. The man in the vehicle asked her for directions to Kentucky Street. Although she knew where the street was, she did not feel that she could give proper directions, so she told the man she did not know how to get there. The man then drove away, and she continued walking. A short time later, the man pulled up alongside her again. This time the man told her that he was from out of town and needed directions to the homes of Tameka Brimmer and Felicia Jones. The man then read to her the written directions he had been given to the Jones home. He asked her if she could show him how to get there and told her he would give her a ride home if she would help him. She agreed and got into his car.

The victim told the police that the man stopped for gas along the way and that she had waited in the car. The man then drove to the north side of a bridge on the Arkansas River. When he drove up under the bridge, she repeatedly told him that he could turn around, as they were apparently not going in the right direction. The man then stopped the car and immediately grabbed her around the neck and began choking her. He put his hand between her thighs and told her not to scream because no one would hear her out there. He then pulled off her shorts and panties and performed oral sex on her. She told him several times to stop. After a short time, the man stopped performing oral sex and

asked her if it felt good. She told him that it did not feel good and put her hands between her legs. The man then started choking her again. When he stopped, he took off his pants, crawled on top of her, and began having sexual intercourse with her. When she tried to squeeze her legs shut, the man choked her again and hit her in the face. The man forced her legs open and continued having sexual intercourse again. He then climbed off her, put on his clothes, and walked around to her side and told her to get out of the car. She then dressed and got out of the car. The man then asked for a hug, which she gave him. He told her that the hug was not right and began choking her again. She told the police that she believed it was at that point she passed out and fell to the ground. When she woke up, she walked to the freeway and flagged down a passing motorist, who drove her to the hospital. She told police that she had never seen the man before that date. She was able, however, to provide a detailed description of the man and the car. Two days following the attack, the victim immediately identified Appellant as the assailant from a photographic lineup.

When Appellant was informed by the police that he was a suspect in the rape, he denied any involvement or knowledge of the battery or rape. He told police that on the date of the rape, he had had sexual intercourse with another woman under the same bridge where the attack had occurred. After further interview, however, he recanted that statement and claimed that he had had consensual intercourse with the victim, whom he referred to as "Pee Wee," under the bridge. He stated that he had initially picked up the girl at the Jiffy "J" convenience store after having received a message from her. He stated that afterwards, he had dropped her off on West 13th Street and then drove home. Appellant then changed his statement again, claiming that after he had dropped off the victim on West 13th Street, he picked her up again and they returned to the bridge and had intercourse a second time. He then stated that after they finished having sex, the victim had asked him for money and that when he refused to give her any, they began to fight. He stated that the victim kicked him in the groin area and that he struck her three to five times in the face with his fist and his elbow. He also admitted that he kicked

her in the stomach, knocking her to the ground. He stated that he then got into his car and drove away, leaving the injured girl under the bridge. He claimed that he did not rape the girl and that the two of them had engaged in sexual intercourse numerous times in the past.

Several days after the hearing, the trial court issued a written order denying Appellant's motion. The order reflected that after hearing the testimony of the witnesses and argument of counsel, it was the court's judgment that the uncorroborated evidence of prior sexual conduct between Appellant and the victim would not be admissible at trial. Appellant now contends the trial court's ruling was erroneous. We disagree.

Section 16-42-101, commonly referred to as the rape-shield statute, provides that evidence of a victim's prior sexual conduct is inadmissible at trial except where the court, at an in camera hearing, makes a written determination that such evidence is relevant to a fact in issue and that its probative value outweighs its inflammatory or prejudicial nature. *State v. Sheard*, 315 Ark. 710, 870 S.W.2d 212 (1994) (citing *Marion v. State*, 267 Ark. 345, 590 S.W.2d 288 (1979)). The purpose of the statute is to shield victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt. *Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995). The trial court is vested with a great deal of discretion in ruling whether the victim's prior sexual conduct is relevant. *Id.* We will not overturn the trial court's decision unless it constituted clear error or a manifest abuse of discretion. *Id.*; *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

Appellant argues that the evidence of the victim's prior sexual intercourse with him was relevant to show that she consented in the present case. Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act. *Sterling v. State*, 267 Ark. 208, 590 S.W.2d 254 (1979). There must be additional evidence connecting the prior acts to the consent alleged in the subsequent act before the prior acts become relevant. *Id.* Here, Appellant argues that the evidence connecting

the prior acts to the present act is the fact that the victim voluntarily got into his car on the date of the offense. We are not persuaded by this argument, which, taken to its logical conclusion, implies that the act of helping a stranger is tantamount to establishing a previous relationship between two people such that any act of sexual contact would be deemed consensual.

In light of the evidence presented at the hearing, we cannot say the trial court's decision to deny admission of the proffered evidence constituted clear error or manifest abuse of discretion. To the contrary, the only evidence presented that supports Appellant's version of events was his own self-serving testimony. There was no corroborating evidence that even linked Appellant with the victim prior to the date of the offense, let alone evidence of their having carried on a clandestine affair for several months. The primary purposes of the rape-shield statute are to protect the victim and encourage rape victims to participate in the prosecution of their attackers. *Brewer v. State*, 269 Ark. 185, 599 S.W.2d 141 (1980). Such worthy purposes would surely be thwarted if every defendant in a rape case was allowed to present uncorroborated "evidence" that he and the victim had previously engaged in sexual intercourse over the victim's denial that she had ever known her assailant before the incident. Particularly in this case, where the victim was badly beaten and injured, the minute probative value of allegations of prior consensual intercourse between the victim and the attacker are clearly outweighed by the inflammatory nature of the alleged evidence. Furthermore, Appellant failed to offer any additional evidence connecting the alleged prior acts to the consent alleged in the present incident.

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. No such errors were found. For the aforementioned reasons, the judgment of conviction is affirmed.

Paul Steven JONES *v.* STATE of Arkansas

CR 97-351 951 S.W.2d 308

Supreme Court of Arkansas
Opinion delivered September 25, 1997

John F. Gibson, Jr., for appellant.

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

DONALD L. CORBIN, Justice. Appellant Paul Steven Jones appeals the judgment of the Drew County Circuit Court convicting him of possession of a controlled substance (cocaine) and sentencing him to a total of ten years' imprisonment in the Arkansas Department of Correction, with imposition of all but fifty-three months suspended. Appellant asserts that the trial court erred by denying the motion to dismiss for lack of speedy trial. Because this appeal involves an interpretation of our Court Rules, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(17)(vi). We affirm.

Appellant was arrested on May 27, 1994. Later, an amended information was filed charging him with possession of a controlled substance (cocaine) with intent to deliver and felon in possession

of a firearm. There were four orders entered of record by the trial court, which excluded various periods of time from the calculation of time for a speedy trial. The trial was held on August 17, 1995. Before the jury had been selected, Appellant made an oral motion to dismiss the charges for lack of a speedy trial. The motion was denied, and Appellant was tried on both charges and convicted of possession of cocaine.

