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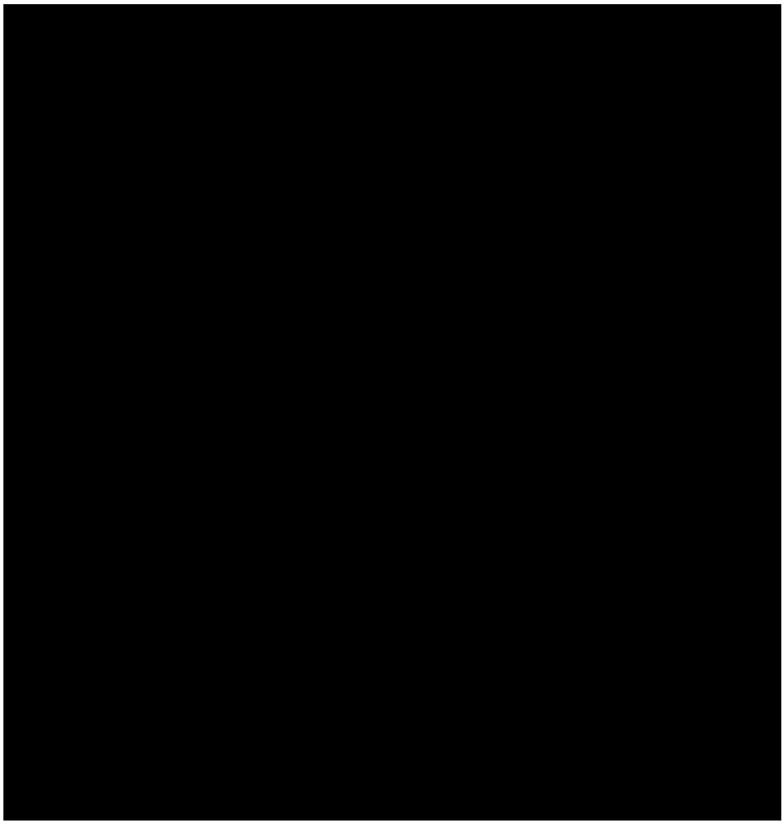

Melvin Eugene REINERT *v.* STATE of Arkansas

CR 01-940 71 S.W.3d 52

Supreme Court of Arkansas
Opinion delivered March 21, 2002

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Charles L. Stutte, for appellant.

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

TOM GLAZE, Justice. Appellant Melvin Reinert was charged with three counts of first-degree violation of a minor after C.J., Reinert's girlfriend's sixteen-year-old daughter, informed her school guidance counselor that Reinert had engaged in sexual intercourse with her three times. Prior to trial, Reinert moved to dismiss the charges against him, alleging that the statute under which he was charged, Ark. Code Ann. § 5-14-120 (Repl. 1997), was void for vagueness. The trial court denied his motion, and the case proceeded to trial. The jury found Reinert guilty on all three counts. On appeal, Reinert again raises his constitutional arguments, and also argues that, if § 5-14-120 is constitutional, the proof was insufficient to convict him.

In his first argument, Reinert contends that § 5-14-120(a) is unconstitutionally void for vagueness. That statute reads as follows:

> (a) A person commits the offense of violation of a minor in the first degree if he engages in sexual intercourse or deviate sexual activity with another person not his spouse who is more than thirteen (13) years of age and less than eighteen (18) years of age, and the actor is the minor's guardian, an employee in the minor's

> school or school district, a temporary caretaker, or a person in a position of trust or authority of the minor.

Particularly, Reinert claims that this statute is vague because 1) it does not define who is a "temporary caretaker" or a "person in a position of trust or authority"; 2) the statute refers to legal relationships that may be subject to a broad range of interpretation; 3) the section lacks any ascertainable standard of guilt and fails to provide a person of average intelligence reasonable notice of the proscribed conduct; and 4) the terms are subject to such a broad range of interpretation as to invite discriminatory interpretation.

Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001); *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). If it is possible to construe a statute as constitutional, we must do so. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998). Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. *Kellar v. Fayetteville Police Department*, 339 Ark. 274, 5 S.W.3d 402 (1999) (citing *Board of Trustees of Mun. Judges & Clerks Fund v. Beard*, 273 Ark. 423, 426, 620 S.W.2d 295, 296 (1981)).

A law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited. *Night Clubs, Inc. v. Fort Smith Planning Comm'n*, 336 Ark. 130, 984 S.W.2d 418 (1999); *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998). A statute will pass constitutional scrutiny if the language conveys sufficient warning when measured by common understanding and practice. *Dougan v. State*, 322 Ark. 384, 912 S.W.2d 400 (1995); *see also Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998) (the standard by which we determine when a statute is void for vagueness is whether it lacks ascertainable standards of guilt such that persons of average intelligence must necessarily guess at its meaning and differ as to its application).

As a general rule, the constitutionality of a statutory provision being attacked as void for vagueness is determined by

the statute's applicability to the facts at issue. *See United States v. Powell*, 423 U.S. 87 (1975). When challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute must be one of the "entrapped innocent," who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Ross v. State*, 347 Ark. 334, 64 S.W.3d 272 (2002); *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993)). That a statutory provision may be of questionable applicability in speculative situations is usually immaterial if the challenged provision applies to the conduct of the defendant in the case at issue. *United States v. Petrillo*, 332 U.S. 1 (1947); *Holt v. City of Maumelle*, 307 Ark. 115, 817 S.W.2d 208 (1991).

We conclude that Reinert's conduct clearly falls within that proscribed by the statute. Although Reinert asserts that § 5-14-120 is an unconstitutionally vague offense because its terms "temporary caretaker" and "person in a position of trust or authority" are undefined, he overlooks the term "guardian" in the statute; that term is defined in Ark. Code Ann. § 5-14-101 (Repl. 1997).[1] Specifically, § 5-14-101(10) provides as follows:

> "Guardian" means a parent, stepparent, legal guardian, legal custodian, foster parent, or *anyone who, by virtue of a living arrangement*, is placed in an apparent position of power or authority over a minor.

(Emphasis added.)

It is clear that Reinert's actions fall within this definition. It is undisputed that he had been living with his girlfriend and her children, including C.J., for over two years. Further, Reinert also admitted that, as between him and the girl's mother, he would be considered the disciplinarian and the authority figure in the household. In the statement he gave to police investigators, Reinert recounted several incidents supporting a conclusion that

[1] Because we conclude that § 5-14-120(a) clearly covers or includes Reinert as a guardian, we need not discuss whether he also comes within the term "temporary caretaker" or the broader phrase "person in a position of trust or authority of the minor."

he was a person in a position of power or authority. First, he related that he assumed the responsibility of covering "hot checks" that C.J. had written, so that the girl would not get into trouble. Second, he pointed out that he had previously stepped in to settle an argument between C.J. and her mother. The girl herself testified that Reinert asked her to do chores around the house, and she stated that she would do what Reinert told her to do. Clearly, Reinert was a "guardian" with respect to C.J.

In sum, a statute will meet constitutional muster if the language conveys sufficient warning when measured by common understanding and practice. *State v. Torres*, 309 Ark. 422, 831 S.W.2d 903 (1992). We conclude that §§ 5-14-120(a) and 5-14-101(10) conveyed sufficient warning and fair notice to Reinert that his sexual relationship with a sixteen-year-old, given their living arrangements and other circumstances, was prohibited by law. Thus, we hold that the trial court did not err in denying Reinert's motion to dismiss the charges on the grounds that the statute was void for vagueness.

For his second point on appeal, Reinert contends that there was insufficient evidence to convict him of the offenses charged. The test for determining sufficiency of the evidence is whether substantial evidence, direct or circumstantial, supports the verdict. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001); *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.*

From the evidence set out above, it is clear that there was sufficient evidence to support Reinert's convictions. It was undisputed that Reinert and C.J. engaged in sexual intercourse three times. Reinert acknowledged that he was the disciplinarian and the authority figure in the family, and C.J. herself testified that she would do what he asked her to do. Although Reinert argues on appeal that he introduced testimony from the girl's uncle to dispute the fact that he was the authority figure in the home, we

consider only that evidence that supports the verdict. From the foregoing, it is clear that there was substantial evidence to support Reinert's convictions.

Affirmed.

Darwin SHIELDS *v.* STATE of Arkansas

CR 01-288 70 S.W.3d 392

Supreme Court of Arkansas
Opinion delivered March 21, 2002

Gregory E. Bryant, for appellant.

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

TOM GLAZE, Justice. Darwin Shields was convicted of the capital murder of Sarah Stafford and sentenced to life in prison. On appeal, he argues that the trial court erred in refusing to suppress his custodial statement, and he also asserts that the trial court erred when it increased his bail bond after the State amended the charges against him from first-degree murder to capital murder.

Shields does not challenge the sufficiency of the evidence, so we recite the facts only briefly. Sarah Stafford was reported missing by her mother on March 15, 2000. As police detectives began investigating the case, they spoke to some of Sarah's friends and relatives, who informed the officers that Sarah was pregnant and believed Darwin Shields to be the father. On March 16, 2000, Detectives Laura Pritchett and Jennifer Elmore, accompanied by uniformed officer Jerry Best, went to speak to Shields at University Mall in Little Rock, where he worked at a store called Champs. Shields accompanied the officers to his car in the parking lot, and Detective Elmore found a pair of grey sweatpants in the car's trunk. Because the sweatpants matched a description of what Sarah had been wearing before she disappeared, the officers decided to take Shields to the downtown police station for further questioning. Detective Elmore called for a patrol car to transport Shields downtown; when the patrol car arrived, Shields was temporarily placed in handcuffs and taken to the police station.

Upon arriving at the station, Detective Eric Knowles removed Shields's handcuffs and advised Shields that he was under no obligation to be there; Shields indicated that he was concerned about Sarah, and he wanted to cooperate. Shields was advised by Knowles that he was a suspect and Knowles then read Shields his *Miranda* rights. After about two and a half hours, Shields gave a statement to Detective Eric Knowles in which he confessed to strangling Sarah. Shields was then placed under arrest, and at that time, he took the police to where Sarah's body was located.

Prior to trial, Shields filed a motion to suppress his statement, arguing that, contrary to Ark. R. Crim. P. 2.3, he had never been informed of the fact that he was under no legal obligation to accompany the officers to the police station. The trial court

denied the motion after a hearing on September 29, 2000. The case proceeded to trial on November 13, 2000, and a jury convicted Shields of capital murder. Because the State waived the death penalty, Shields was sentenced to life in prison.

On appeal, Shields again argues that the trial court erred in denying his motion to suppress his statement. We have repeatedly held that we review a trial court's ruling on a motion to suppress by making an "independent determination based upon the totality of the circumstances, viewing the evidence in a light most favorable to the State." *Barcenas v. State*, 343 Ark. 181, 33 S.W.3d 136 (2000); *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998). The ruling will only be reversed if it is clearly against the preponderance of the evidence. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998).

As pointed out above, Shields's contention is that the officers who initially contacted him violated Ark. R. Crim. P. 2.3. That rule provides as follows:

> 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.*

(Emphasis added.)

Shields specifically alleges that he was not advised that he was under no obligation to appear at police headquarters for questioning, and that Detectives Elmore and Pritchett should have given him this information in clear and unambiguous terms. In support of this argument, he cites the case of *State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997). However, *Bell* does not help Shields. In fact, in *Bell*, this court announced its intention to no longer 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." *Bell*, 329 Ark. at 431. Rather, the court stated, "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)." *Id.*[1] (Emphasis added.)

In the *Mendenhall* case, the Supreme Court held that the question of whether or not one's consent to accompany police officers is voluntary or is the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances, and is a matter which the government has the burden of proving. *Mendenhall*, 446 U.S. at 557. The court wrote as follows:

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.
>
> * * * *
>
> We conclude that a person has been "*seized*" within the meaning of the Fourth Amendment *only if*, in view of all of the circumstances surrounding the incident, *a reasonable person would have believed that he was not free to leave. Examples of circumstances*

[1] Prior to deciding *Bell*, the court had followed the "bright line" approach and had held that "a statement must be suppressed under Rule 2.3 if the police officers simply fail to notify the person that they do not have to come to the station for questioning." *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997) (noting that the court has imposed a positive duty upon the police to inform the citizen of his or her right to refuse the request although the plain words of Rule 2.3 do not specifically require such a verbal notice). *Bell* specifically retreated from this interpretation. We further note that, even under the prior interpretation requiring a verbal warning of a person's freedom to leave, Shields's argument would fail because the officers here did inform him he was free to leave.

> that might indicate a seizure, even where the person did not attempt to leave, *would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.* [Citations omitted.] In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554–55 (emphasis added).

At the suppression hearing in this case, Detectives Elmore and Pritchett and Officer Best all testified that they repeatedly informed Shields that he was not under arrest. Detective Elmore testified that she told Shields that he was not under arrest and that he did not have to go with the officers. Elmore also noted that she felt that, by saying, "you're not under arrest," Shields would understand that he was not obligated to come with her. Detective Pritchett testified that she heard Elmore tell Shields, "You understand that you don't have to come with us, or you're not under arrest," and that Shields said he understood. Pritchett also stated that, had Shields at any time indicated that he wanted to leave, he would have been free to do so. Officer Best confirmed that Elmore repeatedly told Shields that he was not under arrest, that he was just a witness, and that they only needed to talk to him. Best further said that Shields was free to leave at any time.

In addition, Best noted that, although Shields was placed in handcuffs to be transported to the police department, that action was only taken pursuant to police department policy, which he explained to Shields. Before Shields was placed in the patrol car, Best told him again that he was not under arrest, and that the handcuffs were only for the safety of the officer driving the patrol car and for Shields's own safety. The handcuffs were removed as soon as Shields arrived at the police station.

As already stated above, Detective Knowles, who interviewed Shields once he arrived at police headquarters, testified that he told Shields that it was his understanding that Shields had agreed to come down to the station. Knowles further let Shields know that he was under no legal obligation to be there at that time, and Shields said he understood that; Shields also indicated that he was

willing to cooperate, and he verbally indicated that he had agreed to come down and talk to the police about the case. Also set out above, Knowles read Shields his *Miranda* rights and had him sign the rights form at 1:09 p.m. Knowles let Shields know that the police were possibly investigating — and that Shields was possibly a suspect in — a capital murder, although, at the time, Knowles said he was only aware that it was missing- persons case that potentially had come to involve some type of foul play.[2]

Knowles also testified that, when Shields received his *Miranda* warnings, he was a suspect, not under arrest, and was not arrested until he confessed to killing Sarah. Until that time, according to Knowles, Shields was free to get up and walk out of the interview room. Knowles admitted that he had not told Shields that he did not have an obligation to come to the police station, but asserted that, because Shields was an adult, Knowles assumed that it would be good enough to ask if Shields had agreed to come to the detective's office. When asked that question, Shields said yes. Although Shields himself offered testimony to contradict the police officers' assertions, he conceded on cross-examination that he had agreed to go to the police station willingly.

As noted above, Rule 2.3 does not require an explicit statement that one is not required to accompany the police; rather, the police only need to take such steps as are "reasonable to make clear that there is no legal obligation to comply" with the request to come to the police station. Here, the testimony offered at the suppression hearing supports the conclusion that the officers made it reasonably clear to Shields that he was only wanted for questioning, and that he did not have to go to the police station. Accordingly, the trial court's ruling was not clearly against the evidence, and the court, therefore, did not err in denying Shields's motion to suppress.

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[2] The reason for advising Shields that he was a potential suspect in a capital murder, according to Knowles, was because it was standard practice to advise an individual that he or she was charged under a "higher degree crime," so that, if the charge actually were to be revised upward, the suspect would have been informed of his rights knowing the highest possible charge he might be facing.

Shields raises an alternative argument that the court erred, contending that he was arrested without probable cause. In support of this assertion, he points to the fact that he was handcuffed while he was being transported to the police station, and argues that Officer Best informed Officer Zebbie Burnett, who transported Shields to the police station, that Best considered Shields to be a possible suspect in a homicide or abduction. With respect to this latter issue, however, we have held that the subjective beliefs and opinions of other persons, including law enforcement officers, regarding whether a person is free to leave are irrelevant. *See Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000); *see also Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that subjective intentions play no role in ordinary, probably cause Fourth Amendment analysis).

As to the matter of Shields's being placed in handcuffs for transport to the police station, we observe first that Best informed Shields that such action was police department policy. Best testified at the suppression hearing that he told Shields, "You understand that you're not under arrest. This is just for the safety of yourself and for the officers. We have a policy that kind of covers this, and this is the officer's choice basically, but you understand that you are not under arrest for anything?" Shields responded that he understood, and in so doing, his acknowledgment of the fact belies any argument that the officers had placed him under arrest.

However, our decision need not turn on the question of the police department's internal policy regarding handcuffing suspects for transport to the police station. Even assuming that Shields was illegally arrested, the Supreme Court in *Brown v. Illinois*, 422 U.S. 590 (1975), stated that it is entirely possible that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. However, the question of whether a confession was the product of a free will is to be answered *under the facts of each case*, although no single fact is dispositive. While there is no *per se* rule that the giving of *Miranda* warnings alone can break the causal connection between an illegal

arrest and a subsequent confession,[3] the *Brown* Court held that a number of factors must be considered in determining whether a confession is obtained by exploitation of an illegal arrest. In addition to the giving of *Miranda* warnings, a court should also consider "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct[.] *The voluntariness of the statement is a threshold requirement.*" *Brown*, 422 U.S. at 603-04 (emphasis added).

In the present case, Shields himself acknowledged that he went to the police station freely. As noted above, Shields was handcuffed by Officer Zebbie Burnett and placed into the patrol car sometime between 12:30 and 1:00 p.m. Shields asked Burnett if he was under arrest, and Burnett said, "Well, yeah, I guess. I don't know." Shields further testified that, when he asked Burnett what he was "under arrest" for, Burnett replied, "I don't know what's going on. I'm just taking you downtown." Shields was then taken to the police station, where Burnett removed his handcuffs, and Detective Knowles informed Shields that he was under no legal obligation to be at the station. Shields told Knowles that he was concerned about Sarah and wanted to cooperate. He was read his *Miranda* rights at 1:09 p.m., according to Detective Knowles. Knowles began to interview Shields at that time, and began taping his statement at 3:28 p.m., after Shields stated that he had, in fact, killed Sarah. At the beginning of the taped statement, Knowles called Shields's attention to the *Miranda* form, and had Shields again acknowledge that he had read and understood each of the rights on the form. The interview concluded at approximately 4:05 p.m.

Viewing the evidence in the light most favorable to the State, the record reveals that Shields did not appear to have been coerced into giving his statement. Knowles, as well as the other officers involved in questioning Shields, testified that Shields was

[3] The Court said that if *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. *Brown*, 422 U.S. at 602.

polite and cooperative at all times, and he agreed that he was at the police station of his own free will. Given the totality of the circumstances, we cannot agree that — even if Shields had been illegally arrested — his confession was anything other than voluntary.

Shields raises one further argument on appeal, namely, that the trial court erred when it increased his bond from $50,000 to $500,000 after the State increased the charges against him from first-degree murder to capital murder. However, because we affirm his conviction, the question of his pretrial bond is moot. This court does not decide moot issues. *See K.S. v. State*, 343 Ark. 59, 31 S.W.3d 849 (2000) (a case is moot when any decision rendered by this court will have no practical legal effect on an existing legal controversy).

Affirmed.

CORBIN, J. not participating.

David DAVIS and Marlo Davis *v.*
ST. JOHNS HEALTH SYSTEM, INC.

01-653 71 S.W.3d 55

Supreme Court of Arkansas
Opinion delivered March 21, 2002

H. David Blair and *Ray Baxter*, for appellants.

Bassett Law Firm, by: *Shannon L. Fant*, for appellee.

ROBERT L. BROWN, Justice. This is a medical malpractice case that presents the issue of whether Arkansas courts have personal jurisdiction over a Missouri corporation. Appellants David Craig Davis and Marlo Davis are a married couple living in the state of Missouri. The appellee is St. John's Health System, Inc. (St. John's), a Missouri corporation, which is qualified to do business in Arkansas. The Davises filed suit against St. John's in Carroll County Circuit Court, and the suit was dismissed for lack of personal jurisdiction over St. John's. The Davises appeal this dismissal.

On October 26, 1998, David Craig Davis experienced chest pains and sought medical treatment at St. John's in Shell Knob, Missouri. He was attended to by Dr. Randall K. Miller, a physician employed by St. John's. Dr. Miller concluded that Davis was suffering from costochondritis and administered a steroid injection to Davis. Dr. Miller did not order a chest x-ray or do a complete blood count on Davis. Davis was actually suffering from pneumonia, for which steroids are the wrong treatment.

Davis subsequently experienced a worsening of his symptoms and sought further medical treatment at another facility. The treating physicians at the new facility administered antibiotics to treat the pneumonia, but Davis's condition continued to worsen. On October 28, 1998, he was admitted to the intensive care unit

at the North Arkansas Medical Center in Harrison and placed on a ventilator. On October 30, 1998, he was transferred to Baptist Medical Center in Little Rock, where he remained until November 30, 1998.

On September 29, 2000, the Davises filed a complaint against St. John's in Carroll County Circuit Court. They alleged negligence against St. John's on the basis that Dr. Miller, its employee, erred in his diagnosis of costochondritis when Davis was actually suffering from pneumonia. The Davises specifically alleged that Davis's treatment for pneumonia was compromised by the steroids administered by Dr. Miller.

On December 29, 2000, the Davises amended their complaint to allege additional jurisdictional facts. In their amended complaint, they asserted that St. John's is a foreign corporation qualified to do business in Arkansas and subject to service of process in this state. The complaint further maintained that St. John's owns substantial property in Arkansas and operates medical facilities in this state. Through its operation of the medical facilities, St. John's has employees working in Arkansas. The complaint separately alleged that St. John's has wholly owned subsidiaries located in Arkansas that operate medical care facilities in the state. These subsidiaries also, according to the complaint, own substantial property in the state and have employees in the state.

St. John's filed a motion to dismiss for lack of personal jurisdiction of Arkansas courts pursuant to Ark. R. Civ. P. 12(b)(2). In its brief in support of that motion, St. John's noted that Ozark Regions Health System, Inc., d/b/a Carroll County Regional Medical Center, is a corporate member of St. John's and an Arkansas corporation. St. John's argued to the trial court that despite this ownership of an Arkansas corporation, it did not have sufficient contacts with Arkansas to support the personal jurisdiction of Arkansas courts. The Davises responded to this motion and brief and observed that St. John's had designated an agent in Arkansas for service of process. The Davises did, in fact, effect service of process on St. John's by serving this Arkansas agent with their complaint.

The trial court held a hearing on the motion to dismiss and subsequently dismissed the complaint for lack of personal jurisdiction over St. John's. The sole point before this court on appeal is whether the trial court erred in dismissing the Davises' complaint for lack of personal jurisdiction. The Davises make several alternative arguments in support of their position. First, they assert that by serving the agent for service of process for St. John's in Arkansas, they gained personal jurisdiction over the Missouri corporation. Secondly, they claim that St. John's consented to the jurisdiction of Arkansas courts by doing business in Arkansas. Thirdly, they urge that even if neither of these arguments is persuasive, St. John's has sufficient contacts with the State of Arkansas to sustain general jurisdiction by the Arkansas courts over it.

Rule 12(b)(2) of the Arkansas Rules of Civil Procedure provides that lack of jurisdiction over the person is a defense to a complaint that can be raised by motion. In considering the parties' arguments surrounding a Rule 12(b)(2) motion, this court looks to the complaint for the relevant facts alleging jurisdiction, which are taken as true. *Malone & Hyde v. Chisley*, 308 Ark. 308, 825 S.W.2d 558 (1992); *Howard v. County Court of Craighead County*, 278 Ark. 117, 644 S.W.2d 256 (1983). If the complaint does not allege sufficient facts on which personal jurisdiction can rest, then the complaint is factually deficient. *Howard v. County Court of Craighead County*, *supra*. Mere conclusory statements devoid of a factual foundation do not suffice in this inquiry. *See id.*

Prior to the 1995 legislative session, the long-arm statute allowed personal jurisdiction to be exercised over a non-resident defendant when there was a cause of action arising from the person's transacting any business in this state, contracting for services or things in this state, causing tortious injury in this state, owning real property in the state, as well as other grounds. Ark. Code Ann. § 16-4-101C. (effectively repealed by amendment 1995). In 1995, the Arkansas General Assembly amended the long-arm statute and limited it to the constraints imposed by the due process clause of the Fourteenth Amendment. *See* 1995 Ark. Acts 486. Arkansas' long-arm statute now reads:

> B. PERSONAL JURISDICTION. The courts of this state shall have personal jurisdiction of all persons, and all causes of action or

> claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution.

Ark. Code Ann. § 16-4-101(b) (Repl. 1999). *See also John Norrell Arms, Inc. v. Higgins*, 332 Ark. 24, 962 S.W.2d 801 (1998). Thus, this court now looks only to Fourteenth Amendment due process jurisprudence when deciding an issue of personal jurisdiction.

The seminal case on personal jurisdiction and the due process clause is *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the United States Supreme Court expanded the limits of state jurisdiction over nonresident defendants, while leaving in place basic notions of due process limitations on that power. The Court in *International Shoe* looked not merely to the presence of the defendant in the state, as it had fifty years earlier in *Pennoyer v. Neff*, 95 U.S. 714 (1877), but rather looked to the nature of the contacts that the nonresident defendant had with the forum state. The Court said that attention must be paid to the "quality and nature" of those contacts, *see International Shoe* at 319, and also to whether or not that defendant through those contacts enjoyed the "benefits and protections" of the laws of the foreign state. *Id.* The Court further noted that there are situations in which a nonresident defendant's contacts with a forum state may be so substantial and continuous as to justify jurisdiction over that defendant, even though the cause of action is "entirely distinct from those activities." *Id.* at 318. The touchstone principle announced by the Court in *International Shoe* was whether assumption of personal jurisdiction over the nonresident defendant was based on "minimum contacts" by the nonresident defendant in the forum state which does not offend "traditional notions of fair play and substantial justice." *Id.* at 316.

Since *International Shoe*, the Court has had occasion to revisit the personal jurisdiction question. A few of those cases are relevant to our inquiry and have set out further principles governing state court jurisdiction. A nonresident defendant's contacts with a forum state, for example, must be sufficient to cause the defendant to "reasonably anticipate being haled into court there." *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The Court has also identified two types of personal jurisdiction:

general and specific. When a cause of action arises out of or is related to a defendant's contacts with the forum state, the exercise of personal jurisdiction is one of specific jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). However, if the exercise of jurisdiction arises in a case not stemming from the defendant's contacts with the forum state, the exercise of personal jurisdiction is one of general jurisdiction. *Burger King Corp. v. Rudzewicz, supra; Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *International Shoe Co v. Washington, supra.* When general jurisdiction is in question, a defendant may be subject to the forum state's exercise of personal jurisdiction if contacts with the state are continuous, systematic, and substantial. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

This court has stated that it viewed the five-factor test for determining minimum contacts which was adopted by the Eighth Circuit Court of Appeals in *Burlington Industries, Inc. v. Maples Industries, Inc.*, 97 F.3d 1100 (8th Cir. 1996) as helpful. *See John Norrell Arms, Inc. v. Higgins, supra.* Those five factors are: (1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties.

The Davises' first argument is that the Carroll County Circuit Court has jurisdiction over St. John's simply by virtue of its service of process on the registered agent for St. John's in this state. Two events in the past decade influence our decision on this point. The first is our case of *Malone & Hyde, Inc. v. Chisley, supra.* In *Malone*, we held that service of process on an Arkansas agent did *not* automatically give the Arkansas courts personal jurisdiction over a nonresident defendant. In that case, we granted a writ of prohibition, holding that there was no showing that the nonresident defendant's actions in this state gave rise to the cause of action, as was then required under our former long-arm statute. That statute contemplated causes of action arising out of the nonresident defendant's contacts with the state and essentially required specific jurisdiction. The second event that influences us was the 1995 amendment to the long-arm statute (Act 486), which eliminated the requirement that the cause of action arise out of the

nonresident defendant's specific contacts with the state. Act 486 allowed this state to exercise general jurisdiction up to the limits of the due process clause.

In our view, after the passage of Act 486 in 1995, the entire framework of personal-jurisdiction analysis changed. By Act 486, the General Assembly authorized Arkansas courts to exercise jurisdiction to the fullest extent due process will allow. The effect of this change was to convert Arkansas into a general-jurisdiction state for purposes of personal jurisdiction. Since the enactment of Act 486, this court has not had occasion to pass on the question of the limits of due process until this case. The United States Supreme Court, however, has provided precious little authority to govern us on the due process limits on general jurisdiction. One federal district court has summarized this marked lack of guidance:

> The U.S. Supreme Court has provided little specific guidance as to the precise limits on the exercise of general personal jurisdiction. In the more than 40 years since its decision in *International Shoe Co. v. Washington*, the Court has decided only two cases specifically addressing general personal jurisdiction.
>
> *Perkins v. Benguet Consolidated Mining Co., supra*, 342 U.S. at 437, 72 S. Ct. at 413 is the only case since *International Shoe* where the Supreme Court found that general personal jurisdiction was permissibly exercised by a state court. The defendant's mining operations in the Philippine Islands were completely stopped during the Japanese occupation. The president-general manager-principal stockholder of the defendant corporation returned to his home in Ohio. While in Ohio he carried on "continuous and systematic supervision of the necessarily limited war time activities of the company." *Perkins*, 342 U.S. at 446, 72 S. Ct. at 419. The corporation's records were kept in Ohio. The directors' meetings were held in Ohio. Corporate bank accounts were located in Ohio and all key business decisions were made there. In short, Ohio was the "principal, if temporary, place of business" for the corporation. (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779, 104 S. Ct. 1473, 1481, 79 L. Ed. 2d 790 (1984)). Noting that the "essence of the issue" was of "general fairness to the corporation" the Court focused its inquiry on whether the nature and amount of the defendant's activities in Ohio made it "reasonable and just to subject the corporation to the jurisdiction" of the Ohio courts. *Perkins*, 342 U.S. at 444, 72

> S. Ct. at 418. After defining the issue in these terms the Court simply concluded that, under these circumstances, an exercise of general personal jurisdiction was not prohibited by the due process clause.

Follette v. Clairol, Inc., 829 F. Supp. 840, 844 (E.D. La. 1993).

Other jurisdictions are not of one mind over the question of whether an agent, standing alone, allows a forum state to assume general jurisdiction over a nonresident defendant. The Fifth Circuit Court of Appeals is the court that has most squarely addressed this question. *See Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992). In *Wenche Seimer*, the Fifth Circuit concluded that an agent for service, by itself, was not enough:

> To assert, as plaintiffs do, that mere service on a corporate defendant automatically confers *general jurisdiction* displays a fundamental misconception of corporate jurisdictional principles. This concept is directly contrary to the historical rationale of *International Shoe v. State of Wash.*, 326 U.S. 310, 66 S. Ct. 154, 90 L. . Ed. 95 (1945)] and subsequent Supreme Court decisions. A registered agent, from any conceivable perspective, hardly amounts to "the general business presence" of a corporation so as to sustain an assertion of general jurisdiction.

Wenche Siemer, 966 F.2d at 183. *But see Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990) (nonresident corporation's designation of agent for service of process in forum state amounted to consent to personal jurisdiction). The instant case differs from *Wenche Siemer* in that, here, the Davises assert contacts in addition to the presence of an agent for service of process in Arkansas. Thus, we need not decide this issue based solely on the presence of an agent for service in this state.

The Davises make the following allegation concerning the contacts that St. John's has with Arkansas:

> 3. At all times relevant herein Defendant has, in addition to qualifying to do business in Arkansas, systematically and continually done business within the State of Arkansas through the operation of medical care facilities within the State of Arkansas. At all times relevant herein Defendant has owned substantial property within the State of Arkansas and has employees both residing and working within the State of Arkansas on a daily basis. Furthermore Defendant, through wholly owned subsidiaries, who are in fact

> alter egos of Defendant, has, at all times relevant herein, continuously and systematically done business within the State of Arkansas, owns and has owned property within the State of Arkansas, and has employees both residing in and working on a regular and daily basis within the State of Arkansas. By reason of its continuous business done within the State of Arkansas, Defendant has a presence within the State of Arkansas and upon that basis alone is subject to the personal jurisdiction of this court.

Because the parties are only at the pleading stage of this litigation, we do not know the extent of St. John's contacts in Arkansas. What we do know at this point are the allegations made in the Davises' complaint, and we are required for purposes of a Rule 12(b)(2) motion to take these allegations as true. *Malone & Hyde v. Chisley, supra.* As a result, we accept the fact that St. John's is doing business in Arkansas, that it has substantial property in this state as well as employees, and that it is operating medical care facilities through wholly owned subsidiaries.

The question then becomes whether designating an agent for service of process *and* doing business in the state through a wholly owned subsidiary which entails ownership of substantial property and employment of employees in Arkansas subjects St. John's to the personal jurisdiction of our courts. St. John's argues vigorously that this is not enough to establish personal jurisdiction. We disagree. It is true that the parties reside in Missouri and the alleged negligence occurred there. It is also true that under our long-arm statute as it existed prior to Act 486 of 1995, personal jurisdiction would have been lacking. *See Malone & Hyde v. Chisley, supra.* Regardless of those facts, the General Assembly expanded the jurisdiction of Arkansas courts over nonresident defendants significantly by Act 486. That expansion, plus the fact that St. John's has designated an agent for service of process in this state and is doing substantial business in this state, through a wholly owned subsidiary, convinces this court that St. John's has sufficient contacts with this state to satisfy the constraints of the due process clause.

Accordingly, we reverse the order of dismissal and remand this case for further proceedings.

Reversed and remanded.

CORBIN, J., not participating.

Bryant M. FLORES *v.* STATE of Arkansas

CR 01-1295 69 S.W.3d 864

Supreme Court of Arkansas
Opinion delivered March 21, 2002

[redacted]

Daniel D. Becker, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Bryant Flores appealed his conviction of second-degree murder for the murder of Victor Stephens, for which he received a sentence of twelve years, to the Court of Appeals. He raised one issue: the trial court erred in admitting a hearsay statement based on the medical-diagnosis exception to the hearsay rule. The Court of Appeals agreed with Flores and reversed the judgment of conviction and remanded for a new trial. *See Flores v. State*, 75 Ark. App. 397, 58 S.W.3d 417 (2001). The State petitioned this court

for review, and we granted the same. We reverse the judgment of conviction and remand for a new trial.