Appellant argues that pursuant to A.R.Cr.P. Rules 28.1 and 28.2, he was entitled to be tried within twelve months from the date of his arrest, excluding any periods of delay authorized by Rule 28.3. When a defendant is not brought to trial within a twelve-month period, the State has the burden of showing the delay was legally justified. *Hulsey v. Smitherman*, 328 Ark. 234, 943 S.W.2d 568 (1997). Once a defendant has made a prima facie showing of a violation of Rule 28.1, the State bears the burden of showing that there has been no violation, in that some of the time comprising the one-year period provided in the rule is to be excluded as "legally justified." *Id.* at 239, 943 S.W.2d at 570. It is generally recognized that a defendant does not have to bring himself to trial and is not required to bang on the courthouse door in order to preserve his right to a speedy trial. *Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996). The burden is on the courts and the prosecutors to see that trials are held in a timely fashion. *Id.* Under Rule 28.2, the speedy-trial period commences to run "without demand by the defendant[.]" *Id.* at 42, 918 S.W.2d at 169.

Appellant was tried on a date eighty-two days beyond the twelve-month constraint of Rule 28.1. He thus established a prima facie case that a speedy-trial violation had occurred. The burden then shifted to the State to show that the delay was the result of Appellant's conduct or was otherwise legally justified. *See Cupples v. State*, 326 Ark. 31, 929 S.W.2d 150 (1996). The pertinent inquiry on appeal is whether there were excludable periods of time in excess of eighty-two days.

Rule 28.3(i) provides that all excludable periods shall be set by the court in a written order or docket entry. *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996). A trial court should

enter written orders or docket notations at the time continuances are granted to detail the reasons for the continuances and to specify, to a day certain, the time covered by such excluded periods. *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991). However, a trial court's failure to comply with Rule 28.3(i) does not result in automatic reversal. *Goston*, 326 Ark. 106, 930 S.W.2d 332.

Rule 28.3 provides that certain periods of time are excludable from computing the time for trial. Notably, Rule 28.3(c) provides:

> The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.

We conclude that there were two such excludable periods of time, which totaled 127 days, noted in the present case.

[redacted] On November 22, 1994, the trial court entered an "Order Excluding Time Under ARCrP 28" revealing that fifty-seven days, from November 22, 1994, to January 18, 1995, would be excluded on motion by counsel for the defendant. Where a case is delayed by the accused and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of Rule 28.3(i). *Goston*, 326 Ark. 106, 930 S.W.2d 332. Where the trial court specifically noted that the time period did not apply to speedy trial because the appellant was granted a continuance, and the record clearly demonstrated that these were attributable to the appellant or were legally justified, the appellant could not complain about the delays he requested. *Id.* We therefore conclude that this time period of fifty-seven days should be excluded from the calculation of the one-year period, as it was a delay granted at Appellant's request.

[redacted] On May 1, 1995, the trial court signed another "Order Excluding Time Under ARCrP 28," which excluded seventy days, from May 4, 1995, to July 13, 1995. As with the previous time period, the court excluded this seventy-day period as being on motion by counsel for defendant. Appellant conceded to the

exclusion of this time period at trial, and thus he may not complain of its exclusion on appeal. *See Goston*, 326 Ark. 106, 930 S.W.2d 332. Accordingly, we affirm the trial court's denial of Appellant's motion to dismiss as we conclude that his constitutional right to a speedy trial was not violated.

Affirmed.

George T. RAINS *v.* STATE of Arkansas

CR 97-245 953 S.W.2d 48

Supreme Court of Arkansas
Opinion delivered September 25, 1997

[redacted]

Buford Gardner, for appellant.

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

DONALD L. CORBIN, Justice. Appellant George T. Rains appeals the judgment of conviction of the Boone County Circuit Court for six counts of rape, one count of attempted rape, and two counts of first-degree sexual abuse. The trial court sentenced Appellant as a habitual offender to a term of life imprisonment on each count of rape, sixty years' imprisonment on the count of attempted rape, and two terms of thirty years' imprisonment on each count of first-degree sexual abuse. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). Appellant raises two points for reversal. We find no error and affirm.

Appellant's convictions stem from his having engaged in sexual acts with three minor victims, namely his son J.P., his stepdaughter S.D., and his niece D.C. The sexual acts occurred over a period of time from June 1993 through February 1996, during which time J.P. was five to seven years old, S.D. was six to eight years old, D.C. was eight to ten years old, and Appellant was thirty-six to thirty-nine years old. The information charged that on or about February 3, 1996, Appellant committed two counts of rape, one count each against J.P. and S.D. Also on or about February 3, 1996, the information charged Appellant with the attempted rape of S.D. The four remaining counts of rape, charged in the information as having occurred sometime between June 1993 and February 1996, involved two counts against J.P. and two counts against S.D. Specifically, as to the two counts against J.P., the information charged that Appellant had made J.P. place his (Appellant's) penis in the child's mouth and that Appellant had also placed his penis in J.P.'s anus. As to the two remaining counts of rape against S.D., the information reflected that Appellant had made S.D. place his (Appellant's) penis in her mouth and that Appellant had also placed his tongue inside S.D.'s vagina. Lastly, the information charged Appellant with two counts of first-degree sexual abuse for having engaged in sexual

contact with S.D. and D.C. on a date sometime between June 1993 and February 1996.

I. Sufficiency of the Evidence

For his first point for reversal, Appellant argues that there was insufficient evidence to sustain his convictions. He contends that the children's testimony was vague and unclear and that his convictions were based upon the jury's passion, rather than the evidence. The State argues that this point is procedurally barred because the grounds raised in Appellant's first motion for directed verdict differed from those raised in his motion at the close of all the evidence. It is the State's contention that because Appellant did not argue the lack of evidence of sexual penetration or deviate sexual activity in his first motion for directed verdict, that argument is not preserved for appeal. We disagree.

It is well settled that arguments not raised at trial will not be addressed for the first time on appeal, and that parties cannot change the grounds for an objection on appeal and are bound by the scope and nature of their objections and arguments presented at trial. *Evans v. State*, 326 Ark. 279, 931 S.W.2d 136 (1996). Where the defendant's first motion for directed verdict was specific as to the missing proof, but his motion made at the close of the evidence was merely a general renewal of the first motion, his challenge to the sufficiency of the evidence was preserved for appellate review. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995). In *Durham*, the State argued that because the motion made at the close of the evidence was not specific, the defendant waived his challenges to the sufficiency of the evidence on appeal. This court ultimately reached the merits of Durham's argument because the grounds he raised for reversal were the same as those originally raised to the trial court. Thus, it is the opportunity of the trial court to first hear and address the parties' arguments that is of importance in determining whether the argument has been preserved for appeal. That both directed-verdict motions are not identical will not bar an appellant's argument on appeal.