In March of 2000, Flores was living with his girlfriend, Karen Stephens, in Hot Springs. The couple had been living together for about a year, and two children lived with them. One child was Victor Stephens, Karen Stephens's child from a previous relationship, who at the time was three years old. The other child was Gohan Flores, Karen Stephens's and Flores's child, who was four months old at the time of the events giving rise to this appeal. During the time they were living together in Hot Springs, Flores was employed intermittently. Karen Stephens was unemployed during the entire period of time. In the early afternoon of March 26, 2000, Karen Stephens placed a 911 call requesting ambulance service to their residence. She placed the call from a pay phone at the convenience store across the street from where she and Flores lived. Paramedics were dispatched to the residence at 1:41 p.m. and arrived about six minutes later. Karen Stephens was standing in the front yard holding Victor. The paramedics found Victor to be unresponsive to pain and to their verbal inquiries, and his respiratory rate was severely depressed. The paramedics began treating Victor immediately. They noted bruises and abrasions all over the child's body. They also noted his dilated and unresponsive pupils and a tightly clenched jaw, which indicated that he had suffered a severe head injury.

During this initial treatment, the paramedics questioned Karen Stephens about Victor's medical history. She answered most of the questions by saying "I don't know." She also told them that Victor did not have a doctor and that he had never been to one. She added that she did not know if the child was taking any medication or had had any medical problems in the past. Hill testified that she seemed calmer than most parents in similar situations and that her responses seemed "inappropriate." Flores emerged from the residence briefly during the on-the-scene treatment, and he too appeared calm to Hill. He did not talk with the paramedics or go to the hospital with Karen and Victor.

When Victor arrived at St. Joseph's Hospital, he was in a coma. His treating physician was Dr. Karl Wagenhauser. Dr.

Wagenhauser first intubated Victor and then noted his multiple injuries, which were in various stages of healing. Dr. Wagenhauser ordered a CAT scan to determine whether there was hemorrhaging in his brain or abdomen. As Victor was being scanned, Dr. Wagenhauser went to the waiting room to obtain more information from Victor's family and to report the child's status. He found Karen Stephens there and observed that she was calm and was not crying. During this first conversation with Karen, she said that she had been across the street while Victor was "exercising" at their residence. When she returned, she found him unresponsive. She placed Victor in the bathtub and ran water over him to wake him up.

Dr. Wagenhauser testified at trial that the information he gathered during this first encounter with Stephens did not change his treatment or his diagnosis of Victor's condition. At the pretrial *Denno* hearing, he further stated that he did not consider this account from Karen Stephens to have been truthful. He returned to the radiology area to be on-hand in case Victor's situation worsened during his CAT scan. The scan was completed and showed a traumatic brain injury. Specifically, Victor suffered a subdural hematoma — ruptured blood vessels in the brain causing blood clots and swelling. Dr. Wagenhauser decided to have Victor airlifted to Arkansas Children's Hospital in Little Rock for specialized care.

At this point, Dr. Wagenhauser was notified by a social worker that Karen Stephens wanted to speak to him again. At trial, Dr. Wagenhauser testified to the following exchange between Karen Stephens and him:

> PROSECUTOR: Did you later have occasion to speak with her?
>
> DR. WAGENHAUSER: Yes, I did.
>
> PROSECUTOR: And what was the content of that discussion that you had with Karen Stephens?
>
> DR. WAGENHAUSER: I spoke with her just before Victor was airlifted to Little Rock. We let her come into the room to see him before he was sent by helicopter. The social worker was in there with her, or case manager, and had been speaking with her

and Donna called me to the room and said that Victor's mother had something to tell me.

PROSECUTOR: Okay. And did you speak with her at that time?

DR. WAGENHAUSER: Yes, I did.

PROSECUTOR: And what did she communicate to you?

DR. WAGENHAUSER: She told me that both she and the boyfriend had struck Victor and that the boyfriend had thrown Victor up against the wall.

PROSECUTOR: What did you do at that point in time, if anything?

DR. WAGENHAUSER: That did not change my management of Victor at the time. I made a mental note of it.

Garland County Investigator Danny Wilson also spoke with Karen Stephens while Victor was being prepared for the airlift, though Wilson did not testify at trial regarding the content of their conversation. At the pretrial *Denno* hearing, Wilson indicated that Stephens told him that Flores and she had physically abused Victor for the past five months.

During this time period, Flores remained at home with Gohan. While Karen and Victor were at the hospital, Garland County sheriff's deputies and a representative from the Department of Human Services went to Flores's house to remove Gohan. Flores initially thought that the sheriff's deputies had come there to give him a ride to the hospital. The DHS representative, however, took Gohan into custody, and the deputy sheriffs arrested Flores.

After Flores was transported to the Garland County Sheriff's Department, Investigator Wilson questioned him. In the resulting statement, Flores revealed that Victor had urinated on himself and on the bedroom floor. Flores stated he disciplined Victor by making him do jumping jacks. While Victor was doing jumping jacks, Flores left the bedroom. According to his statement, when he returned to the bedroom, he found Victor on the floor unconscious. Flores thought the child was dehydrated, and so he placed him in the bathtub. As for the head injury, Flores's statement was

that he did not know how it occurred, but offered that Victor may have fallen or Flores might have accidentally bumped Victor's head against the bathtub when he placed him in the tub water.

Victor died at Children's Hospital on March 27, 2000. The state charged both Flores and Karen Stephens with capital murder, and later waived the death penalty for Flores. As a result of the pending charges, Karen Stephens invoked her Fifth Amendment right against self-incrimination at all of the Flores proceedings.

On October 4, 2000, the State filed a Motion for Use of Co-Defendant's Statements, in which it sought the admissibility of Karen Stephens's hearsay statement to Dr. Wagenhauser under Arkansas Rule of Evidence 803(4), the medical-treatment exception. Before trial, the trial court held a *Denno* and motion hearing at which Dr. Wagenhauser testified about the circumstances surrounding Karen Stephens's statement. At this hearing, Dr. Wagenhauser testified that it is his practice to speak with the parents of critically injured children to let them know their child's medical status and to gather any information that may be pertinent to the diagnosis or treatment of the child. Dr. Wagenhauser testified that he spoke with Karen Stephen for both of those reasons. He described the first encounter with Stephens — in which she told him that she had been across the street — as unhelpful and not pertinent to Victor's diagnosis or treatment.

At the pretrial hearing, the prosecutor and he engaged in the following colloquy regarding the second encounter:

> DR. WAGENHAUSER: At another time I was called back into the [waiting] room. [Stephens] had been speaking with one of the case managers I know and I spoke with her again there.
>
> PROSECUTOR: Okay, and did she give you any information at that time?
>
> DR. WAGENHAUSER: At that time the case manager told me that the mother had something she wanted to tell me and I asked her what that was and at that time I was physically standing in the room, she was in the room and her son was there on the ventilator, and she told me that both she and the boyfriend had struck him at times and additionally that the boyfriend had thrown the child up against the wall.

PROSECUTOR: Okay, were you able to use what she conveyed to you to help treat Victor?

DR. WAGENHAUSER: I think it basically confirmed a lot of what we'd already seen.

PROSECUTOR: Okay, so did it confirm your diagnosis in essence?

DR. WAGENHAUSER: It helped substantiate it, it did, yes.

PROSECUTOR: And did it make any difference in any further treatment that you gave him, i.e., airlifting him, so forth and so on?

DR. WAGENHAUSER: Did the statement of hers make a difference?

PROSECUTOR: Uh-hum.

DR. WAGENHAUSER: Actually no, it did not. We would have sent him [to Arkansas Children's Hospital] anyway.

This testimony was repeated to a large degree on cross examination at the hearing, and Dr. Wagenhauser repeated that the hearsay statement regarding the abuse and Flores did not assist him in his diagnosis and that all decisions relevant to Victor's treatment had been made by the time she implicated him in the child's injuries.

On redirect examination, the prosecutor engaged Wagenhauser in the following line of questioning:

PROSECUTOR: Okay. After speaking with her were you able to make a diagnosis, though, regarding his condition of what had caused the injuries?

DR. WAGENHAUSER: She — her statement to me did not affect the child's treatment. We had our diagnosis made. What she told me was who caused the injuries at that time.

PROSECUTOR: Okay, so what she told you basically reaffirmed the diagnosis that . . .

DEFENSE COUNSEL: Objection to leading, Your Honor.

THE COURT: Sustained.

DR. WAGENHAUSER: The mother did not diagnose the child. We diagnosed the child.

PROSECUTOR: Correct, I understand.

DR. WAGENHAUSER: We had a CAT scan, we saw the bleed, we saw the injuries. We knew that this child had been beaten. It is not my job to find out who—I don't care who caused the injuries. My job is to take care of the child. I walked into the room, and without me asking, she said that she and her boyfriend had hit the child and that the boyfriend had thrown the child up against a wall. That's what she told me without questioning from myself.

In its posthearing brief, the State argued Rule 803(4) again as well as the excited-utterance exception under Rule 803(2). The trial court granted the State's motion and permitted it to use Karen Stephens's hearsay statement to Dr. Wagenhauser. The trial court said:

> The statement made by Karen Stephens to Dr. Karl Wagenhauser . . . is admissible as offered.
>
> The statement provided the treating emergency room doctor with information that was reasonably pertinent to the treatment and diagnosis of the child at that time. Specifically, the statement told the doctor that there was multiple traumas to the child and that the child's body had been thrown against a hard surface.
>
> This statement was provided not to merely identify the perpetrators but to provide the doctor with information as to the cause and extent of the injuries. The doctor testified that this information confirmed his diagnosis.

The case proceeded to a three-day jury trial which resulted in a verdict of guilty for second-degree murder. Flores was sentenced to twelve years in prison. The Court of Appeals reversed his conviction in a unanimous opinion, because that court concluded Karen Stephens's hearsay statement constituted blame shifting and did not fall within the purview of the medical-diagnosis exception. *See Flores v. State*, 75 Ark. App. 397, 58 S.W.3d 417 (2001). The State petitioned for review, and we granted the State's petition.

Flores urges as his sole point on appeal that the trial court erred in allowing Dr. Wagenhauser to tell the jury what Karen

Stephens told him while Victor was being treated at St. Joseph's Hospital. Specifically, he asserts that Karen Stephens's statement that Flores threw Victor against a wall was inadmissible hearsay. The State responds that the statement is admissible under three provisions of the Arkansas Rules of Evidence: (1) under Rule 803(4) as a statement made in furtherance of medical treatment; (2) under Rule 803(2) as an excited utterance; and (3) under Rule 803(24), the residual hearsay exception.

When we grant a petition to review a decision of our court of appeals, we treat the matter as if the appeal had been originally filed in this court. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001); *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998); *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). The admission or rejection of evidence is within the discretion of the trial court, which this Court will not reverse in the absence of a manifest abuse of that discretion. *Burmingham v. State*, 342 Ark. 95, 27 S.W.2d 351 (2000); *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998). We have held that a trial court is accorded wide discretion in evidentiary rulings. *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000); *Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999). Specifically, we have stated that we will not reverse a trial court's ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001); *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000); *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997).

a. *Medical-diagnosis exception.*

Flores first claims that the trial court erred in ruling that the statement fell within the medical-diagnosis or treatment exception to the hearsay exclusion set out in Rule 803(4). His argument focuses on the fact that her statement identified him as the perpetrator of the fatal blow. As such, it was not related to Dr. Wagenhauser's treatment of Victor's head wound but was, rather, an attempt to shift blame for the child's death to Flores. The State responds that the fact that Victor's abuser was a member of his household made the identification of that abuser relevant to treating his wounds and preventing future abuse.

Rule 803(4) provides in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Ark. R. Evid. 803(4).

In *Carton v. Missouri Pac. R.R. Co.*, 303 Ark. 568, 798 S.W.2d 674 (1990), this court addressed Rule 803(4) extensively for the first time. In *Carton*, we reversed and remanded the plaintiff's slip-and-fall case for a new trial after the trial court granted a directed verdict in favor of the defendant. Although we reversed on other grounds, we addressed a Rule 803(4) issue due to the likelihood that the issue would recur in the new trial. The disputed point involved a statement made to a treating physician by the plaintiff that she fell and that her fall was caused by the sole of her boot being covered with diesel fuel. We stated for purposes of remand that the statement that she fell was admissible as made in furtherance of treatment under Rule 803(4), but we further stated that the statement regarding the diesel fuel as the reason for her fall was not admissible. We said:

> The basis for this hearsay exception is the patient's strong motivation to be truthful in giving statements for diagnosis and treatment. Cotchett and Elkind, *Federal Courtroom Evidence* 144 (1986). Also admissible under the rule are statements regarding the cause of the condition, *if pertinent to the diagnosis or treatment.* However, where such information is not relevant for diagnosis, but rather attempts to fix blame, it may be excluded. *Id.*, citing federal cases. "Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light." *Id.* Similarly, plaintiff's statement that her foot slipped and she fell was admissible, but not that she had "apparently accumulated some diesel fuel on her sole." The latter phrase was not pertinent to diagnosis or treatment given by the physician, and, more importantly, the patient had no motivation to be truthful in the

> statement because she knew that it would not matter in her treatment whether she had snow or diesel fuel on her boot. Thus, there is no basis for the hearsay exception.

Carton, 303 Ark. at 575, 798 S.W.2d at 677 (emphasis in original).

We applied Rule 803(4) again in *Benson v. Shuler Drilling Co., Inc.*, 316 Ark. 101, 871 S.W.2d 552 (1994). In *Benson*, we considered whether a statement from a person other than the patient seeking treatment was surrounded in the necessary indicia of reliability for purposes of Rule 803(4). There, the doctor had written on his discharge summary that the plaintiff had fallen from a cat walk, but the doctor could not remember whether the plaintiff or someone else had told him that. We held that the statement regarding cause was inadmissible under Rule 803(4), because the doctor was unable to recall who gave him the statement and, thus, a special relationship with the patient could not be established. We quoted from *Weinsteins's Evidence*, p. 803-145 (vol. 4, 1993), as follows:

> Statements relating to someone else's symptoms, pains or sensations would be admissible, provided again, they were made for purposes of diagnosis or treatment. The relationship between the declarant and patient will usually determine admissibility . . . As the relationship becomes less close, the statement becomes less reliable, both because the motive to tell the truth becomes less strong, and because even a stranger in good faith may not be able to describe another's physical pain and suffering as infallibly as an intimate.

Benson, 316 Ark. at 109, 871 S.W.2d at 556 (ellipsis in original).

Other courts have considered Rule 803(4) statements in which the victim or someone else not only described the injuries, but also identified the perpetrator. In *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), the Eighth Circuit Court of Appeals dealt with a case where a doctor testified about a nine-year-old victim's statements to him in an assault-with-intent-to-rape case. The doctor testified that the girl told him that she had been drug into bushes, her clothes had been removed, and the man had tried to force something into her vagina which hurt. There was no statement by the girl to the doctor identifying who

did it. The Eighth Circuit looked to the Federal Rule of Evidence 803(4), which is identical to our Rule 803(4) and applied the hearsay exception. The court said:

> The rationale behind the rule [803(4)] has often been stated. It focuses upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part on what the patient says.
>
> . . .
>
> Thus, two independent rationales support the rule and are helpful in its application. A two-part test flows naturally from this dual rationale: first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment.
>
> . . .
>
> There is nothing in the content of the statements to suggest that [the victim] was responding to the doctor's questions for any reason other than promoting treatment. It is important to note that the statements concern what happened rather than who assaulted her. The former in most cases is pertinent to diagnosis and treatment while *the latter would seldom, if ever, be sufficiently related.*

Iron Shell, 633 F.2d at 83, 84 (emphasis added).

Our court of appeals has also dealt with the issue of a hearsay statement made in the course of medical treatment. *See, e.g., Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989). In *Huls*, the court held that a statement by the victim, later murdered, to a dentist that the defendant had broken her teeth by throwing a lamp at her was inadmissible under Rule 803(4). Using the *Iron Shell* analysis which it adopted, the court concluded that the statement was made to identify the perpetrator and not to help the dentist diagnose or treat her. The court, nonetheless, affirmed the defendant's conviction because the defendant did not preserve his hearsay argument for appeal. Likewise, the Kentucky Supreme Court, over hearsay objections, affirmed a man's conviction for sexual abuse of a child where the trial court allowed a physician to testify to a "sanitized version" of the way the injuries were inflicted under that state's Rule 803(4), without mentioning who caused the injuries. *See Garrett v. Commonwealth*, 48 S.W.3d 6

(Ky. 2001); *see also United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) (per curiam) (affirming conviction where doctor was allowed to testify to statements describing the injury under that state's Rule 803(4), but was required to omit the identity of the assailant).

Only in the special situation of sexual or physical abuse of a child has the rule of excluding the identification of the perpetrator been modified. Again, it is the Eighth Circuit Court of Appeals that has outlined this child-abuse exception in the leading case on the matter. *See United States v. Renville*, 779 F.2d 430 (8th Cir. 1985). In *Renville*, the Eighth Circuit dealt with answers made by a child victim of sexual abuse who was living in a household with the abuser. The questions were asked by the treating physician, who explained to the victim that the questions were being asked to help in her treatment. The child identified her stepfather as the abuser, and the Eighth Circuit held that this statement of identification was admissible due to the fact that it was pertinent to a course of treatment, which was to remove the child from the abuser's home. The Eighth Circuit limited its holding by stating that in order to meet the two-part test set out in *United States v. Iron Shell, supra*, the declarant's statement must be made in response to a question where the identification of the perpetrator is important to diagnosis and treatment, and where the victim manifests an understanding of the importance of the statement given to medical diagnosis and treatment. *Id.* at 438. Shifting blame to another perpetrator was not part of the *Renville* analysis.