Here, Appellant made specific motions for directed verdict at the end of the State's case and at the close of all the

evidence. The fact that he stated additional grounds in his final motion does not bar our consideration of them. Therefore, because Appellant has not raised any issues on appeal that were not first presented to the trial court, we will reach the merits of this argument.

[redacted] On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). We view the evidence in a light most favorable to the State and consider only that evidence which supports the verdict. *Id.* Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Id.* This court does not, however, weigh the evidence presented at trial, as this is a matter for the factfinder. *Dabney v. State*, 326 Ark. 382, 930 S.W.2d 360 (1996). Nor will this court weigh the credibility of witnesses. *Caldwell v. State*, 319 Ark. 243, 891 S.W.2d 42 (1995).

[redacted] A person commits rape if he engages in sexual intercourse or deviate sexual activity with a person who is less than fourteen years of age. Ark. Code Ann. § 5-14-103 (Repl. 1993). "Deviate sexual activity" means any act of sexual gratification involving the penetration, however slight, of the anus or mouth of one person by the penis of another person or the penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person. Ark. Code Ann. § 5-14-101(1) (Supp. 1995). Rape is not defined as a continuing offense; rather, it is a single crime that may be committed by either engaging in sexual intercourse or deviate sexual activity with, as in this case, another person who is less than fourteen years of age. *See Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986). Where the prosecutrix testifies as to multiple acts of rape of a different nature, separated in point of time, there is no continuing offense, as a "separate impulse was necessary for the commission of each offense." *Id.* at 195, 710 S.W.2d at 203.

A person commits first-degree sexual abuse if, being eighteen years old or older, he engages in sexual contact with a person not his spouse who is less than fourteen years old. Ark. Code Ann.

§ 5-14-108 (Repl. 1993). "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, or buttocks, or anus of another person or the breast of a female. Ark. Code Ann. § 5-14-101(8) (Supp. 1995).

This court has repeatedly held that the uncorroborated testimony of a rape victim, whether adult or child, is sufficient to support a conviction. *Evans*, 326 Ark. 279, 931 S.W.2d 136; *Caldwell*, 319 Ark. 243, 891 S.W.2d 42; *Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987). Likewise, the victim's testimony need not be corroborated to demonstrate sufficient evidence of first-degree sexual abuse. *McGalliard v. State*, 306 Ark. 181, 813 S.W.2d 768 (1991). To the extent there may be inconsistencies in the victims' testimony, this is a matter of credibility for the jury to resolve. *Puckett v. State*, 324 Ark. 81, 918 S.W.2d 707 (1996). In cases of sexual abuse, it may be assumed that the defendant had sexual contact with the victim for the purpose of sexual gratification, and it is not necessary for the State to directly prove that he was so motivated. *Holbert v. State*, 308 Ark. 672, 826 S.W.2d 284 (1992). *See also McGalliard*, 306 Ark. 181, 813 S.W.2d 768; *Williams v. State*, 298 Ark. 317, 766 S.W.2d 931 (1989).

It is similarly not necessary for the State to prove specifically when and where each act of rape or sexual contact occurred, as time is not an essential element of the crimes. *See Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996); *Bonds v. State*, 296 Ark. 1, 751 S.W.2d 339 (1988). It is rare that youthful victims of sexual abuse can provide exactness as to the time an offense occurred, and any discrepancies in the testimony concerning the date of the offense are for the jury to resolve. *Yates v. State*, 301 Ark. 424, 785 S.W.2d 119 (1990). In order to prove a charge of attempted rape, it must be shown that the defendant's actions constituted a substantial step in a course of conduct intended to culminate in the commission of rape. *Daffron v. State*, 318 Ark. 182, 885 S.W.2d 3 (1994).

J.P. testified at trial that on at least four occasions, Appellant put his "private" or "wiener" in J.P.'s anus or in his mouth, mak-

ing J.P. suck on it. He stated that Appellant had also put his (J.P.'s) wiener in his (Appellant's) mouth and sucked on it. He stated that these acts occurred three times at the trailer near Dogpatch, where he lived with Appellant, his mother, and S.D. He stated that the acts occurred once at his grandmother's house in Bergman. He stated that Appellant had also put his wiener in S.D.'s private. He stated that sometimes "gooey," "yellow" stuff would come out of Appellant's wiener. He stated that the last time such acts had occurred was at his grandmother's house, while his grandmother was gone and he was alone with Appellant and S.D. He stated that on that occasion, Appellant told him to suck on Appellant's wiener and that he did as he was told. He stated that Appellant put his wiener into his (J.P.'s) anus and that it hurt, but that he did not cry. He stated that he remembered Appellant "coming" on S.D. while she was on the bed with Appellant. He stated that Appellant made S.D. suck on his (Appellant's) wiener. He stated that during each incident that occurred at the trailer, Appellant made him put his (Appellant's) wiener in his mouth, and that S.D. was present each of those three times. He stated that the incident in Bergman was not the only time that Appellant put his wiener in his (J.P's) anus.

S.D. testified that Appellant was her stepdad and that at one time she had lived with Appellant, her mother, and J.P. in a trailer in Dogpatch. She stated that Appellant made her suck his "thingy," which she said was her word for penis. She stated that Appellant had made her do this in too many places to remember, but that he had made her perform such acts of oral sex on him on more than three occasions while they lived at the trailer. She stated that when Appellant would make her put his thingy in her mouth she would be dressed and he would be wearing a shirt. She stated that Appellant had also licked her thingy, which she described as being between her legs, where she goes to the bathroom. She stated that on one occasion Appellant tried to put his thingy inside her thingy. She stated that Appellant would get on top of her or put her on top of him, while her clothes were off and he was wearing a shirt, and would rub on her. She stated that stuff would come out of Appellant's thingy on different occasions at the trailer and at her grandmother's house in Bergman, and that

it had got on her and it felt "yucky." She stated that when Appellant tried to put his thingy in her thingy, it hurt and it tickled, but that it mostly tickled when he rubbed it against her. She stated that she had also seen Appellant doing the same kinds of things to J.P., putting J.P.'s thingy in his mouth and sucking on it, and making J.P. suck his thingy. She stated that on one occasion while she was staying at her Aunt Marsha's house, when she was six years old, Appellant had made her and her cousin, D.C., put their hands on his thingy. She stated that the last time Appellant had abused her was at her grandmother's house about two weeks before her Aunt Marsha questioned her about the abuse.

D.C. testified that Appellant was her uncle and that he had lived with her family at different times. She stated that during one of the times when Appellant was living with them, about two or two and one-half years ago, Appellant had made her and S.D. touch his private part. She stated that her mother had gone to the store and that Appellant had told the two girls to go to bed. She said Appellant later came into their bedroom and made them touch his penis. She stated that Appellant made each of the two girls take turns touching it, and that it got hard at one time and white stuff came out of it. She stated that when her mother started pulling into the driveway, Appellant made the girls get into bed and then went into the living room.

Marsha Douglas, D.C.'s mother and Appellant's sister, testified that Appellant was married to S.D.'s and J.P.'s mother until February 1995. She stated that while Appellant was married to the children's mother, they had lived in a trailer in Dogpatch, off Highway 7. She stated that Appellant had lived with her and her family in Bergman on two different occasions, the first being two and one-half to three years ago, and the second being around the end of April 1995. She stated that she became aware of the sexual abuse in February 1996, while she was questioning the children about two events, which occurred at their grandmother's house in Bergman, involving some of the children performing oral sex on each other. She stated that when she questioned D.C., the child told her that Appellant had made her and S.D. fondle him a couple of years earlier, when Appellant had lived with them. She

stated that she then questioned S.D. and J.P. separately and that both children told her about the abuse.

[redacted] From the foregoing evidence, it is clear that there was sufficient evidence presented to the jury to sustain the convictions against Appellant. Concerning the two counts of first-degree sexual abuse, both S.D. and D.C. stated that Appellant had made them touch his penis. D.C., the older of the two girls, stated that Appellant made the girls take turns touching him and that his penis got hard and that white stuff came out of it. Such testimony is more than sufficient to prove that Appellant engaged in an act of sexual gratification with the girls, who were both under the age of fourteen, involving the direct touching of his penis.

[redacted] As for the two counts of rape on February 3, 1996, both J.P. and S.D. testified that Appellant made them engage in oral sex with him. Additionally, J.P. stated that on that occasion, Appellant put his wiener in the child's anus. As to the count of attempted rape, which also occurred on that date, S.D. stated that Appellant had tried to put his thingy in her thingy and that it hurt and tickled. J.P. corroborated S.D.'s testimony by stating that Appellant put his wiener in S.D.'s private. The children's testimony sufficiently establishes the acts of deviate sexual activity against each child and the act of attempted penetration of S.D.'s vagina.

[redacted] As for the four remaining counts of rape alleged to have occurred during the time the children lived with Appellant in the trailer in Dogpatch, there was sufficient evidence presented by both J.P. and S.D. to support the convictions. J.P. testified that on at least four occasions, Appellant had made him perform oral sex or had engaged in anal sex with him. On three occasions at the trailer, J.P. stated that Appellant made J.P. suck his wiener. He also stated that the incident in Bergman was not the only time Appellant had put his wiener in J.P.'s anus. S.D. stated that Appellant made her suck his thingy on more than three occasions while they lived at the trailer and that Appellant had licked her thingy. Clearly, this testimony is more than sufficient to sustain the four counts of rape involving deviate sexual activity against both J.P. and S.D.

II. Motion for New Trial

For his second point for reversal, Appellant argues that the trial court erred in failing to have Appellant present for the hearing on his motion for new trial. This point is procedurally barred because Appellant did not file a timely notice of appeal of this issue.

The record reflects that a judgment and commitment order against Appellant was filed on September 4, 1996, and that Appellant filed his notice of appeal on September 20, 1996. An amended judgment and commitment order was filed on October 2, 1996, of which Appellant filed a second notice of appeal on October 4, 1996. Also on October 4, 1996, Appellant filed a motion for new trial based upon juror misconduct. On February 24, 1997, some 143 days after the motion was made, an order denying the motion was filed. Appellant then filed an additional notice of appeal on February 26, 1997.

Recently, in *Harris v. State*, 327 Ark. 14, 935 S.W.2d 568 (1997), we held that where a posttrial motion, such as a motion for new trial, is not resolved by the trial court within thirty days from the date of its filing, it is deemed denied pursuant to Ark. R. App. P.—Crim. 2. In that case, the judgment of conviction against Harris was entered on October 5, 1995, and Harris filed a motion for new trial on October 16, 1995, asserting juror misconduct. Fifty-one days after Harris filed his motion, on December 6, 1995, the trial court entered its order denying the motion. Harris filed his notice of appeal on January 2, 1996. We concluded that because Harris's motion for new trial was filed on October 16, 1995, it was deemed denied thirty days later on November 15, 1995, and that his notice of appeal was thus untimely.

In the present case, Appellant's motion for new trial was deemed denied as of November 3, 1996. Accordingly, Appellant had thirty days within which to file a notice of appeal from that denial, which expired on December 3, 1996. It is of no benefit to Appellant that the trial court belatedly denied the motion for new trial on February 24, 1997, as the trial court lacked jurisdiction to so rule. *Id.* Therefore, because Appellant

did not file his notice of appeal of the order denying the motion for new trial until February 26, 1997, we dismiss this part of the appeal.

III. Rule 4-3(h)

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 such errors were found. For the aforementioned reasons, the judgment of conviction is affirmed.

GLAZE and IMBER, JJ., concur.

TOM GLAZE, Justice, concurring. I concur in affirming this case, but write to disagree with the majority court's decision to reach the merits regarding appellant's motion for directed verdict questioning the sufficiency of the State's proof on the elements of penetration and deviant sexual conduct. In stating his motion for directed verdict at the end of the State's case, appellant contended the State had failed to prove rape because the State never showed when and where these events occurred. No mention was made that the State had failed to show the elements of penetration or deviant sexual conduct. It was only after the defense had rested, and at the close of all evidence, that appellant renewed his directed-verdict motion, stating the State had failed to prove the time and place of the rapes *and* the elements of penetration or deviant sexual conduct.

Rule 33.1 of the Arkansas Rules of Criminal Procedure provides that the failure of a defendant to move for a directed verdict at the conclusion of the State's case and at the close of the case because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. Rule 33.1 further requires the defendant to specify the respect in which the evidence is deficient, and the renewal of a previous motion for a directed verdict at the close of all the evidence preserves the issue of insufficient evidence for appeal.

In *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995), this court made clear that our case law does not militate against the *renewal* of the *same, earlier, specific* directed verdict motion at the end of all the proof. However, this court has never intimated that a defendant may omit a reason(s) in defendant's directed-verdict motion at the end of the State's case, and later add it when defendant moves for directed verdict at the close of all the evidence. Obviously, if this were the rule, a defendant could simply delay and withhold defendant's real reasons for directed verdict until after all evidence has been presented.

In *Walker v. State*, 318 Ark. 107, 883 S.W.2d 831 (1994), this court thoroughly discussed and explained the standard for preserving an insufficiency-of-the-evidence argument and set out the practical reasons for requiring that the grounds be specified in a defendant's directed-verdict motion. One reason is that, in multiple-count cases, it is easy for an element to be overlooked. Another reason given by the *Walker* court is stated as follows:

> The reasoning underlying our holdings is that when specific grounds are stated and the absent proof is pinpointed, the trial court can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof.