Our court of appeals has adopted the *Renville* approach. *See Stallnacker v. State*, 19 Ark. App. 9, 715 S.W.2d 883 (1986). In *Stallnacker*, that court allowed a physician's testimony that a victim had identified her father as her sexual abuser in answer to the physician's questions. The court of appeals has also extended the *Renville* analysis to physical abuse where the victim answered a doctor's inquiry about what happened. *See Clausen v. State*, 50 Ark. App. 149, 901 S.W.2d 35 (1995). The child identified her stepfather as the beater. Again, neither the *Stallnacker* decision nor the *Clausen* decision involved a potentially culpable declarant who identified someone else as the perpetrator.

We conclude that the *Renville* analysis is not pertinent to the case before us. A child victim was not the declarant, and there was no questioning by the doctor which precipitated the hearsay statements. In fact, after the first encounter between Dr. Wagenhauser and Karen Stephens about Victor, the doctor concluded that she was unhelpful and untruthful. Only later did she return and admit to child abuse, while placing the blame squarely on Flores for throwing the child against the wall. Accordingly, there was no inquiry by a doctor pertaining to a future course of treatment, such as removing the child from the home. We further note as a critical distinction that blame-shifting was not an issue in *Renville*, while it is the centerpiece of the case at hand. In holding as we do, we do not intend in any way to diminish the obligation of physicians to report suspected abuse or neglect to the child-abuse hotline. Ark. Code Ann. § 12-12-507 (Supp. 2001). Nor do we intend to undercut the policy behind the *Renville* decision, which is to encourage child victims to identify perpetrators of child abuse for purposes of planning a future course of treatment and placement of the child. We simply conclude that *Renville* does not apply to the facts of this case, where the parent of the child admits to abuse and then shifts the blame for the fatal blow to another.

We are persuaded, however, that the two-part test set out by the Eighth Circuit Court of Appeals in *United States v. Iron Shell*, *supra*, has merit, even though this court is not bound by the decisions of that court. We will proceed in our analysis of the case at hand using the *Iron Shell* standard. The *Iron Shell* analysis requires us to look first at the motive of the declarant and determine whether her motivation was to assist in the diagnosis and treatment of her child. Karen Stephens was the mother of Victor. She was also facing the prospect of prosecution, together with Flores, for the abuse of her child. In the waiting room at St. Joseph's Hospital, she conversed with both a social worker and a law enforcement officer while her child was being treated. She made blame-shifting statements to the social worker *before* she ever made the unsolicited statement to the Dr. Wagenhauser. Because of this, Flores urges that the motive in talking to Dr. Wagenhauser was purely to point the finger at him.

At the same time, when talking to the doctor, Karen Stephens admitted to abusing the child herself. We are unwilling to conclude that, as Victor's mother, she was completely without motivation to assist the doctor in her son's treatment by telling him what had occurred. Without question, knowing what caused the injuries to Victor's body as well as the blow to his head would, from the mother's perspective, have been important information for the doctor to have had at his disposal. We hold that the first part of the *Iron Shell* test was met.

Under the second part of the test, we examine whether Karen Stephens's statement was relied on by the treating physician. From his own testimony, it is clear that Dr. Wagenhauser had already decided to airlift Victor to Children's Hospital when Karen Stephens told him the cause of Victor's injury. It is also true that he had diagnosed Victor's injuries as being the result of child abuse. Nevertheless, the doctor testified that Karen Stephens's statement *confirmed* his diagnosis. As such, it lent some value to his diagnosis and treatment. We conclude that the second part of *Iron Shell* was also met. Accordingly, Karen Stephens's statement to Wagenhauser *to the extent she told him about the physical abuse to Victor* falls within the medical-treatment exception set out in Rule 803(4).

We hold, however, that that part of Karen Stephens's statement that identifies Flores as the culprit in throwing Victor against the wall has no pertinence to his diagnosis and treatment and is inadmissible hearsay. Identifying the perpetrator had nothing to do with medical treatment and could well have been blame-shifting by someone who was soon to be charged as a co-defendant. Other jurisdictions have made this distinction, just as this court did in *Carton v. Missouri Pac. R.R. Co., supra. See, e.g., United States v. Iron Shell, supra; United States v. Nick, supra; Nash v. State*, 754 N.E.2d 1021 (Ind. App. 2001) ("Hearsay statements admissible for the purpose of medical diagnosis or treatment typically do not involve statements of identity because identity of the person responsible for the injury is usually not necessary to provide effective medical care."); *Garrett v. Commonwealth, supra.*

b. *Excited-utterance exception.*

The State's alternative basis for admission of Karen Stephens's statement is the excited-utterance exception to the hearsay exclusion under Rule 803(2). The State urges this court to affirm the trial court because it reached the right result, albeit for the wrong reason, which we clearly can do. *Harris v. State*, 339 Ark. 35, 2 S.W.3d 768 (1999) (citing *Dandridge v. State*, 292 Ark. 40, 727 S.W.2d 851 (1987); *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981)). The State further argues that Karen Stephens's statement was made under stress because of the injury to her child and was, thus, an excited utterence. Flores responds in his reply brief that the statement was not made under the stress of the moment, because Stephens's demeanor was, according to all present, unusually calm for a parent of a critically injured child.

Arkansas Rule of Evidence 803(2) provides in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Ark. R. Ev. 803(2). There are several factors to consider when determining if a statement falls under this exception: the lapse of time, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement. *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000); *Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994) (adopting these factors from the Eighth Circuit's decision in *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980)). For the exception to apply, there must be an event which excites the declarant. *Fudge v. State*, *supra*; *Moore v. State*, *supra*. In addition, "[i]n order to find that 803(2) applies, it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation." *Fudge v. State*, *supra* (quoting *Iron Shell*, 633 F.2d at 85-86). The statements must be uttered during

the period of excitement and must express the declarant's reaction to the event. *Fudge v. State, supra; Moore v. State, supra.*

Here, in addition to Karen Stephens's calm demeanor, she had time and reason to reflect on her statement to Dr. Wagenhauser and even revise it between her first encounter with him and her second. Her first statement to Dr. Wagenhauser was that she had been across the street and knew nothing about the incident. Her second, revised statement was that Flores threw the child against a wall. These circumstances do not suggest an excited utterance. Nothing about the second statement suggests spontaneity, excitement, or impulsivity. *See Fudge v. State, supra.* Indeed, the content of her statement cuts against the State's argument, because Stephens was shifting the blame for her son's head injury and resulting death to Flores. We hold that the requisite factors for determining an excited utterance are not met.

c. *Residual exception.*

For its final argument, the State argues that the statement made to Dr. Wagenhauser falls within the residual hearsay exception, which reads in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (24) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Ark. R. Ev. 803(24). The residual hearsay exception was intended to be used very rarely, and only in exceptional circum-

stances. *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001); *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992); *Hill v. Brown*, 283 Ark. 185, 672 S.W.2d 330 (1984).

As Flores points out, the requirement of this rule were not met. First, the State failed to give Flores advance notice that Rule 803(24) would be used at trial to admit Karen Stephens's statement. The rule clearly requires this. Indeed, the issue of the residual hearsay exception was never raised to the trial court but was first mounted as an alternative vehicle for admission of her statement on appeal. Nor did the trial court make the necessary findings that the hearsay statement (1) is material, (2) is more probative than other evidence, and (3) serves the interests of justice, as required by the rule. These criteria were all met in *Martin v. State, supra*. Here, they were lacking. We decline to admit the statement under Rule 803(24).

We reverse the judgment of conviction and remand for further proceedings. In the event of a new trial, we direct that any reference to Flores as the person who threw Victor against the wall be omitted from Dr. Wagenhauser's testimony. In all other respects, Karen Stephens's hearsay statement to the doctor is admissible.

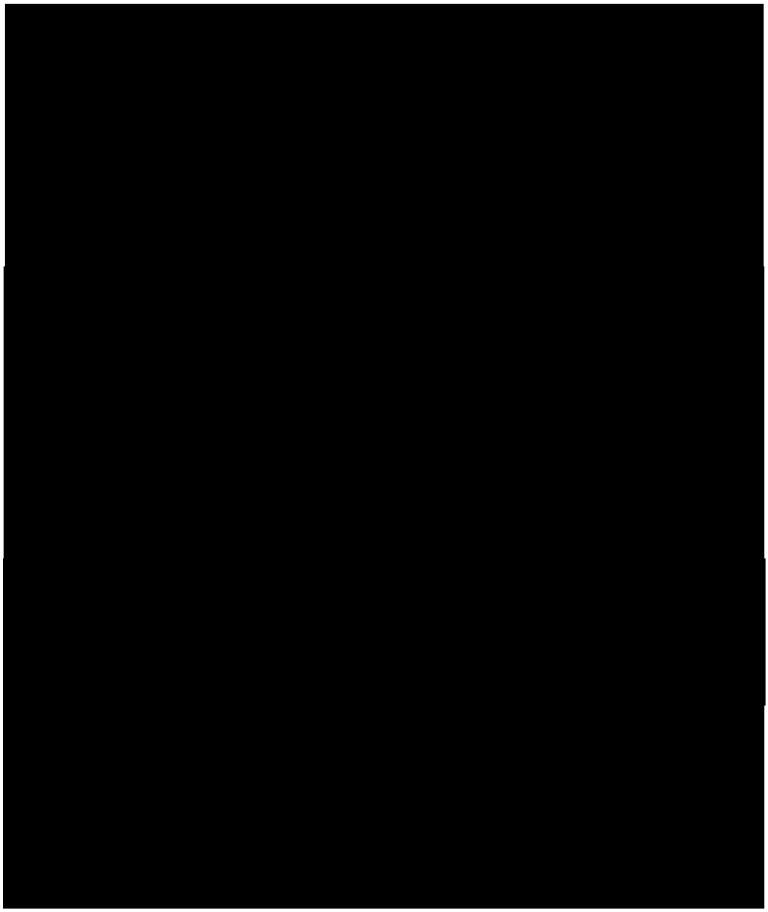
Reversed and remanded.

ARKANSAS PROFESSIONAL BAIL BONDSMAN LICENSING BOARD *v.* Marc OUDIN, Jr., and Bail Bond Financing, Inc.

01-782 69 S.W.3d 855

Supreme Court of Arkansas
Opinion delivered March 21, 2002

[Petition for rehearing denied April 25, 2002]



Mark Pryor, Att'y Gen., by: *Kim Evans*, Ass't Att'y Gen., for appellant.

David A. Hodges, for appellees.

ANNABELLE CLINTON IMBER, Justice. Appellant Arkansas Professional Bail Bondsman Licensing Board challenges the Pulaski County Circuit Court's reversal of its decision to sanction Appellees Marc Oudin, Jr., and Bail Bond Financing, Inc., for the dual ownership of a bail bond company and a fine-collection company that serve a common court. The Board concluded that Mr. Oudin's dual ownership of the companies violated Section 17 B of Rule and Regulation 1 of the Arkansas Professional Bail Bondsman Licensing Board. We hold that substantial evidence supports the Board's decision. Accordingly, we reverse the circuit court's order and remand with directions to reinstate the Board's decision.

Mr. Oudin is the owner and sole shareholder of a bail bond company, Bail Bond Financing, Inc., and the owner and sole shareholder of Court Services, Inc., a company that assists various courts in collecting outstanding fines and warrant forfeitures in return for fees and service charges. The Board held a disciplinary hearing on April 9, 1999, to determine whether Mr. Oudin's conduct violated the Bail Bondsman Licensing Law at Ark. Code Ann. §§ 17-19-101 to 17-19-212 (Repl. 2001) or the rules and regulations governing the bail bond profession. The Board found that Bail Bond Financing provides bond services to the Pine Bluff Municipal Court and that Court Services has contracted to provide its fine-collection services to the Pine Bluff Municipal Court. The Board concluded that Mr. Oudin's dual ownership of the companies was in violation of Section 17 B of Rule and Regulation 1 of the Arkansas Professional Bail Bondsman Licensing Board. That regulation prohibits an owner, partner, officer, or stockholder of a bail bond company from being "regularly or frequently employed by" a court of law. The Board sanctioned Appellees by suspending Marc Oudin, Jr.,'s professional bail bondsman license for six months and by fining Bail Bond Financing, Inc., in the amount of $5,000.

Following the Board's decision, Appellees appealed to the Pulaski County Circuit Court pursuant to the Arkansas Administrative Procedure Act at Ark. Code Ann. § 25-15-201 to 25-15-214 (Repl. 1996 and Supp. 2001). The circuit court found that the Board was within its authority to take action, that the correct standard of review was substantial evidence, and that substantial evidence existed to support the Board's finding of a contract between Court Services and the Pine Bluff Municipal Court. The court concluded that, due to apparently contradictory Attorney General's opinions on the subject, the petitioners had not met their burden of showing there was no substantial evidence to support the Board's finding that Court Services was "regularly or frequently employed by" Pine Bluff Municipal Court. The circuit court ultimately decided, however, that because Court Services is an independent contractor, rather than an employee, of the Pine Bluff Municipal Court, Appellees were not in violation of Rule and Regulation 1, Section 17 B. As a result, the court reversed

the Board's decision imposing sanctions. For its one point on appeal, the Board contends that its decision finding Appellees in violation of Section 17 B of Rule and Regulation 1 was based upon substantial evidence and was not arbitrary and capricious.

I. Standard of Review

This court's review is limited in scope and is directed not to the decision of the circuit court but to the decision of the administrative agency. *Arkansas Cont. Lic. Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001); *Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000). "It is not the role of the circuit courts or the appellate courts to conduct a *de novo* review of the record; rather, review is limited to ascertaining whether there is substantial evidence to support the agency's decision." *Tomerlin v. Nickolich*, 342 Ark. at 331, 27 S.W.3d at 749; *Arkansas Bd. of Exam'rs v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998). *See also Arkansas Dep't of Human Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). We review the entire record in making that determination. *Arkansas Bd. of Exam'rs v. Carlson, supra*; *Arkansas Alcoholic Beverage Control v. Muncrief*, 308 Ark. 373, 825 S.W.2d 816 (1992).

This court has previously noted:

> [A]dministrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. Because decisions regarding the licensing of bond companies and their employees turn on executive wisdom, it is appropriate to limit the scope of the review on appeal.

Tomerlin v. Nickolich, 342 Ark. at 332-33, 27 S.W.3d at 750 (citations omitted). Thus, our review of administrative decisions is limited in scope. Administrative decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499

(1999); *In re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992). These standards are consistent with the provisions of the Administrative Procedure Act at Ark. Code Ann. §§ 25-15-201 to 25-15-214:

> [R]eview is limited to ascertaining whether there is substantial evidence to support the agency's decision or whether the agency's decision runs afoul of one of the other criteria set out in section 25-15-212(h).

Arkansas Cont. Lic. Bd. v. Pegasus Renovation Co., 347 Ark. at 326, 64 S.W.3d at 244-45; *Arkansas State Racing Comm'n. v. Ward, Inc.*, 346 Ark. 371, 57 S.W.3d 198 (2001); *Arkansas Bd. of Exam'rs v. Carlson, supra.*

Arkansas Code Annotated § 25-15-212(h) provides that this court may reverse or modify the Board's decision

> if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the agency's statutory authority;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error or law;
>
> (5) Not supported by substantial evidence of record; or
>
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

Ark. Code Ann. § 25-15-212(h) (Supp. 2001). In making this determination, we review the entire record and give the evidence its strongest probative force in favor of the agency's ruling. *Arkansas Health Servs. Agency v. Desiderata, Inc.*, 331 Ark. 144, 958 S.W.2d 7 (1998). "[B]etween two fairly conflicting views, even if the reviewing court might have made a different choice, the board's choice must not be displaced." *Arkansas Contr. Lic. Bd. v. Pegasus Renovation Co.*, 347 Ark. at 327, 64 S.W.3d at 245; *Jackson v. Arkansas Racing Comm'n*, 343 Ark. 307, 34 S.W.3d 740 (2001).

Substantial evidence is defined as "valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture." *Tomerlin v. Nickolich*, 342 Ark. at 333, 27 S.W.3d at 751 (quoting *Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 362, 994 S.W.2d 456, 461 (1999)). The challenging party has the burden of proving an absence of substantial evidence. *Id.* To establish an absence of substantial evidence, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* "The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made." *Id.*

As for our rule regarding the determination of whether an administrative action is arbitrary and capricious, this court said in *Arkansas Cont. Lic. Bd. v. Pegasus Renovation Co.*:

> Administrative action may be regarded as arbitrary and capricious where it is not supportable on any rational basis. To have an administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case. We have stated that the requirement that administrative action not be arbitrary and capricious is less demanding than the requirement that it be supported by substantial evidence. . . . [O]nce substantial evidence is found, it automatically follows that a decision cannot be classified as unreasonable or arbitrary.

347 Ark. at 332, 64 S.W.3d at 248 (citations omitted).

II. The Board's Authority

The Board maintains that it acted within its authority in conducting a hearing and imposing sanctions against Appellees for a violation of Section 17 B of Rule and Regulation 1 of the Arkansas Professional Bail Bondsman Licensing Board.[1] Rule and Regulation 1, Section 17, states:

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[1] Pursuant to Ark. Code Ann. § 17-19-106(b)(5) (Repl. 2001), the Board is authorized to adopt and enforce rules and regulations "to enable it to effectively and

> A bail bond company license shall not be issued or renewed if any owner, partner, stockholder or officer:
>
> . . . .
>
> B. Is regularly or frequently employed by:
>
> (1) A court of law; . . .