See also Webb v. State, 327 Ark. 51, 938 S.W.2d 806 (1997).

In the present case, as clearly set forth in the majority opinion, the State's proof sufficiently proved all elements of the rape counts. However, I am of the view that Rains failed to preserve his argument pertaining to the penetration and deviant sex elements, so I would hold Rains is procedurally barred in arguing those elements in this appeal.

IMBER, J., joins this concurrence.

Roger BRADFORD *v.* STATE of Arkansas

CR 97-113 953 S.W.2d 549

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Maxie G. Kizer, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. The appellant, Roger Bradford, appeals his judgment of conviction for delivery of a controlled substance, cocaine, as a habitual offender. He was sentenced to life imprisonment and given a $25,000 fine. For his sole point on appeal, Bradford contends that his right to a speedy trial was violated. We agree and reverse and dismiss.

On March 20, 1992, the Arkansas County Prosecuting Attorney filed an information against Bradford charging him with delivery of a controlled substance, cocaine, as a habitual offender. This charge encompassed a controlled-drug buy conducted in Dewitt on February 28, 1992. The case was styled "CR 92-28" in the Arkansas County Circuit Court, and was initially joined with other charges pending against Bradford on April 14, 1992.

While the record suggests that Bradford's trial for CR 92-28 was first set for June 10, 1992, what unfolds is a prolonged series of continuances and other delays, almost all caused by the appellant. The trial court granted over fifteen continuances at Bradford's request. At least seven different attorneys, both retained and appointed, represented Bradford at one point or another. While trial dates approached, Bradford engaged in a recurrent and eventually predictable pattern of attempts to have counsel relieved or fired. During two of several attempts to try Bradford on another charge, he attacked his own counsel. There is also evidence to suggest that Bradford feigned injury by falling down the courthouse stairs in yet another successful attempt at delay. The appellant even escaped from prison on the eve of a trial date.

Ultimately, Bradford was tried and convicted on June 27, 1996, where the jury imposed a life sentence. Bradford now brings the present appeal, arguing that he was denied his right to a speedy trial under Ark. R. Crim. P. 28, and that therefore his conviction should be reversed and dismissed.

For speedy-trial purposes, the time for bringing Bradford to trial began when the information was filed on March 20, 1992. Ark. R. Crim. P. 28.2(a). As it is apparent that Bradford's

trial was held outside of the applicable speedy-trial period found in Ark. R. Crim. P. 28.1, the burden is upon the State to show that the delay was the result of the defendant's conduct or was otherwise justified. *Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996). The period of time between the filing of the information and the commencement of trial is 1,560 days. Thus, by the State's own calculation, it must exclude 1,195 days. Rule 28.3 provides a number of instances where time is excluded for speedy-trial purposes, including: (1) the period of delay resulting from other proceedings concerning the defendant; (2) the period of delay resulting from a continuance granted at the request of the defendant or his counsel; (3) the period of delay resulting from the absence or unavailability of the defendant; and (4) "[o]ther periods of delay for good cause."

The calculation of excluded time in this case is made difficult due to the trial court's failure to maintain a docket sheet or written orders memorializing all of the excluded periods in accordance with Ark. R. Crim. P. 28.3(i). The only docket sheet found in the record is attached as an exhibit to a writ of prohibition filed by Bradford, and the last entry on this docket sheet is dated August 18, 1993.

The trial court should enter written orders or make docket entries at the time a continuance is granted to detail the reason for the continuance, and to specify to a date certain the amount of excluded time. Ark. R. Crim. P. 28.3(c); *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991). Adherence to this principle is necessary "[i]n order to provide any impetus behind Rule 28.3 . . . otherwise, there is no need for the rule." *Id.* For example, in *Turbyfill v. State*, 312 Ark. 1, 846 S.W.2d 646 (1993), the trial court failed to enter a proper continuance indicating the reasons for a trial delay which was not requested by the defendant, resulting in a violation of the appellant's right to a speedy trial.

This is not to say that written orders or docket entries must always be contemporaneously made in order to exclude time for speedy-trial purposes. Even in *Hicks*, *supra*, the court observed that "when a case is *delayed by the accused* and that delaying act is memorialized by a record taken at the time it occurred, that rec-

ord may be sufficient to count as excluded time attributable to the defendant." (emphasis in original) (citing *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990)). In these situations, the trial court's failure to comply with Rule 28.3(i) does not result in automatic reversal. For instance, in *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996), the trial court did make some docket entries attributing a given time period to the appellant for speedy-trial purposes. However, the trial court correctly charged other delays to the defendant without a written order or notation, given that "the record clearly demonstrates that these [delays] were attributable to [the appellant] or were legally justified." *Id.* One example of this included a continuance granted at the appellant's request after he appeared for trial, claiming that the jury panel was tainted because some veniremen had witnessed a disturbance he created in a different case tried weeks earlier. Similarly, in *Lynch v. State*, 315 Ark. 47, 863 S.W.2d 834 (1993), the appellant filed a *pro se* motion to dismiss counsel prior to trial, and requested a hearing. The trial court held a hearing where it removed the attorney and appointed new counsel. This pretrial motion caused a delay in the trial, and the *Lynch* court held that the time period between the original trial date and the date of new counsel's appointment was properly excluded even without a written order or docket entry. Given that the delay was caused by the appellant and the reasons were contained in the contemporaneous record of the proceedings, the excluded period was "properly memorialized." *Id.; see also Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996) (delay due to sickness of trial counsel); *Foxworth v. State*, 263 Ark. 549, 566 S.W.2d 151 (1978) (continuance granted due to appellant's attack on counsel).

In short, where the delay is caused by the defendant, this court has demonstrated a willingness to exclude the time when there is at least some contemporaneous record of the proceedings reflecting the delaying act. Bearing this principle in mind, the excludable periods in the present case are as follows:

May 15, 1992, to May 26, 1992 — 11 days.

The docket-sheet entry for May 15, 1992, shows that an order was entered relieving attorney Kearney. On May 26, 1992,

attorney McCullough files a discovery motion on behalf of Bradford. This period, necessitating that Bradford obtain new counsel, is excludable. *See Lynch v. State, supra*; *Foxworth v. State, supra.*

The State would also exclude a period of time from May 28, 1992, to July 2, 1992, based primarily upon a chronology of events recited by the prosecutor at a jury trial on July 8, 1993. However, the State's version is not borne out by the contemporaneous record. The docket entry merely refers to a letter order dated May 29, 1992, resetting the case to July 30, 1992, without attributing the delay to the appellant. Further, since the record contains no copy of the order, we do not have the benefit of the contents of the letter order resetting the trial date. Thus, the contemporaneous record does not demonstrate that this delay in 1992 was attributable to the appellant, and the reasons for delay were not memorialized at the time of the occurrence. *See Hicks, supra.*

July 1, 1992, to February 24, 1993 — 238 days.