The Board argues that, though the licenses of Appellees were not up for issuance or renewal at the time of the hearing, Ark. Code Ann. § 17-19-210(a)(1) authorizes the Board to take action against a license if it is determined, after notice and a hearing, that the licensee has "[v]iolated any provision of, or any obligation imposed by, [ ] any lawful rule, regulation, or order of the board . . . ." The Board also relies on language from *Bob Cole Bail Bonds, Inc. v. Howard*, 307 Ark. 242, 819 S.W.2d 684 (1991), indicating that "the bondsman retains his license with an annual renewal application, barring any violations of the provisions of Act 417 [of 1989][2] or the rules and regulations of the commissioner."

Appellees, on the other hand, contend that the Board went beyond the scope of its authority in sanctioning them because, according to the prefatory language of the regulation, the provision only applies when a license is being "issued or renewed." Appellees' licenses did not expire until December 31, 1999. The hearing was held by the Board on April 9, 1999, and its decision was issued on April 13, 1999. Therefore, Appellees argue that the provisions of Rule and Regulation 1, Section 17, were inapplicable to them because their licenses were not up for renewal at the time. Based upon this argument, they contend that Section 17 B is an insufficient basis upon which the Board could take action under section 17-19-210(a)(1).

Appellees further assert that we should follow our decision in *Arkansas Contr. Lic. Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001), by holding that the clear language of the statute in question indicates that it should be utilized by the Board to decide only when to issue an original license or renew a license

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efficiently carry out its official duty of licensing and regulating professional bail bond companies and professional bail bondsmen."

[2] Act 417 of 1989 was the original act governing the practice of bail bondsmen.

and not to determine whether misconduct has occurred. Reliance upon *Pegasus*, however, is fundamentally misplaced. In *Pegasus*, this court was interpreting two statutes pertaining to the Contractor's Licensing Board. The list of acts deemed to be grounds for revocation of a license was contained in a specific statute, Ark. Code Ann. § 17-25-308, and was different from the factors listed in a separate statute, Ark. Code Ann. § 17-25-305, indicating the qualifications required for issuance or renewal of a contractor's license. We concluded, interpreting those specific statutes, that the plain language of section 17-25-305 made it clear that the trial court erred in using the elements specifically applicable to issuance or renewal to determine whether "misconduct" had occurred under the separate provision of section 17-25-308. The two statutes interpreted in that case present a different scenario than does the regulation now before us.

The Board advances the policy argument that allowing Appellees to violate or transgress Section 17 B between renewal periods would completely undercut the legislative intent for having regulations in the first place. We agree. Section (a)(8) of Ark. Code Ann. § 17-19-210 clearly indicates the legislature's intent that the licenses of professional bail bondsmen and bond companies may be suspended when the bondsman or company has failed to comply with the Board's rules and regulations. By authority of that statute, the Board may

> suspend for up to twelve (12) months or revoke or refuse to continue any license issued pursuant to the provisions of this chapter if, after notice and hearing, the board determines that the licensee or any member of a company which is so licensed has:
>
> . . . .
>
> (8) Failed to comply with . . . rule, regulation, or order of the board for which issuance of the license could have been refused had it then existed and been known to the board.

Ark. Code Ann. § 17-19-210(a)(8) (Repl. 2001). In addition, Arkansas Code Annotated § 17-19-211 (Repl. 2001) provides for an alternative sanction of an administrative penalty not to exceed $5000 against a licensee where grounds exist for the suspension or revocation of the license. Accordingly, we conclude that the Board did not act outside its authority when it conducted a hear-

ing and imposed sanctions upon Appellees for a violation of Section 17 B of Rule and Regulation 1.

III. Regular or Frequent Employment by a Court of Law

A. Parties to the Contract

The Board concluded that a violation of Section 17 B of Rule and Regulation 1 occurred based on its finding that "[Mr. Oudin] is the owner of a bail bond company and a company [Court Services] which is regularly or frequently employed by a court of law." Though the introductory paragraph of Court Services' contract for services states that the agreement is between Court Services and the City of Pine Bluff, the Board points to substantial evidence that the contract is between Court Services and the Pine Bluff Municipal Court. The evidence in favor of the Board's decision consists of the following: (1) the third recital of the contract states, "[*w*]*hereas*, A.C.A. section 16-17-217(a) (Repl. 1994) authorizes the Municipal Court, upon approval of the governing body of a municipality, to execute a contract with a person for the collection and enforcement of fines and costs;" (2) Paragraph No. 1 of the contract states, "Court Services is hereby retained by the Municipal Court to monitor and collect installment payments of fines and court costs;" (3) Paragraph No. 2 of the contract lists certain services that Court Services will provide "in cooperation with the Municipal Court;" and (4) the contract is signed by Mr. Oudin and both the Mayor of Pine Bluff and the Pine Bluff Municipal Judge.

In spite of the above-referenced language in the contract, Appellees maintain that the contract at issue was solely between Court Services and the City of Pine Bluff and that Court Services performs a service for the municipal court that is not prohibited by applicable statutes, rules, or regulations. In support of this argument, Appellees point out that the Pine Bluff City Council passed an ordinance on December 21, 1998, waiving competitive bidding and authorizing the mayor, municipal judge, and city clerk to execute the contract with Court Services for the collection of outstanding fines. They also emphasize Mr. Oudin's testimony that Court Services provides a service for the court but

actually contracts with the city and county governments and his testimony that employees of Court Services have no contact with the municipal judge.

Once again, our standard of review requires us to review the agency's decision, giving the evidence its strongest probative force in favor of the agency's decision, and to determine whether the Board's decision is supported by substantial evidence. Pursuant to this standard of review, viewing the evidence in the Board's favor, we conclude that there is substantial evidence to support the Board's decision that the contract is between Court Services and the Pine Bluff Municipal Court.

B. Independent Contractor Status

We turn next to the Board's argument that the status of Court Services as an independent contractor is irrelevant to the Board's interpretation of Rule and Regulation 1, Section 17 B. There is no dispute that, according to the contract at issue, "Court Services acts as an independent contractor and is not an agent, employee or servant of the City." The Pulaski County Circuit Court, in its order entered on March 26, 2001, reversed the Board and concluded that Rule and Regulation 1, Section 17 B, does not apply to independent contractors. We disagree and hold that the Board's interpretation of the regulation is not clearly wrong.

The Board admittedly relied upon Attorney General's Opinion No. 98-194 as to the relevance of Court Services' status as an independent contractor. We need not address the effect of that opinion, however, other than to note that Attorney General's opinions are not binding precedent. *See, e.g., City of Fayetteville*, 304 Ark. 179, 801 S.W.2d 275 (1990); *Klinger v. City of Fayetteville*, 293 Ark. 128, 732 S.W.2d 859 (1987).[3]

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[3] Likewise, we need not consider the Board's assertion that Attorney General's Opinion No. 98-194 provided substantial evidence for its decision; nor must we consider Appellees' assertion that the opinion does not constitute substantial evidence. As Attorney General's opinions are not binding authority, such opinions cannot constitute substantial evidence nor show a lack thereof.

The first rule in considering statutory meaning is to construe the statute exactly as it reads, giving the words their ordinary and usually accepted meaning. *See, e.g., Bob Cole Bail Bonds, Inc. v. Howard*, 307 Ark. 242, 819 S.W.2d 275 (1991). An administrative agency's interpretation of its own regulation will not be overturned unless it is clearly wrong. *Arkansas Dep't of Human Servs. v. Hillsboro Manor Nursing Home, Inc.*, 304 Ark. 476, 803 S.W.2d 891 (1991). It is also important to note that, in considering the administrative intent behind a regulation, this court should not engage in interpretations that defy common sense and produce absurd results. *See, e.g., Green v. Mills*, 339 Ark. 200, 4 S.W.3d 493 (1999). Appellees assert that the phrase "regularly or frequently employed" does not ordinarily refer to independent contractors because the term "frequently employed" could apply to temporary workers and does not necessarily apply to independent contractors. They further claim, without citation to authority, that because independent contractors are not specifically mentioned within the regulation's prohibition they are necessarily excluded.

These arguments assume that independent contractors are not "employed" by those for whom they work. Though Appellees are correct in asserting that there is a clear distinction between employees and independent contractors, it does not follow that independent contractors are not "employed." The specific arguments made by Appellees elucidate the flaw in their logic. Appellees point out several indicia of an independent-contractor relationship. For example, they assert that "[c]haracteristic of an independent contractor relationship is that the *employer* does not possess the power of controlling the person as to the details of the stipulated work." (Emphasis added). *See Jackson v. Petit Jean Elec. Co-op*, 268 Ark. 1076, 599 S.W.2d 402 (1980). Appellees also point out that circumstances to consider in determining whether a workman is an independent contractor include the time for which a workman is *employed* and the right to terminate *employment* without liability. *See Arkansas Transit Homes v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000); *Parker Stave Co. v. Hines*, 209 Ark. 438, 190 S.W.2d 620 (1945). These specific arguments indicate that independent contractors, though

clearly not employees within the legal definition, are still considered to be "employed" by those for whom they work. A holding by this court that the regulations preventing bail bondsmen and bail bond companies from engaging in employment with courts of law do not apply where the bondsmen or bond companies are independent contractors, rather than employees, of such courts would produce absurd results. Likewise, exempting independent contractors would defeat the purpose of the regulation, which is to prevent objectionable conflicts of interest. *See* Ark. Code Ann. § 17-19-105 (Repl. 2001) (prohibiting bondsmen or bond companies from giving or promising anything of value to a person who has power to hold in custody).

Appellees further their argument that Section 17 B of Rule and Regulation 1 does not apply to them by underscoring the fact that, in addition to being an independent contractor, Court Services, Inc., is a corporation. They maintain that Court Services and the bail bond company are separate corporate entities and the Board improperly pierced the corporate veil in order to find liability. This argument is without merit. The Board's order simply states:

> 1. That Marc Oudin is a bail bondsman licensed by this Board. He owns and is President of Bailbond Financing, Inc., which is also licensed by this Board.
>
> 2. That Marc Oudin is the President and owner of Court Services, Inc., a corporation which has contracted with various cities to collect fees assessed by their Municipal Courts.
>
> . . . .
>
> Respondent, Marc Oudin violated Section 17 of Rule and Regulation 1 in that he is the owner of a bail bond company and a company which is regularly or frequently employed by a court of law.

As demonstrated by its order, the inquiry before the Board under Section 17 B of Rule and Regulation 1 was whether any owner, partner, stockholder, or officer of a bail bond company was regularly or frequently employed by a court of law. Clearly, Marc Oudin, Jr., is the owner, sole shareholder, and contact person for a bail bond company, Bail Bond Financing, Inc.

Marc Oudin, Jr., is also the owner, sole shareholder, and contact person for Court Services, which is regularly employed by the Pine Bluff Municipal Court. Pursuant to our standard of review, we cannot say that the Board's interpretation of Rule and Regulation 1, Section 17 B, is clearly wrong.

Reversed and remanded with directions to reinstate the Board's decision.

CORBIN, J., not participating.

Makybe Shinda HARSHAW *v.* STATE of Arkansas

CR 01-847 71 S.W.3d 548

Supreme Court of Arkansas
Opinion delivered April 4, 2002

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

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

W. H. "Dub" Arnold, Chief Justice. Appellant Makybe Shinda Harshaw was previously before us in *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001), wherein Harshaw appealed the trial court's refusal to instruct the jury on the lesser-included offense of manslaughter on a second-degree murder charge. On appeal, we held there was sufficient evidence presented which would support a finding that Harshaw formed his belief in the need for the use of deadly force too hastily and without due care, or recklessly. Accordingly, a manslaughter instruction was warranted, and the trial court committed reversible error by failing to allow the proffered manslaughter instruction. On remand and retrial for the second-degree murder charge, Harshaw was again found guilty of second-degree murder. Harshaw, now, brings this appeal, raising the point of whether the trial court erred in denying his motion for directed verdict. We hold that the trial court's ruling was correct, and, therefore, affirm.

Background

On remand, Harshaw's trial began on March 29, 2001, in Pulaski County Circuit Court and a jury sat as the trier of fact. The evidence presented revealed that on or about July 8, 1998,

Harshaw was playing cards and drinking beer with friends at a house in southwest Little Rock. At some point during the night, Harshaw left the residence to drive a friend home. Upon returning to the house, he found that Cunningham had arrived at the residence and was standing in the driveway arguing with a woman identified as "Chan." She was the mother of Cunningham's child. Harshaw took it upon himself to intervene in the argument between Cunningham and Chan. Cunningham apparently took offense and told Harshaw that the matter was none of his business. According to Harshaw's testimony and that of other eyewitnesses, Cunningham then made several statements insinuating that if there was a problem, he would settle it with a gun.

Thereafter, Harshaw testified that he and Cunningham both turned and went to their respective cars. Several eyewitnesses stated that Cunningham reached into his car through the window on the driver's side of the car. At the same time, Harshaw went to the trunk of his car, opened it, and retrieved a shotgun. As Cunningham came back up from reaching into the car, Harshaw shot him in the chest. Harshaw testified that he was afraid Cunningham was about to pull a pistol from his car and shoot him. As it turned out, Cunningham did not have a gun. Actually, there was testimony from an eyewitness that Cunningham had his empty hands raised in the air when Harhsaw fired his weapon.

At the conclusion of the State's presentation of its case-in-chief, Harhsaw moved for a directed verdict on the second-degree murder charge on the basis that the State failed to prove Harshaw knowingly caused the victim's death under circumstances manifesting extreme indifference to the value of human life. The trial court denied Harshaw's motion for a directed verdict. Harshaw rested without presenting a case-in-chief. Thereafter, defense counsel renewed the directed-verdict motion, which the trial court did not rule on.

The jury was instructed on the "knowingly/extreme indifference to the value of human life" definition of second-degree murder and was instructed on the "recklessly" definition of manslaughter, which was consistent with this court's previous findings. Harshaw was found guilty of second-degree murder, and after a

brief sentencing hearing the jury imposed on Harshaw a sentence of nineteen years' imprisonment. The trial court sentenced Harshaw accordingly. It is from this conviction and sentence this appeal arises.

Motion for Directed Verdict

Harshaw's sole point on appeal is whether the trial court erred in denying Harshaw's motion for directed verdict because the circumstantial proof of Harshaw's culpable mental state was such that the jury was left to speculate whether Harshaw caused the victim's death knowingly or recklessly.

The culpable mental state for second-degree murder is that the defendant knowingly caused the victim's death under circumstances manifesting extreme indifference to the value of human life. Harshaw argues this court should reverse the conviction based upon circumstantial evidence that leaves the fact-finder only to speculation in choosing between two equally reasonable conclusions.

The standard of review we apply when reviewing a defendant's contention that the State failed, at trial, to prove his or her guilt is well established. In a jury trial, a defendant challenges the sufficiency of the State's proof of his guilt by moving for a directed verdict at the close of the State's presentation of its case-in-chief and again at the close of the presentation of all the evidence. Ark. R. Crim. P. 33.1(a). A motion for directed verdict is a challenge to the sufficiency of the evidence. *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001). A directed-verdict motion should be granted when there is no evidence from which the finder of fact could have found, without resorting to surmise and conjecture, the guilt of the defendant. *Nichols v. State*, 280 Ark. 173, 655 S.W.2d 450 (1983). When a defendant challenged the sufficiency of the evidence, this court considers only the evidence that supports the guilty verdict. *Britt v. State, supra.* The court also views the evidence in light most favorable to the State. *Britt, supra.*

Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and

inconsistent with any other reasonable conclusion. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Such a determination is a question of fact for the fact-finder to determine. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). The credibility of witnesses is an issue for the jury and not the court. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Phillips, supra.* We will disturb the jury's determination only if the evidence did not meet the required standards, thereby leaving the jury to speculation and conjecture in reaching its verdict. *Philips, supra.* When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it. *Phillips, supra.* Additionally, the longstanding rule in the use of circumstantial evidence is that the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused to be substantial, and whether it does is a question for the jury. *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000).

During retrial, Harshaw moved for a directed verdict at the closing of the State's case and the motion was then renewed after the defense rested without presenting a case-in-chief. The trial court denied the motions. Harshaw argues to this court that the State did not present circumstantial evidence that, when he shot the victim at point-blank range with a shotgun, he "knowingly" caused death "under circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. § 5-10-103(a)(1) (Repl. 1997). The trial court instructed the jury with the "recklessly" definition of manslaughter as a lesser-included offense of second-degree murder. This definition of manslaughter, a Class C felony, states that "a person commits manslaughter if: he recklessly causes the death of another person." Ark. Code Ann. § 5-10-104(a)(4) (Repl. 1997).

Harshaw further argues to this court that when the trial court instructed the jury on the definitions of the culpable mental states of both knowingly and recklessly, it left the jury to speculate whether Harshaw caused the victim's death knowingly or recklessly. Harshaw contends this is so because the jury could reasonably conclude that Harshaw caused the victim's death either

knowingly under circumstances manifesting extreme indifference to the value of human life or recklessly in that Harhsaw consciously disregarded a substantial and unjustified risk that the victim's death would result from Harshaw's conduct.

[redacted] However, a person's intent or state of mind at the time of the offense is seldom apparent. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990). But, the intent can be inferred from the type of weapon used, the manner of use, and the nature, extent, and location of the trauma suffered by the victim. *Stanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

In this case, Harshaw used a shotgun to murder an unarmed man at point-blank range despite the victim's obvious signal that he posed no threat. The trial court followed this court's findings in *Harshaw v. State*, 344 Ark. 129, and instructed the jury on second-degree murder and manslaughter. Under these facts, the jury could, and did, infer that Harshaw knowingly killed his victim with extreme indifference to the value of human life.