On July 1, 1992, a docket-sheet entry for case number 92-28 shows that the case was continued at the defendant's request. In a letter order dated July 2, 1992, Bradford's trial is reset to November 17-20, 1992, at Bradford's request. On November 17, Bradford moves to continue, and the trial court issues a letter order dated November 18, 1992, continuing the case to January 28-29, 1993, at Bradford's request. The trial is later reset at Bradford's request to February 24, 1993, in a letter order dated January 29, 1993. Given that all of these continuances were granted at Bradford's request, they are excludable under Rule 28.3(c).

March 4, 1993, to May 20, 1993 — 77 days.

At Bradford's request, his trial was reset to May 20-21, 1993, in a letter order dated March 4, 1993. This period can be excluded under Ark. R. Crim. P. 28.3(c).

The period of time between February 24, 1993, and March 4, 1993, is the first in a series of small gaps that the State would exclude "because they fall between two continuances at [Bradford's] request and the record shows nothing to suggest he wanted to go to trial in that. . . gap between his continuances." However,

we are unable to charge this period of time against Bradford because the record is utterly void of any explanation for the gap.

July 8, 1993, to September 29, 1994 — 448 days.

Bradford appeared for trial on July 8, 1993, and requested additional time to hire his own attorney. The trial court gave Bradford thirty days, and a letter order dated July 14, 1993, shows that the trial had been reset to September 2, 1993. At a pre-trial hearing on September 1, Bradford states that he is "not prepared to go to trial tomorrow," and the trial is continued at Bradford's request. This is followed by a letter order dated September 3, 1993, showing that the trial has been reset to October 7-8, 1993.

On October 6, 1993, Bradford escapes from prison and does not appear for trial on October 7, 1993. Bradford's trial is continued indefinitely in an order dated October 15, 1993, and the intervening time is charged to him for speedy-trial purposes. In a letter order dated April 21, 1994, Bradford's trial is reset to July 7, 1994, due to his escape. At a pretrial hearing on July 6, the parties discuss the status of the various pending charges. Bradford requests that a possession charge, CR 92-1, be severed for trial on July 7, and that the other charges be continued. The trial court grants Bradford's motion to sever and states that the other charges will be "reset as soon as possible."[1] In a letter order dated August 11, 1994, the case is reset to September 29, 1994.

This time period from July 8, 1993, to October 7, 1993, begins with continuances granted at Bradford's request, excludable under Rule 28.3(c), and continues with a period of excludable time due to Bradford's escape. Ark. R. Crim. P. 28.3(e). Once Bradford makes an appearance following his escape on July 6, the case is again continued at Bradford's request to September 29, 1994. Ark. R. Crim. P. 28.3(c).

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[1] Meanwhile, the State attempted to try Bradford on CR 92-1 on July 7, 12, and 21, 1994. However, all of these trial dates were continued at Bradford's request.

October 4, 1994, to November 14, 1994 — 41 days.

In a letter order dated October 4, 1994, Bradford's trial is reset at his request to November 1, 1994. On October 12, 1994, the trial court issues a letter order setting the case for November 10, 1994, at Bradford's request. On November 3, 1994, attorney Pickell was relieved, and on November 14, 1994, attorney Howard filed a motion for discovery on Bradford's behalf.

The period of time from October 4, 1994, to November 10, 1994, is excludable at Bradford's request. Ark. R. Crim. P. 28.3(c). The overlapping period between November 3, 1994, and November 14, 1994, can be excluded due to the necessity that Bradford obtain counsel. *See Lynch v. State, supra*; *Foxworth v. State, supra.* The record contains no explanation of the gap between September 29, 1994, and October 4, 1994.

November 21, 1994, to December 29, 1994 — 38 days.

During this time period, the trial court issued a letter order dated November 21, 1994, resetting the case to December 29, 1994, at Bradford's request. This is chargeable to Bradford under Ark. R. Crim. P. 28.3(c). Again, it is impossible to glean from the record a reason for the delay from November 14, 1994, to November 21, 1994.

January 4, 1995, to Fberuary 16, 1995 — 43 days.

In a letter order dated January 4, 1995, the trial is continued at Bradford's request to February 16, 1995. Ark. R. Crim. P. 28.3(c). The record contains no explanation for the gap between December 29, 1994, and January 4, 1995.

February 21, 1995, to May 11, 1995 — 79 days.

In a letter order from the trial court dated February 21, 1995, Bradford's trial is reset to March 30, 1995, at his request. On March 30, the trial court issued a letter order resetting the case to May 11, 1995, at Bradford's request. On April 27, 1995, Bradford appears for trial on CR 92-1, where defense counsel Howard explains that he was attacked by Bradford prior to trial. Bradford

adds that he is not ready to proceed to trial. The trial court agrees to reset the trial on CR 92-1 to June 22, 1995, and appoints attorney Molock. On June 22, at the trial of CR 92-1, Bradford attacks attorney Molock. Nonetheless, Bradford is convicted.[2] On July 31, 1995, attorney Etoch is appointed to represent Bradford.

Here, the case is continued until May 11 at Bradford's request. Ark. R. Crim. P. 28.3(c). The State would also exclude a period of time at least from June 22 and extending to July 31, 1995, when attorney Etoch is appointed. However, we are unable to do so because there is no record of an order or hearing where the status of attorney Molock is taken up. Although Molock was attacked during his representation of Bradford at the June 22 trial of CR 92-1, the trial court nonetheless reiterated that attorney Molock would continue to represent Bradford after the trial. There is no subsequent record of whether Molock was relieved at any time before the appointment of attorney Etoch. Without such a record relieving Molock we are left to speculate as to whether there was any period of time during which Bradford was without counsel, thereby necessitating the appointment of new counsel. The gap between February 16, 1995, to February 21, 1995, is once again left unexplained by the record.

June 22, 1995 — 1 day.

On this day, Bradford was tried and convicted in CR 92-1. This is excludable under Rule 28.3(a).

February 14, 1996, to June 27, 1996 — 134 days.

On February 14, 1996, a pretrial hearing was held where the trial court continues the case and charges it to Bradford. In a letter order dated February 15, 1996, the trial court continues the case to June 27, 1996, at Bradford's request. This time can be excluded under Rule 28.3(c).

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[2] This court affirmed his conviction in *Bradford v. State*, 328 Ark. 701, 947 S.W.2d 1 (1997).