[redacted] The jury heard testimony from witnesses presented by the State and determined that Harshaw should be convicted of second-degree murder because he knowingly caused Cunningham's death under circumstances manifesting extreme indifference to the value of human life. The jury obviously determined the credibility of the witnesses and resolved any questions of conflicting testimony in favor of the State. The jury was not left to speculate on whether Harshaw caused Cunningham's death knowingly or recklessly. The jury chose to convict on the second-degree murder charge. Therefore, this court should not disturb the jury's conviction and sentence. It is reasonable that Harshaw "knew" he would cause death to Cunningham when he pulled a shotgun out of the trunk of his car and shot Cunningham at point-blank range. The jury was not left to speculation that Harshaw either knowingly acted with extreme indifference to the value of human life or recklessly and consciously disregarded a substantial and unjustified risk that Cunningham's death would result from Harshaw's conduct.

Therefore, we affirm the trial court's order denying Harshaw's motion for directed verdict.

Affirmed.

Juan GOMEZ, Individually and on Behalf of the Estate of Herminia Espinoza Gomez, *Deceased*, and Juan Castorena, Jesus Castorena, Valentin Castorena, and Gilberto Castorena *v.* ITT EDUCATIONAL SERVICES, INC., *d/b/a* ITT Technical Institute

01-1089 71 S.W.3d 542

Supreme Court of Arkansas
Opinion delivered April 4, 2002

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Henry & Cullen LLP, by: *Tim Cullen*; and *Law Offices of Bruce Flint, P.C.*, by: *Bruce Flint*, for appellants.

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

TOM GLAZE, Justice. Herminia Gomez, the wife of appellant Juan Gomez, was murdered in Dallas County, Texas, on March 11, 1998, by Bobby Turner, a recruiter employed by ITT Educational Services, Inc., d/b/a ITT Technical Institute ("ITT Technical"). On February 18, 2000, Mrs. Gomez's family filed a wrongful-death lawsuit in Dallas County, Texas, purporting to name ITT Technical as defendant, and alleging that ITT Technical had negligently hired Turner without discovering his extensive criminal record. However, the Gomez suit named the wrong defendant, and actually sued a company called "ITT Teleco," which is unrelated to ITT Technical. On July 7, 2000, more than two years after the murder, the Gomezes amended the original

complaint to add ITT Technical as a defendant and dismiss ITT Teleco; ITT Technical moved for summary judgment on the grounds that Texas' two-year statute of limitations for wrongful-death actions had already expired. The Gomezes took a voluntary nonsuit in the Dallas County case before an adverse judgment could be entered.

ITT Technical operates schools in 27 states, including Arkansas. On February 15, 2001, within three years of Herminia's murder, the Gomez family filed a wrongful-death action in Pulaski County Circuit Court, again alleging ITT Technical's negligent hiring of Turner. ITT Technical answered and admitted jurisdiction and venue. ITT Technical then filed a motion for summary judgment, arguing that, applying conflict-of-law considerations, Texas' shorter two-year statute of limitations should apply to bar the action. After a hearing on June 26, 2001, the Pulaski County court granted ITT Technical's motion for summary judgment. From the order granting that motion, the Gomezes bring the instant appeal, arguing that the trial court erred in applying the shorter, two-year statute of limitations instead of Arkansas' three-year statute of limitations.

The facts in this case are undisputed; every relevant action took place in the State of Texas, and every party is a resident of that state. The sole question on appeal is whether Texas' or Arkansas' statute of limitations should apply. Arkansas's wrongful death act is codified at Ark. Code Ann. § 16-62-102 (Supp. 2001); this statute provides that "[e]very action authorized by this section shall be commenced within three (3) years after the death of the person alleged to have been wrongfully killed." § 16-62-102(c)(1). In Texas, the statutory provision allowing a cause of action for wrongful death is Tex. Civ. Prac. & Rem. Code Ann. § 17.002 (1997), and § 16.003(b) states that "[a] person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death."

The Gomezes contend that statutes of limitation are procedural in nature, and as such, the Arkansas court should have applied Arkansas's own procedural law. Further, he argues that Arkansas has abandoned the rule of *lex loci delicti*, or the law of the

place where the wrong took place, and has instead adopted a modified rule, as set out in *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977). With respect to his first argument, we note that statutes of limitations are indeed generally considered to be procedural in nature. *See, e.g.*, *Bodiford v. Bess*, 330 Ark. 713, 956 S.W.2d 861 (1997). However, this court has also held that statutes of limitations are to be distinguished from statutes which create a right of action not existing at common law and restrict the time within which action may be brought to enforce the right. *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988). Although the general rule is that a true statute of limitations extinguishes only the right to enforce the remedy and not the substantive right itself, the limitation of time for commencing an action under a statute creating a new right enters into and becomes a part of the right of action itself and is a limitation not only of the remedy but of the right also; the right to recover depends upon the commencement of the action within the time limit set by the statute, and if that period of time is allowed to elapse without the institution of the action, the right of action is gone forever. *Id.* at 424 (citing 51 Am. Jur. 2d *Limitation of Actions* 15). Thus, time limitations which are set out in a statute creating a right — such as the statute of limitations contained within the wrongful-death act — are substantive, not procedural in nature.

A leading author on the subject of conflicts of laws has similarly set forth the following well-settled exception to the traditional rule that forum law governs statutes of limitations:

> When a statute which creates a right specifies that the existence of its new creation shall continue only for a limited length of time, there is no existent right beyond what the statute has created, *and no other state, even though its statute would allow a longer period for such suits, will entertain an action on a right which has ceased to exist.* Death acts are characteristic in this respect, since the action for wrongful death is in the states wholly statutory, and the death acts often state specifically that actions thereunder must be brought within a named time after the death. *Thus a forum state will refuse to entertain an action for wrongful death brought later than the one-year period allowed for the bringing of such actions in the state where the tort occurred, even though the two-year period set by the forum's wrongful death act has not yet passed.*

Robert A. Leflar, *American Conflicts Law* § 127, at 254 (3d ed. 1977) (emphasis added).

Other authorities offer similar instructions. The Restatement (Second) of Conflict of Laws § 143, dealing with foreign statutes of limitations barring a right, provides that "[a]n action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy." The commentary to this section states that "it is for the forum courts to determine whether a foreign statute of limitations bars the right and not merely the remedy. The almost invariable prerequisite is that the liability sought to be enforced must have been created by statute. Once this requirement has been met, the usual test is whether, in the opinion of the forum, the limitation provision was directed to the right 'so specifically as to warrant saying that it qualified the right.'" Section 143, cmt. c (citing *Davis v. Mills*, 194 U.S. 451 (1904)). The most common situation where this occurs, comment c goes on to read, "is when a statute creates but a single right of action and also contains a provision limiting the time in which actions under the statute may be brought. Wrongful death statutes are typical examples of statutes of this sort." *Id.*

Thus, Arkansas must determine whether Texas's wrongful-death statute of limitations bars the right and not merely the remedy. The Texas Court of Appeals has held that, "with statutorily created actions, time limits are not procedural statutes of limitations, but are substantive qualifications and conditions restricting the right to bring wrongful death actions." *Trunkhill Capital, Inc. v. Jansma*, 905 S.W.2d 464 (Tex. App.—Waco 1995); *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789 (Tex. 1974). Clearly, then, the trial court here did not err in determining that Texas law should apply to bar Gomez's action.

Gomez offers an additional argument, however, and suggests that this court should apply the five "choice influencing considerations" we utilized in *Wallis*, *supra*. These five factors are as follows: 1) predictability of results; 2) maintenance of interstate and international order; 3) simplification of the judicial task; 4) advancement of the forum's governmental interests; and 5) appli-

cation of the better rule of law. *Wallis*, 261 Ark. at 629.; *see also* Leflar, §§ 103-107, at 205-15. Gomez further contends that the *Wallis* court impliedly overruled and abandoned the *lex loci delicti* rule that this court had consistently applied up until the *Wallis* case. *See McGinty v. Ballentine*, 241 Ark. 533, 408 S.W.2d 891 (1966); *Wheeler v. Southwestern Greyhound Lines, Inc.* 207 Ark. 601, 128 S.W.2d 214 (1944); *Earnest v. St. Louis, Memphis, & S.E. Railway Co.*, 87 Ark. 65, 112 S.W. 141 (1908).

In *Schlemmer v. Fireman's Ins. Co.*, 292 Ark. 344, 730 S.W.2d 217 (1987), this court noted that it had adopted the Leflar choice-influencing approach in *Wallis* and had continued to use the approach. *Schlemmer*, 292 Ark. at 346 (citing *Williams v. Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978)). However, neither *Schlemmer* nor *Wallis* explicitly overruled *McGinty* and the other earlier cases applying the more mechanical *lex loci delicti* rule. Nor do we find it necessary to overrule *McGinty* and its progeny here. Instead, the adoption of the Leflar factors in *Wallis* and subsequent cases appears to be merely a softening of what previously had been a rigid formulaic application of the former rule of law.

This conclusion is consistent with Leflar's commentary on the issue. In *American Conflicts Laws*, Leflar states that these five considerations "do not furnish rules of thumb for the decision of every conflicts case. *The considerations tie in with the common law as it has already developed, and they assume that the mass of developed common law on choice of law will continue to serve its precedential function.*" Leflar, § 108, at 215 (emphasis added). Leflar continues as follows:

> The function of the considerations should be to assure a continuing reexamination of precedents, a readiness to lay aside old mechanical rules that turn out to be without support in the considerations or that contradict them, *yet at the same time to promise a reaffirmation of old rules, or at least of old results, that conform to and implement the considerations.*

Id. at 216 (emphasis added).

However, even applying these five considerations to the case before us, we would still reach the same conclusion.[1] The first factor is predictability of results. Leflar noted that this consideration "includes the . . . ideal that the decision in litigation on a given set of facts should be the same regardless of where the litigation occurs, so that forum-shopping will benefit neither party." Leflar, § 103, at 205. It cannot be denied that the Gomez family engaged in forum-shopping in this case, as they chose a nearby state with a wrongful death act that essentially differed from Texas' only in the amount of time in which a suit could be brought. Otherwise, however, the issue of predictability of results is not necessarily a paramount concern in this case, as the wrongful-death statutes provide a similar remedy for plaintiffs (but for the statute of limitations).

The second factor, maintenance of interstate and international order, is similarly not of great concern here, because residents of Texas are not likely to venture to Arkansas to engage in tortious conduct, nor are potential Arkansas defendants generally going to go to Texas to cause a wrongful death in order to avail themselves of the shorter statute of limitations. However, Leflar notes that "[d]eference to sister state law in situations in which the sister state's substantial concern with a problem gives it a real interest in having its law applied, even though the forum state also has an identifiable interest, will at times usefully further this part of the law's total task." Leflar, § 104, at 208. Applying this consideration further militates in favor of applying Texas law, because that is the state with the more "substantial concern with [the] problem," as every actor and event is situated in that state.

The third consideration, simplification of the judicial task, is ordinarily not a paramount consideration, because the "law does not exist for the convenience of the court that administers it, but for society and its members." Leflar, § 105, at 208. Dr. Leflar

[1] Leflar noted that not every case will involve a consideration of each of the five factors, citing *Clark v. Clark*, 107 N.H. 851, 222 A.2d 205 (1966) (wherein the New Hampshire Supreme Court commented that several of the factors were "largely irrelevant"). Leflar, § 108, at 217. Likewise, in *Wallis*, our court relied on a Mississippi case that looked only to the last two factors. *Wallis*, 261 Ark. at 629 (citing *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968)).

further observed that, where the out-of-state rule is outcome-determinative and easy to apply, "there is no good reason why the possibility of importing it as part of the out-of-state law governing the case should not be seriously considered." *Id.* at 209. Here, of course, the application of Texas law is outcome-determinative and easy to apply.

The fourth factor, however, is the advancement of the forum's governmental interests. This consideration weighs heavily in our analysis, because of the tangential nature of the parties' connections with this state. Simply put, Arkansas has few, if any, governmental interests in this case. As pointed out repeatedly above, every party to this action is a resident of Texas. The decedent lived in Texas; her assailant lived in Texas; her family lives in Texas; and the murder occurred in Texas. Applying Arkansas law to this case would do little or nothing to advance Arkansas's governmental interests, as no citizen of Arkansas is involved.

The final consideration is the "better rule of law." The Arkansas wrongful-death statute and the Texas wrongful-death statute both provide that a person is liable for actual damages arising from an injury that causes an individual's death. *See* Ark. Code Ann. § 16-62-102; Tex. Civ. Proc. & Rem. Code 71.002. Neither offers a "better" remedy than the other, as they both provide the same redress for the same wrong; the only difference is in the time period in which such a cause of action must be brought. The Gomez family, of course, argues that the longer statute of limitations makes Arkansas's the better rule of law. However, Arkansas simply does not have a sufficient relationship to the parties or to the injury that would cause this final consideration to be the controlling factor. The Restatement provides that "[i]n an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties *unless, with respect to the particular issue, some other state has a more significant relationship* . . . to the occurrence and the parties, in which event the local law of the other state will be applied." *Restatement (Second) of Conflicts of Law* § 175 (emphasis added). Clearly, Texas has a more significant relationship with the parties and with the issues, and Texas law should be applied in this case.

We conclude that the trial court in this matter correctly applied Texas law and determined that the two-year statute of limitations in that state barred the Gomezes' action. The trial court's grant of summary judgment to ITT Technical is, therefore, affirmed.

James HOAY *v.* STATE of Arkansas

CR 01-1108 71 S.W.3d 573

Supreme Court of Arkansas
Opinion delivered April 4, 2002

[Petition for rehearing denied May 16, 2002]

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

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

ROBERT L. BROWN, Justice. This is an appeal by appellant James Hoay from a conditional plea of guilty to possession of methamphetamine. He was sentenced to eighteen months to serve in prison followed by five years' suspended imposition of sentence. He appeals his conditional plea under Ark. R.

Crim. P. 24.3(b) based on the trial court's denial of his motion to suppress the seizure of methamphetamine following an illegal traffic stop. We reverse the order denying the suppression and remand this case for determination of the question of who was responsible for not quashing an outstanding arrest warrant that led to Hoay's invalid arrest.

On July 9, 1999, during the early evening hours, Officer Jeff Midgett of the Clay County Sheriff's Department observed a truck driven by Hoay move to the right of the fog line, cross the center line twice, and drive to the right of the fog line again for approximately one-half a mile to one mile. At that point, Officer Midgett stopped the vehicle. As the truck pulled off to the side of the road, the police officer saw the driver "bending over . . . toward the floorboard" of his vehicle. The driver identified himself as James Hoay, and he gave the police officer his driver's license. The police officer did not detect the smell of alcohol and requested no field sobriety tests. He ran the driver's license through the National Crime Information Center and found that there was an outstanding arrest warrant on Hoay issued from Greene County.

Officer Midgett then checked with two dispatchers in the Greene County Sheriff's Department and verified that an arrest warrant on Hoay was outstanding due to his failure to appear in court on a felony charge for possession of a controlled substance. The police officer returned to Hoay's vehicle and arrested Hoay on the outstanding warrant and handcuffed him. At that point he observed a bulge in one of Hoay's socks and pulled the sock down. He found a ziploc bag which contained crystal methamphetamine. In a bag with personal belongings located in the truck, Officer Midgett found a separate plastic bag and razor blades.

Hoay was charged with possession of methamphetamine and possession of drug paraphernalia. He moved to suppress the methamphetamine seized based on the fact that the Greene County warrant had been set aside and, thus, the arrest was invalid. In support of his motion, Hoay introduced a Greene County docket sheet showing that the arrest warrant was issued on Febru-

ary 11, 1999, and quashed on April 20, 1999. The motion was denied. The trial court specifically found that Officer Midgett was operating in good faith in making the arrest, though the court also noted that there was some breakdown in communication with the Greene County Sheriff's office. Hoay then entered his conditional plea to possession of methamphetamine. The drug paraphernalia charge was *nolle prossed.*

The Arkansas Court of Appeals suppressed the drugs seized and remanded the case. *Hoay v. State*, 75 Ark. App. 103, 55 S.W.3d 782 (2001). We granted the state's petition for review. When reviewing a case, we treat the matter as if the appeal were originally filed in this court. *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998).

Hoay contends on appeal that the trial court erred in denying his motion to suppress. This court has said that the proper standard for reviewing a trial court's grant of a motion to suppress is to "make an independent determination based upon the totality of the circumstances, viewing the evidence in the light most favorable to the State." *Bunch v. State*, 346 Ark. 33, 57 S.W.3d 124 (2001) (quoting *Wright v. State*, 335 Ark. 395, 983 S.W.2d 391 (1998)). The court will only reverse if the trial court's ruling is clearly against the preponderance of the evidence. *Id.*

Hoay urges that Officer Midgett lacked reasonable suspicion to effect the traffic stop. We disagree. Rule 3.1 of the Arkansas Rules of Criminal Procedure provides in part:

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

Officer Midgett observed Hoay weaving across the road lines for a substantial distance. That certainly would constitute reasonable suspicion of driving while intoxicated, even though Midgett did not smell alcohol on Hoay's breath after the stop. We conclude

that there was no error by Midgett in making the stop. *See Piercefield v. State*, 316 Ark. 128, 871 S.W.2d 348 (1994).

Hoay's primary point on appeal is that he was arrested pursuant to an invalid arrest warrant and that, as a consequence, the subsequent search was invalid. The State's retort is that Officer Midgett operated in good faith in making the arrest and seizing the drugs and, indeed, did not only receive the information regarding the outstanding warrant from the NCIC but verified it twice through the Greene County Sheriff's dispatcher.

In *United States v. Leon*, 468 U.S. 897 (1984), the United States Supreme Court set the standard for searches and seizures made in good faith. In *Leon*, the Court confronted the question of a police officer's good-faith reliance on a magistrate's determination of probable cause in issuing a search warrant which was found to be invalid. The Court said that the purpose of the exclusionary rule for unconstitutional searches is to "deter police misconduct rather than to punish the errors of judges and magistrates." 468 U.S. at 916. The Court went on to say that "[i]f exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments." *Id.* at 918. The Court further found that suppression of evidence pursuant to a warrant should be ordered only on a case-by-case basis when the purposes of the exclusionary rule will be furthered. Quoting *United States v. Peltier*, 422 U.S. 531 (1975), the Court reasoned that evidence should only be suppressed if the particular officer "had knowledge, or may properly [have been] charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. at 539). The Court concluded that where an officer is acting in good faith, using an objective standard, a subsequently invalidated warrant obtained from a magistrate will not operate to trigger the exclusionary rule. *Id.* at 920-21.

In *Arizona v. Evans*, 514 U.S. 1 (1995), the Court was confronted with a situation that bears striking similarities to the case at hand. In *Evans*, a police officer pulled the defendant over after he

violated a traffic law. After learning that the defendant's driver's license was suspended, the police officer entered the defendant's license into a data terminal in his patrol car. He discovered that the defendant had a outstanding misdemeanor warrant. Based on the outstanding warrant, the police officer arrested Evans and handcuffed him. After doing so, he discovered that Evans had a marijuana cigarette. Later, it came to light that the misdemeanor arrest warrant had been quashed seventeen days prior to the arrest, but the evidence showed that a court clerk had made the computer error and not the sheriff's office. The Court concluded that a court clerk must have been responsible for the error and, thus, exclusion of the evidence would serve no deterrent effect on the police department. The Court said:

> If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. Second, respondent offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. To the contrary, the Chief Clerk of the Justice Court testified at the suppression hearing that this type of error occurred once every three or four years.
>
> Finally, and most important, there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.
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> . . .
>
> There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record. Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees.

Id. at 14-16 (internal citations omitted). The clear import of the *Evans* decision is that the good-faith exception to the exclusionary rule is applicable for errors committed by court personnel. The converse issue of whether the good-faith exception applies when police personnel are involved in faulty recordkeeping was not reached by the Court. Justice O'Connor, however, noted in her concurrence in *Evans*: "Certainly the reliability of recordkeeping systems deserves no *less* scrutiny than that of informants." 514 U.S. at 17 (CONNOR, J., concurring). She was joined by two other justices in her concurrence. Two additional justices dissented to the *Evans* holding, albeit for different reasons, on the basis that the exclusionary rule should apply to clerical errors made by court personnel.

In the case before us, the State failed to establish who was at fault in failing to nullify the Greene County arrest warrant. While the State argues to the contrary, it was the State's burden to show that the good-faith exception to an unconstitutional search applied. *See United States v. Leon*, 468 U.S. at 924 ("[T]he prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time."). And while the State offers that Officer Midgett ostensibly acted in good faith, the State fails to address whether that good faith extended beyond Officer Midgett and to the law enforcement personnel in the Greene County Sheriff's Department. Indeed, the Court said in *Leon* that "[i]f exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officer *or the policies of their departments*." *United States v. Leon*, 468 U.S. at 918 (emphasis added). While Officer Midgett's actions are relevant to the first part of *Leon*'s concern, clearly the actions of the Greene County Sheriff's Office are relevant to determine whether the exclusion of evidence would alter the policies of that department with respect to recordkeeping and arrest warrants.

Ascertaining the scope of the fault in failing to quash an invalid search warrant is a matter of first impression for this court. Officer Midgett acted reasonably and in good faith in this case, based on what we have before us. It would fly in the face of the *Leon* principle, however, were this court to refuse to suppress the

drugs seized based on objective good faith when Greene County law enforcement personnel, as opposed to Officer Midgett, may have been at fault. If the touchstone of the exclusionary rule is deterrence of police misconduct, as *Leon* makes clear, that rule should apply equally to defective recordkeeping by law enforcement. Hence, the issue of who was at fault, court personnel or law enforcement, needs to be resolved. We note on this point that the State, as a secondary argument, does not oppose a remand to resolve this issue.

Accordingly, we reverse the order denying suppression and remand this case to the trial court for a second suppression hearing to determine who was at fault in failing to quash the arrest warrant. If law enforcement personnel were not responsible, and the error was clerical in nature, then the good-faith exception should apply. *See Arizona v. Evans*, *supra*.

Reversed and remanded.

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

W. H. "DUB" ARNOLD, Chief Justice, dissenting. I agree with the majority that Officer Midgett acted reasonably and in good faith in this case based upon what we have before us; however, I disagree with the majority that the facts of *this* case necessitate a determination of who was responsible for not quashing an outstanding arrest warrant that led to the appellant's invalid arrest. Although the identity of the person(s) who failed to remove the warrant from the computer is unknown, I believe it is clearly immaterial in *this* particular case, wherein the arresting officer from one county relied in good faith upon the information from another county and exercised exceptional care in determining that the warrant was truly outstanding before he made the arrest. In my opinion, this case illustrates a perfect example of when the good-faith exception to the exclusionary rule should apply under *Leon*, thereby saving from suppression the evidence seized during the search incident to arrest.

In *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001), we stated that the Supreme Court in *Leon* noted that the Fourth Amendment contains no provision expressly precluding the use of

evidence obtained in violation of it commands. *Id.* In interpreting *Leon*, we stated:

> The Court further noted that an examination of the Fourth Amendment's origin and purposes makes it clear that the use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong. The exclusionary rule rather works to deter future violations generally. *Leon*, 468 U.S. at 906. The Court then went on to note that if the goal is to deter future police misconduct, then it only makes sense to apply the exclusionary rule where indeed its application has a deterrent effect, and that where the officers acted in objective good faith or where the transgressions are minor, the magnitude of the benefit conferred upon guilty defendants offends the basic concepts of the justice system. *Id.* at 907. The Court found that in the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically correct, and that once the warrant issues, there is literally nothing more the officer can do in seeking to comply with the law. *Leon, supra*; *Starr v. State*, 297 Ark. 26, 759 S.W.2d 535 (1988).

Id. at 118. Certainly, in this case, there was nothing more the arresting officer could have done except ignore the outstanding warrant, and that would have been a clear dereliction of his duty. Further, and more importantly, I fail to comprehend how the suppression of the contraband discovered in *Clay* County due to an error committed by someone in the *Greene* County court system *or* by its law enforcement personnel would have *any* deterrent effect on the law enforcement personnel of Greene County, which is not the county wherein the arrest was made and the case was tried.

The majority relies heavily on the *Arizona v. Evans*, 514 U.S. 1 (1995), case to support its opinion that when police personnel are involved in faulty recordkeeping, the good-faith exception does not apply; however, I believe the majority's opinion is too far-reaching. It is basically lumping *all* police personnel, from whatever county, city, or state, together under the theory that, in so doing, it will have some sort of universal deterrent effect. This is implausible.

In *Evans*, the facts were substantially the same as the instant case with two exceptions. In both cases an officer had reasonable suspicion to make a routine traffic stop; upon checking with the patrol car's computer, the officer learned of an outstanding arrest warrant and made an arrest; upon search of the subjects and the vehicles, unlawful drugs were found; and it was subsequently learned that the arrest warrant was no longer outstanding and should have been removed from the computer. In *Evans*, there was testimony that the failure to remove the arrest warrant from the computer was the error of an employee of the clerk of the court; and, in the instant case, there was no testimony as to the reason for the error. The other difference, and the one that makes this case so distinguishable from *Evans*, was that the officer in the instant case was not satisfied just to learn of the outstanding warrant on the computer; he also made two separate calls to the neighboring county where the warrant emanated and was told by two different dispatchers that the warrant was outstanding.

Through his own dispatcher, Midgett checked appellant's license with the National Crime Information Network ("NCIC"), which, according to Midgett, is a nationwide list of persons who have felony warrants for arrest, and found that a warrant for appellant's arrest had been issued in Greene County. Midgett then contacted two different dispatchers for Greene County, one by telephone and one by radio, and Midgett was informed by both dispatchers that they possessed an arrest warrant for appellant based on his failure to appear on a felony charge for possession of a controlled substance. Midgett testified that he did not know that the warrant had been set aside, that this was his typical method for verifying warrants, and that he had no problems with Greene County in the past, as he had made several felony and misdemeanor arrests on Greene County warrants.

Again, in this case, there was nothing more the arresting officer could have done, and I fail to understand how the suppression of the contraband discovered in *Clay* County due to an error committed by someone in the *Greene* County court system *or* by its law enforcement personnel would have *any* deterrent effect on the law enforcement personnel of Greene County, which is not the county wherein the arrest was made and the case was tried.

Even if the error was determined to be the fault of law enforcement from Greene County, Officer Midgett, a *Clay* County officer, still acted in good faith.

In short, although the identity of the person(s) who failed to remove the warrant from the computer is unknown, I believe it is clearly immaterial in *this particular* case. I, therefore, must dissent with the majority's decision to remand the case for a determination of who was responsible for not quashing the warrant.

CORBIN and HANNAH, JJ., join this dissent.

Sharon WHITAKER *v.* STATE of Arkansas

CR 01-1044 71 S.W.3d 567

Supreme Court of Arkansas
Opinion delivered April 4, 2002

[redacted]

Page, Thrailkill, and McDaniel, P.A., by: *Patrick McDaniel*, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellant, Sharon Whitaker, appeals from a judgment of conviction for manslaughter and a sentence of ten years. She raises two points on appeal: (1) the trial court erred in permitting the jury to take the videotape of a custodial statement made to the Mena Chief of Police into the jury room as part of its deliberations; and (2) the trial court erred in failing to suppress that statement. We reverse on the second point and remand for further proceedings.

In March 2000, Bill and Sharon Whitaker had been married for about twenty years. They lived in Mena, and they had one child, Matthew, who was nineteen years old at that time. Sharon also had two children from a previous marriage. The couple owned two businesses together, Rich Mountain Aviation and Rich Mountain Aircraft Parts. Bill was the president of both companies, and Sharon served as the companies' office manager.

Their marriage was tumultuous, according to several witnesses who testified at trial, including the Whitakers' son Matthew. Bill had multiple extramarital affairs and was, at times, mentally and physically abusive to his wife and son. Sharon left Bill several times, only to return to him following his promises to recommit himself to the marriage. In January 2000, Sharon learned that her husband had been having another affair, this time with a woman he had known since high school. Sharon decided that she wanted a divorce. The two coexisted uneasily for the next month and a half.

On the afternoon of March 15, 2000, Sharon was at home, packing her husband's clothes into a trailer for purposes of the divorce. Bill was on his way back to Mena from Missouri. He reached the Rich Mountain office at about 3:30 p.m. When he got to his office, his secretary, Carolyn Lindy, updated him on

business matters. He told Lindy that he would be at the office well into the evening.

Sharon had also been in touch with Lindy and wanted Lindy to notify her when her husband returned to the office. According to her trial testimony, Sharon was frightened about their next encounter, because she wanted a divorce and wanted her husband to move out of their home. She told Lindy that she wanted her to call her when Lindy left the office. When Lindy did leave the office around 5:45 p.m., she called Sharon and told her that she was leaving. She also told her that Bill was going to stay at the office to continue working.

Sharon left her home and went to the office. The facts concerning what happened when she got to the office were sharply disputed at trial. Sharon contended that she wanted to speak with her husband about the divorce and his moving out. She testified at her trial that there was a struggle in the Rich Mountain Aviation office and that when Bill pushed her down, she grabbed a pistol on a nearby table and shot him in self-defense. The State countered that Sharon went to the office with the intent to kill her husband and that the shooting was not an act of self-defense.

What is undisputed is that Sharon called 911 at 5:57 p.m. and told the dispatcher that someone had been shot. She requested police and ambulance units. Officer Tim Milham of the Mena Police Department responded to the call. He found Sharon sitting outside the office building, crying. She told Officer Milham that there was someone inside the building who had been shot. Inside the building, he and other responding officers found Bill Whitaker barely alive, with five gunshot wounds to his legs and lower torso. Emergency medical technicians arrived at the scene, and Bill was taken to the hospital where he died from his wounds.

The police officers arrested Sharon and took her to the Mena Police Station. At about 6:30 that evening, she was interrogated by Mena Police Chief Russell Nichols. The interrogation was videotaped. She had already been *Mirandized* once, but Chief Nichols informed her again of her *Miranda* rights and then asked her to tell him what had happened. She initially responded "no," but after Chief Nichols asked again, she began discussing her mar-

riage. She continued to answer questions for fifteen minutes, at which time she asked for an attorney. Chief Nichols stopped the interrogation.

The State charged Sharon with first-degree murder. Subsequently, she moved to suppress her videotaped statement and asserted that Chief Nichols had violated her Fifth Amendment right to remain silent when he continued questioning her after she had first answered "no" to his initial inquiry. The trial court denied her motion to suppress.

A jury trial was held over four days. When they retired, the jurors took Sharon's videotaped statement to Chief Nichols back to the jury room with them. No objection was made to this by defense counsel. In closing argument, the prosecutor had encouraged the jury to watch the videotape during its deliberations. The jury returned a verdict, convicting Sharon of manslaughter, and she was sentenced to ten years' imprisonment.

Sharon asserts that Chief Nichols obtained her videotaped statement in violation of her Fifth Amendment right to remain silent and not incriminate herself. Thus, she argues, it was error for the trial court to admit the videotape into evidence over her motion to suppress. The State argues, in response, that Whitaker did not unequivocally invoke her right to remain silent and that in the absence of an unequivocal invocation, Chief Nichols was well within his authority to continue questioning her.

When reviewing a trial court's decision on a motion to suppress, this Court makes an independent determination based on the totality of the circumstances and will reverse if the trial court's decision was clearly against the preponderance of the evidence. *Burris v. State,* 330 Ark. 66, 954 S.W.2d 209 (1997); *Wofford v. State,* 330 Ark. 8, 952 S.W.2d 646 (1997); *Norman v. State,* 326 Ark. 210, 931 S.W.2d 96 (1996); *Bohanan v. State,* 324 Ark. 158, 919 S.W.2d 198 (1996). This court will only reverse a trial court's ruling on a motion to suppress if the ruling was clearly erroneous. *Lacy v. State*, 345 Ark. 63, 44 S.W.3d 296 (2001); *Barcenas v. State,* 343 Ark. 181, 33 S.W.3d 136 (2000).

A statement made while an accused is in custody is presumptively involuntary, and the burden is on the State to prove, by a preponderance of the evidence, that a custodial statement was given voluntarily and was knowingly and intelligently made. *Lacy v. State*, *supra*; *Smith v. State,* 334 Ark. 190, 974 S.W.2d 427 (1998). A defendant may cut off questioning at any time by unequivocally invoking his right to remain silent. *Michigan v. Mosley*, 423 U.S. 96 (1975). When the right to remain silent is invoked, it must be "scrupulously honored." *Mosley*, 384 U.S. at 479; *Miranda*, 423 U.S. at 103; *Hatley v. State,* 289 Ark. 130, 133, 709 S.W.2d 812, 814 (1986). Our Criminal Rules follow in this mold and provide that a police officer shall not question an arrested person if that person indicates "in any manner" that he does not wish to be questioned. Ark. R. Crim. P. 4.5.

A defendant may also waive an invocation of her right to silence. *Bunch v. State*, 346 Ark. 33, 57 S.W.3d 124 (2001). Specifically, answering questions following a statement that attempts to invoke the right to remain silent may waive that right by implication. *Jones v. State*, 344 Ark. 682, 42 S.W.3d 536 (2001); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995); *Standridge v. State*, 329 Ark. 473, 951 S.W.2d 299 (1997). The accused may change her mind and decide to talk to law enforcement officials. *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995) (citing *Michigan v. Jackson,* 475 U.S. 625 (1986); *Edwards v. Arizona,* 451 U.S. 477 (1981); *Bussard v. State,* 295 Ark. 72, 747 S.W.2d 71 (1988); *Coble v. State,* 274 Ark. 134, 624 S.W.2d 421 (1981)).

Whitaker contends that she unequivocally invoked her right to remain silent at the outset of the videotaped statement. The record contains the following transcription of the interview:

> CHIEF NICHOLS: Now, having these [*Miranda*] rights in mind, like I said, I don't know even what happened. Do you want to tell me what's going on?
>
> SHARON: No.
>
> CHIEF NICHOLS: And, what we're doing?
>
> SHARON: No.

CHIEF NICHOLS: Okay.

SHARON: No. No. No. No.

CHIEF NICHOLS: Well, what's — what happened out there?

SHARON: Huh-uh. [negative response]

CHIEF NICHOLS: Have you been involved in a fight?

SHARON: Well, I can tell you this. My husband decided that he wanted to marry his high school sweetheart and — and I've just found out she's filed for a divorce and they were going to get married. And we've been married for a long time. We have a 19 year old son that just went in the navy and he's doing really good. And we've just started a business and —

CHIEF NICHOLS: Why do people do stuff like that?

However, the tape itself reveals a different sequence of questioning. Whitaker and Nichols were speaking simultaneously at several points. Sharon's six statements of "no" were continuous and were interspersed within Nichols's questions. While Sharon was repeating her statement of "no," she was bent over and shaking her head. The following is a more accurate transcription of the interchange. Sharon's initial "no" is contained within brackets.