In sum, only 1,110 days are excludable under Rule 28.3. Therefore, the State has failed to meet its burden to show that the delay was the result of the defendant's conduct or was otherwise justified. Accordingly, we are left with no choice but to reverse and dismiss.

Reversed and dismissed.

ARNOLD, C.J., AND GLAZE, J., concur.

TOM GLAZE, Justice, concurring. Appellant Roger Bradford is a habitual offender who fought against having a trial, especially a speedy one. He requested and was granted fifteen continuances. He feigned injury to avoid a trial and even escaped from incarceration on the eve of trial to avoid one. He had trouble with seven different attorneys who were retained or appointed to represent him, and he physically attacked one. To say the least, Bradford was uncooperative to those assigned to represent and defend him.

Notwithstanding Bradford's obvious reluctance to go to trial, this court, relying on its own Speedy Trial Rule 28, Arkansas Rules of Criminal Procedure, dismisses Bradford's conviction and charges because certain periods of delay had not been specifically documented by the trial judge as ones attributable to Bradford. Whether or not the trial judge failed in documenting the record in this case misses the real issue. Here, Bradford never desired nor requested a speedy trial, and the record reflects ever so clearly his efforts to avoid a trial.

Other justices and I have noted in the past that the United States Constitution does not require the rigid approach taken by this court's Rule 28. *See Weaver v. State*, 313 Ark. 55, 852 S.W.2d 130 (1993) (Hays and Glaze, JJ., dissenting); *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991) (Hays, Glaze, and Corbin, JJ., dissenting); *Asher v. State*, 300 Ark. 57, 776 S.W.2d 816 (1989) (Hickman, Hays, and Glaze, JJ., dissenting). The foregoing dissenting justices consistently cited *Barker v. Wingo*, 407 U.S. 514 (1972), and stated their beliefs that when determining a defendant's speedy-trial rights, this court should adhere to the constitutional principles set out by the Supreme Court rather than follow those directives contained in Rule 28. In *Barker*, the Supreme

Court set out the following four factors to be considered in determining if a defendant had been denied his or her right to a speedy trial: (1) length of delay, (2) the reason for delay, (3) the assertion of his right, and (4) prejudice to the defendant. *See also Doggett v. United States*, 505 U.S. 647 (1992). As gleaned from *Barker*, it is clear that to be entitled to dismissal of a criminal charge, a defendant is required to assert his or her right to a speedy trial after the defendant has been duly charged with a crime. *Cf. Doggett v. United States*, 505 U.S. 647 (1992) (where court held the defendant was denied a speedy trial when, unknown to him, he had been indicted, and more than eight years later he was arrested); *see also State v. Tipton*, 300 Ark. 211, 779 S.W.2d 138 (1989) (where court found defendant knew of his charges, but held he was denied a speedy trial after he announced ready to go forward with the trial, but was denied the right to proceed).

As discussed by Justice Hickman in his dissent in *Asher*, he criticized this court's speedy-trial rule because it ignores the factors in *Barker* concerning whether the defendant has asserted his right or whether he suffered prejudice due to a delay. He submitted that, in promulgating this court's speedy-trial rule, the court had overstepped its constitutional authority and adopted a substantive rather than a procedural rule. Hickman noted that, in the federal realm, Congress, rather than the judiciary, had established the law involving speedy trials. That federal law is codified in 18 U.S.C. §§ 3161-3174 (1994), and while § 3161 of that law sets out time limits and exclusions, § 3162 ameliorates any harshness in dismissing charges by giving the trial court discretion whether to dismiss with or without prejudice. In exercising that discretion, the trial court must consider, among other factors, (1) the seriousness of the crime, (2) the facts and circumstances of the case which led to the dismissal, and (3) the impact of a reprosecution on the administration of justice.

Finally, I mention other jurisdictions with laws or rules that make more sense than Rule 28. For example, the Missouri legislature enacted Mo. Ann. Stat. § 545.780 (Vernon 1986) which provides that, if the defendant announces that he is ready for trial and files for a speedy trial, the court then shall set the case for trial as soon as reasonably possible. This speedy-trial request is

enforceable by mandamus, but failure to comply with the speedy-trial provision is not grounds for dismissal unless the court also finds the defendant has been denied his constitutional right to a speedy trial.

Wyoming is another example of a simple speedy-trial provision that implements the factors in *Barker*. *See* Rule 48 of the Wyoming Rules of Criminal Procedure. Rule 48 requires a trial within 120 days following arraignment and sets out certain excludable periods. But it also provides that a dismissal for lack of a speedy trial shall not bar the state from again prosecuting the defendant for the same offense unless the defendant made a written demand for a speedy trial or can demonstrate prejudice from any delay. For another example of a provision that better follows the balancing test in *Barker* than Arkansas's rule, *see* North Carolina Criminal Procedure Act, N.C. Gen. Stat. § § 15A-702-704 (1993).

In sum, the present case illustrates how this court's speedy-trial rule can be manipulated by a defendant who simply wants to avoid prosecution. It is time this court rectifies Rule 28's weaknesses and its failure to meet the real constitutional objectives which are designed to protect those defendants who actually seek and are entitled to a prompt trial.

While I continue to strongly disagree with this court's speedy-trial rule, that rule remains Arkansas law concerning a defendant's speedy-trial rights. The majority court's analysis and result is in compliance with Rule 28's dictates, thus, I reluctantly join in the court's holding. However, I hope the court will revisit Rule 28 and make appropriate changes so the court can avoid needless dismissals of serious charges in the future; especially those dismissals of charges against defendants who are as undeserving as Bradford has shown to be in this case.

ARNOLD, C.J., joins this concurrence.

Stephanie DORITY *v.* STATE of Arkansas

CR 97-66 951 S.W.2d 559

Supreme Court of Arkansas
Opinion delivered September 25, 1997

John H. Bradley, for appellant.

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

RAY THORNTON, Justice. This appeal raises the question whether Ark. R. Crim. P. 28.1, which requires that a defendant be tried within twelve months from the time she is charged with an offense in circuit court, applies to a revocation of probation. The trial court found that the rule does not apply because, in a probation revocation hearing, the defendant is not charged with an offense, but is alleged to have violated the terms of a previously imposed sentence on an offense. This is a question of first impression for this court. The reasoning of the trial court is sound, and we affirm.

A felony information was filed against Stephanie Dority, appellant, on May 9, 1993, charging her with second-degree battery, disorderly conduct, and refusal to submit to arrest. She pleaded guilty to the battery charge, and the other charges were dismissed. On November 9, 1993, the trial court entered an order of probation, which required her, among other things, to report as directed to her parole officer, promptly notify the sheriff and probation officer of any change of address, pay $15.00 per month probation fee, and pay installments of $25.00 per month on a $155.00 fine.

Two petitions for revocation were filed; one on March 14, 1994, and one on February 15, 1995. The first petition stated that appellant had failed to pay $155.95 on her fine, costs, and restitution. The second one stated that she had failed to notify her probation officer and sheriff of any change of address or employment, failed to cooperate with the probation officer "and/or" report as directed, failed to pay probation fees, and failed to pay fines and court costs.

A revocation hearing was held on June 24, 1996. Appellant argued that her right to a speedy trial had been violated because the hearing was held more than one year after the petition to revoke probation had been filed. The court agreed that more than one year had passed and that the extra time periods were not excludable. However, it ruled that appellant had no right to a hearing within a year under the provisions of Ark. R. Crim. P. 28.1 because the constitutional right to a speedy trial does not apply to revocation hearings, and proceeded to hear testimony.

Appellant's probation officer testified that appellant's records indicated that she had only reported once in fifteen months. She did not meet with an officer in person, but slid a note under his door. He stated that he had attempted to locate her, but she had moved. Appellant did not report any changes of address, and the officer filed a report on February 14, 1995, listing her as a absconder because he could not locate her.

Appellant testified that she hadn't paid her fees because she only receives $162.00 per month through Aid for Families with Dependent Children. She said that she had not reported to the probation officer because she had "caught" a drug charge and had assumed that she was not supposed to report after that. She said that she had moved three times since she had been put on probation. She admitted that she had not notified the officer of any changes of address. She said that she had been "hiding out" from police since she "caught" the drug charge.

The court found that appellant had inexcusably violated her probation and sentenced her to four years' imprisonment. Appellant argues on appeal that the trial court erred in determining that the constitutional right to a speedy trial does not apply to a revocation proceeding, and she contends that its finding that she inexcusably violated her probation is not supported by the preponderance of the evidence.

As we consider appellant's speedy-trial argument, we recognize that the constitutional right to a speedy trial, as embodied in Ark. R. Crim. P. 28.1, is available to an accused in a stage of criminal prosecution. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy

and public trial." U.S. Const. amend. VI. However, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the United States Supreme Court held that a probation revocation hearing is not a stage of criminal prosecution. As we pointed out when considering another issue in *Padilla v. State*, 279 Ark. 100, 648 S.W.2d 797 (1983), in a probation revocation hearing, a trial has already been held, and the defendant convicted. While a hearing must be held within a reasonable time, there is no absolute right, as in criminal prosecutions, to be heard within twelve months. What constitutes a reasonable time must be determined upon the facts of the particular case. *See Moody v. Daggett*, 429 U.S. 78 (1976); *United States v. Jackson*, 590 F.2d 121 (1979); Fed. R. Crim. Pro. 32.1. Appellant does not allege that her hearing did not take place within a reasonable time, but that her right to a speedy trial was violated because her hearing did not take place within a year of her revocation petition. We hold that appellant had no right to avail herself of the provisions of Ark. R. Crim. P. 28.1, which require a trial within twelve months, because her probation revocation hearing was not a criminal prosecution.

Having determined that the constitutional right to speedy trial does not apply to probation revocations, we turn to appellant's second argument that the trial court erred in determining that she inexcusably violated the terms of her probation. Under Ark. Code Ann. § 5-4-309 (Repl. 1993), a court may revoke a defendant's probation if it finds by a preponderance of the evidence that she inexcusably violated the conditions of her probation. *Id.* § 5-4-309(d). We review a trial court's decision to revoke probation in the light most favorable to the State, and will affirm if the decision is supported by a preponderance of the evidence. *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993).

Here, appellant admitted that she did not notify the probation officer of her change of address and that she purposely failed to report because she was "hiding out" from police after she "caught" a drug charge. The trial court's finding that these violations were inexcusable is not clearly against the preponderance of the evidence.

We affirm.

Colandra S. COVIN *v.* STATE of Arkansas

CR 97-1035 950 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered September 25, 1997

James R. Marschewski, for appellant.

No response.

PER CURIAM. The appellant's attorney, James R. Marschewski, has filed a motion for rule on the clerk. The attorney, James R. Marschewski, admits that the transcript was untimely filed due to negligence 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 *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.

Thomas E. MORRIS *v.* STATE of Arkansas

CR 97-1003 950 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Alvin D. Clay, for appellant.

No response.

PER CURIAM. The appellant's attorney, Alvin D. Clay, has filed a motion styled, "Motion for a Rule on the Clerk." The attorney, Alvin D. Clay, admits that the notice of appeal was untimely filed due to negligence on his part.

We find that such an error admittedly made by the attorney for a criminal defendant, is good cause to treat this motion as one for belated appeal and 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.

Excel WARREN *v.* STATE of Arkansas

CR 97-166 950 S.W.2d 462

Supreme Court of Arkansas
Opinion delivered September 25, 1997

Zimmery Crutcher, for appellant.

No response.

PER CURIAM. On May 5, 1997, we issued an order to counsel, Zimmery Crutcher, to show cause why he should not be held in contempt for failing to perfect the appeal in this case. Mr. Crutcher denied responsibility, so a master was appointed to hold a hearing and to report his findings of fact. That hearing has been conducted and the master's report was filed on July 3, 1997. Mr. Crutcher filed his objections to the master's report on July 17, 1997.

From the master's report, Mr. Crutcher's objections, and the record tendered herein, we conclude the appellant was convicted on July 3, 1996, and appellant appealed from that conviction on July 18, 1996, even though the conviction judgment had not, as yet, been filed. The delay in filing the judgment was likely caused because a probation hearing for appellant was scheduled for September 16, 1996, but on the September 16 date, Mr. Crutcher informed the trial court he had appealed appellant's case. Appellant's conviction judgment was actually dated December 12, 1996, and not filed until December 18, 1996. Mr. Crutcher failed to file

his notice of appeal after the December 18 date, and when he tendered the transcript on January 13, 1997, and again on January 22, 1997, the transcript reflected no timely notice of appeal having been filed from the judgment entered on December 18, 1996.[1] For this reason, Mr. Crutcher's February 13, 1997 motion for rule on the clerk was denied.

It was Mr. Crutcher's responsibility to file a timely appeal on appellant's behalf, and we find Mr. Crutcher has failed to do so. We now direct the clerk to accept the transcript herein and to establish a briefing schedule. Because Mr. Crutcher has failed his responsibility in this cause, a copy of this per curiam will be forwarded to the Professional Conduct Committee. Since Mr. Crutcher's conduct does not show repeated failures or refusals to file a record or briefs in this appeal, we hold his conduct warrants no finding of contempt.

[1] The transcript tendered on January 10, 1997 was supplemented on January 22, 1997, with the December 12, 1996 judgment containing the December 18, 1996 file mark. This conviction judgment was introduced at Mr. Crutcher's hearing and made a part of the master's report.

[redacted]

[redacted]

[redacted]

[redacted]