CHIEF NICHOLS: Now, having these rights in mind, like I said, I don't know even what happened. Do you want to tell me what's going on [no] and what we're doing?

SHARON: No. No. No. No. No.

CHIEF NICHOLS: Well, what's — what happened out there?

SHARON: Huh uh.

CHIEF NICHOLS: Have you been involved in a fight?

SHARON: Well, I can tell you this. My husband decided that he wanted to marry his high school sweetheart and — and I've just found out she's filed for a divorce and they were going to get married. . . .

At this time, Sharon continued to answer questions and did so for about fifteen minutes. She never directly admitted shooting Bill; however, she said to Chief Nichols: "Put me way away" and

repeatedly said that she did not want to live. She also discussed her marital problems at length. She added: "I'm scared to know what I did." When asked later by the police chief whether she was involved in a shooting, she answered: "Huh, uh, I don't want to talk about it." When she eventually requested an attorney, Chief Nichols ceased the questioning immediately.

The trial court ruled that Sharon never unequivocally invoked her right to remain silent. In doing so he said:

> To me, that [transcription] looked different than what I saw on the tape. Mr. McCombs [defense counsel], I don't see that it's that big a problem, it may very well be, but I'm not as incensed with it as you are. I don't think I need to start setting examples. I don't know what the "no, no, no, no" meant. You interpreted it to mean that no, I don't want to talk to you. I don't know, so, I can't necessarily say that that's what it is. It may very well have been. I don't think the police are required to not say anything at all on a mere suspicion someone might supposedly not want to talk to them. I don't — I'm inclined to deny the motion.

When invoking a *Miranda* right, the accused must be unambiguous and unequivocal. *Davis v. United States*, 512 U.S. 452 (1994). For example, when invoking the right to counsel, the Court has said:

> [H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Davis, 512 U.S. at 459. This court has extended the *Davis* holding by reviewing the question of specificity when invoking the right to silence. *Standridge v. State*, *supra*; *Bowen v. State*, *supra*. For example, in *Standridge*, we held that a suspect's statement "I ain't ready to talk" was not unequivocal. Likewise, we held in *Bowen* that the statement that the accused wanted to "think about" talking to police officers was not sufficiently definite.

The trial court, in its ruling, considered the series of "no's" to be subject to interpretation. But in reading the colloquy, we note that not only did Sharon respond in the negative at first about

answering questions, but she also answered "Huh-uh" when asked "What happened out there?" When Chief Nichols pursued matters and asked, "Have you been involved in a fight?," she answered, "Well, I can tell you this . . .," as if to say she was willing only to talk about certain facets of what happened. Later on, she repeated that she did not "want to talk about it." Yet, Chief Nichols persisted in his questioning.

As already noted in this opinion, when a suspect invokes her right to silence, that invocation must be scrupulously honored. *Michigan v. Mosley*, *supra*; *Miranda v. Arizona*, *supra*; *Hatley v. State*, *supra*. We agree with the State that invoking silence must be unambiguous and unequivocal, but by the same token, the response "no" certainly connotes a desire not to speak. This is especially so when the "no" was followed by "Huh-uh" and then a limited, qualified response. It is true that Sharon was intensely emotional, but the pattern of her answers to the police chief tells this court that she did not want to talk about what happened. Moreover, "no" in common parlance is not an equivocal answer but one of acknowledged clarity and specificity. *See State v. Weeks*, 2000 WL 1473851 (Tenn. Crim. App., Oct. 2, 2001). In short, we hold that Sharon clearly articulated her right to be silent. *See*, *e.g.*, *Commonwealth v. Sicari*, 434 Mass. 732, 752 N.E.2d 684 (2001).

The State argues that Sharon waived her Fifth Amendment rights by answering questions. But that argument avoids the fact that Chief Nichols never honored her desire not to talk. It is true that waiver has its place after a right to silence has been raised, but the interrogating officer must first cease questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966). Otherwise, the right is meaningless. As the Court has said:

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned.

Michigan v. Mosley, 423 U.S. at 102.

Nor can we conclude that admission of Sharon's statement qualifies as harmless error. Her statement was inculpatory,

even though she never confessed to killing Bill. Furthermore, she set out a motive for committing manslaughter and made statements such as "I'm scared to know what I did" and "put me way away." The prejudice from her statement is palpable.

Accordingly, we hold that the trial court clearly erred in refusing to suppress Sharon's statement to Chief Nichols. *Burris v. State*, *supra*. We reverse the judgment of conviction and remand for further proceedings. Because the videotaped statement has been suppressed, the first issue is moot.

Reversed and remanded.

Robert D. HOLLOWAY *v.*
ARKANSAS STATE BOARD of ARCHITECTS

01-994 71 S.W.3d 563

Supreme Court of Arkansas
Opinion delivered April 4, 2002

Hankins & Hicks, by: *Stuart W. Hankins*, for appellant.

Mark Pryor, Att'y Gen., by: *Warren T. Readnour*, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. We accepted a petition from Robert D. Holloway, the appellant, for review of an order of the court of appeals dismissing his appeal from an underlying decision of the trial court because of a failure to comply with Rule 5 of the Rules of Appellate Procedure—Civil. Because the sole issue presented for our review is an interpretation of Rule 5, we granted review on this question only.

Appellee, the Arkansas State Board of Architects, moved that the appeal be dismissed on the basis that the trial court erred in granting an extension of time to file the record, and as a result of Holloway's reliance upon the invalid extension, that he did not timely lodge the record with this court. Significantly, appellee's motion to dismiss was not filed until after the record had been lodged with our clerk in accordance with the trial court's order. Under these circumstances, we conclude that appellee's challenge to the trial court's order extending the time for filing was ineffectual because the motion was not made before the record was lodged with our clerk. Accordingly, we reverse the determination of the court of appeals dismissing the appeal, and return the case to the court of appeals for consideration on the merits.

On December 19, 2000, the Pulaski County Circuit Court entered an order affirming the decision of the State Board of Architects, appellee, finding that Holloway engaged in the practice of architecture without a license. The decision was timely reviewed by the circuit court, and the circuit court's order affirming appellee's decision was timely appealed by Holloway on December 22, 2000. Upon a motion made by the court reporter, the trial court entered an order on February 22, 2001, finding that the record on appeal must include the court reporter's stenographically prepared transcript of evidence and that an extension of time was needed to permit the preparation of the record.

The trial court's order extended the time for the filing of the record to July 18, 2001. Upon entry of the trial court's order, a copy of the order was provided to both Holloway and appellee. At the time of the entry of the trial court's extension order, there

remained almost thirty days before the ninety-day requirement of Rule 5 would expire.[1] filing challenging the trial court's order was filed before Holloway lodged the record with the clerk on July 11, 2001, well in advance of the July 18, 2001 date allowed by the trial court order.

The issue in this review is whether the appellee can wait until after a transcript has been lodged with our clerk in compliance with a trial court's order extending the time for filing, before challenging the validity of the trial court's order granting the extension.

Appellee contends that the trial court's order was invalid because it was entered upon a motion by the court reporter; because no hearing was held upon the motion; and because the parties were not given notice of the consideration of the request for an extension before it was granted. However we cannot address these issues, because appellee did not timely file a challenge to the trial court's order extending the time for filing.

We recently denied a motion to dismiss an appeal under circumstances similar to the present case. *Dugal Logging, Inc. V. Arkansas Pulpwood*, 336 Ark. 55, 984 S.W.2d 410 (1999). We denied the motion to dismiss because appellant did not file the motion to dismiss before the record was filed with the court. We held that if appellant had serious questions about whether a hear-

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[1] Rule 5 of the Arkansas Rules of Appellate Procedure–Civil, in pertinent part reads:

> (a) *When filed*. The record on appeal shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal, unless the time is extended by order of the circuit court as hereinafter provided. . . .
>
> (b) *Extension of time*. In cases where there has been designated for inclusion any evidence or proceeding at the trial or hearing which was stenographically reported, the circuit court, upon finding that a reporter's transcript of such evidence or proceeding has been ordered by appellant, and upon a further finding that an extension is necessary for the inclusion in the record of evidence or proceedings stenographically reported, may extend the time for filing the record on appeal . . .
>
> (c) *Partial record*. Prior to the time the complete record on appeal is filed with the clerk of the Arkansas Supreme Court as provided in this rule, any party may docket the appeal to make a motion for dismissal or for any other intermediate order by filing a partial record with the clerk.

ing was required for the extension of the time in which to file, it should have raised the issue *before* the record was filed with the court. *Id.* The present case is very similar in that appellee's motion to dismiss came *after* the record was filed. Appellee waited five months from the granting of the extension to raise questions about the validity of the order granting the extension.

Appellee relies upon case law that is distinguishable from the present case. In *Murphy v. Dumas*, 343 Ark. 608, 36 S.W3d 351 (2001) (*per curiam*), the circuit court's order extending the time in which to file the record contained none of the required findings from Rule 5(b), including the necessity of an extension of time for the inclusion in the record on appeal of a reporter's transcript and appellant had ordered the transcript from the court reporter. We held in *Murphy*, "The extension order was entered without . . . findings by the trial court." *Id.* In the present case, the extension order contained the following findings:

> (1) The record on appeal includes a reporter's transcript of evidence or a proceeding which was stenographically reported and such transcript has been timely ordered by Appellants.
> (2) An extension of time is necessary for the inclusion in the record on appeal of the evidence or proceeding stenographically reported.
> (3) The time for filing the record on appeal is hereby extended until July 18, 2001, which is seven months from the date of the entry of the final judgement.

Pursuant to this order of the trial court, Holloway proceeded to file the record within the time established by the trial court. No challenge was made by appellee until after the record was lodged with the clerk. By contrast, the appellants in *Murphy* had not yet filed the record at the time the appellees filed their motion to dismiss the appeal. In the present case, the order of extension had been in effect for five months, the record was timely filed, and only then, after the record was filed, did appellee file its motion to dismiss the appeal. The facts in *Murphy* are distinguishable from the present case and therefore *Murphy* is inapplicable.

Appellee also relies upon *Seay v. Wildlife Farms, Inc.*, 342 Ark. 503, 29 S.W.3d 711 (2000), in support of its contention

that Rule 5 should be strictly complied with. *Seay* is also distinguishable from the instant case because the record contained nothing that had been stenographically reported, thereby causing the trial court to be without authority to extend the time to file the record under Rule 5(b). Our decision in *Seay* is therefore inapposite to the circumstances of this case.

In a somewhat similar case, *C & M Construction Co. v. Simmons 1st National Bank*, 260 Ark. 906, 545 S.W.2d 631 (1977), we considered extensions of time that stem from the court reporter's workload and inability to complete the transcript.[2] In *C & M*, appellee did not file its motion to dismiss or take any other action until more than sixty days after the extension had been granted. *Id.* Thus, the facts of *C & M* are similar to the present case, except that in the instant case, appellee waited five months after the extension had been granted to file the motion to dismiss. *C & M* is a precedent for our determination that the appeal should not be dismissed.

In summary, the court reporter asked for an extension of time in which to complete the record, and sent a copy of the order, which included the necessary findings, to both appellant and appellee. Five months later, and a week after the record was filed, appellee filed a motion to dismiss based on an alleged violation of Rule 5 of the Arkansas Rules of Appellate Procedure Civil. In the motion for dismissal, there was no contention of prejudice nor did appellee argue that it could have successfully resisted the order of extension had there been a hearing. In accordance with our decisions in *Dugal Logging Inc.*, and *C & M supra*, we conclude that the appeal should not have been dismissed.

Accordingly, we agree with Holloway that Rule 5 does not require that his appeal be dismissed, reverse on that point, and return the case to the court of appeals for consideration on the merits.

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[2] It should be noted that although our decision in *C & M Construction Co.* addressed a superseded version of Rule 5, Ark. Stat. Ann § 27-2127.1 (Supp. 1975) and Rule 26A of the Arkansas Supreme Court Rules, the substance of prior Arkansas law remains unchanged in Rule 5. See Reporter's Notes to Ark. R. App. P. Civ. 5 (2001).

CORBIN, J., not participating.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. I join the majority, but write to warn attorneys seeking extensions to file a record on appeal to not rely on a court reporter's gracious efforts to perform the attorney's job. Here, this court denied appellee Arkansas State Board of Architects' motion to dismiss appellant Robert D. Holloway's appeal because the Board filed its dismissal motion too late. *See Dugal Logging, Inc. v. Arkansas Pulpwood*, 336 Ark. 55, 984 S.W.2d 410 (1999). However, if the Board's dismissal motion would have been timely, we would be confronted with a far different situation.

Recently, this court gave notice to the bench and bar that the court will strictly enforce the requirement of Ark. R. Civ. P. 5(b), which provides that an extension to file a record will only be entered (1) upon the appellant's having filed a motion requesting the extension, (2) a hearing being held by the trial court, (3) notice to the appellee or opposing party, and (4) findings by the trial court. *See Murphy v. Dumas*, 343 Ark. 608, 36 S.W.3d 351 (2001); *see also Jacobs v. State*, 321 Ark. 561; 906 S.W.2d 670 (1995); *Osburn v. Arkansas Department of Human Services*, 341 Ark. 218, 155 S.W.2d 673 (2000); *Alexander v. Beaumont*, 275 Ark. 357, 629 S.W.2d 300 (1982); *Harper v. Pearson*, 262 Ark. 294, 556 S.W.2d 142 (1977) (court reiterated the necessity for ordering a transcript and conducting a hearing on the necessity for an extension); *Perry v. Perry*, 257 Ark. 237. 515 S.W.2d 640 (1974) (court stated that the purpose of the rule — a statute at that time — was to eliminate unnecessary delay in the docketing of appeals and that the court expected compliance to the end that lawsuits may progress as expeditiously as justice requires).

As is readily discernable by reading Rule 5(b), the parties and their attorneys have the responsibility to see the requirements of the Rule are met — not the court reporter. In the instant case, the court reporter's efforts on the parties' behalf were most accommodating, but those efforts do not meet Rule 5(b) requirements.

Eddie RODGERS *v.* STATE of Arkansas

CR 02-029 71 S.W.3d 579

Supreme Court of Arkansas
Opinion delivered April 4, 2002

[redacted]

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

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

RAY THORNTON, Justice. Appellant, Eddie Rodgers, was convicted of aggravated assault. This conviction stems from an incident that occurred in late 1999. On December 17, 1999, appellant pointed a gun at Bryant Young's head, threatened to kill him, and then fired a shot into Mr. Young's car.

During the penalty phase of appellant's trial, the trial court instructed the jury that it could recommend that appellant be placed on probation as an alternative to imprisonment. However, the trial court informed the jury that it was not bound to follow its recommendation. The jury chose to sentence appellant to three years' imprisonment and to impose a $5,000 fine. The trial court adopted the jury's sentence.

After sentencing had been pronounced, appellant's attorney asked the trial court to set aside the jury's sentence and to place appellant on probation. The trial court, denying appellant's request, stated "had the jury recommended that, I probably would, but I have not gone against a jury yet and I don't think this would be the appropriate time to start."

Appellant appealed the trial court's ruling to the court of appeals. Citing *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), appellant argued that the trial court erred in failing to

exercise its discretion in deciding whether appellant should have been placed on probation. In a 4-2 decision, the court of appeals affirmed the trial court. *Rodgers v. State*, 76 Ark. App. 245, 64 S.W.3d 275 (2001). The court of appeals chose to factually distinguish *Acklin* from appellant's case. Specifically, the court of appeals determined that *Acklin* was inapposite because *Acklin* involved a trial judge's failure to exercise his discretion in determining whether a defendant was entitled to have his sentences run consecutively or concurrently rather than a trial court's failure to exercise discretion in determining whether a defendant is entitled to probation.

On January 7, 2002, appellant filed a petition for review of the court of appeals' opinion. We granted appellant's petition. Appellant raises one point on appeal. We reverse the trial court and the court of appeals, and remand the matter to the trial court for resentencing.

Before addressing appellant's point on appeal, we note that the State argues that the matter was not properly preserved for appellate review. Specifically, the State argues that because appellant failed to object to the imposition of his sentence, he is procedurally barred from raising an issue involving the sentence on appeal. We have held that in order to preserve an argument for appeal there must be an objection in the trial court that is sufficient to apprise that court of the particular error alleged. *Eliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000). We have further held that we will not address arguments raised for the first time on appeal. *Id.*

In the case now before us, appellant made a motion to set aside the jury's sentencing recommendation, thereby asking the trial court to exercise its discretion to place appellant on probation. The trial court denied appellant's motion. On appeal, appellant challenges this ruling. Appellant's motion was sufficient notice of the issue raised on appeal. Accordingly, the State's argument on this issue is misplaced, and the merits of appellant's issue are preserved for appellate review. *See Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996) (holding that the denial of a

motion seeking a particular sentence was sufficient preservation of an issue for appeal).

In his only point on appeal, appellant contends that the trial court did not exercise its discretion when it denied appellant's request to set aside the jury's sentence and place appellant on probation. We have explained that under our bifurcated trial procedure, the jury fixes punishment following the penalty phase of the trial. *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996). The jury may recommend an alternative sentence such as suspension or probation. *Id.* However, the actual assessment of probation is a matter that lies within the discretion of the trial court. *Id.* We have also noted that in sentencing there must be an exercise of judgment by the trial judge, and not a mechanical imposition of the sentence suggested by the jury in every case. *Lawhon v. State*, 327 Ark. 674, 940 S.W.2d 475 (1997).

Turning now to appellant's point on appeal, he contends that the trial court did not exercise its discretion in denying his request for probation. Specifically, appellant argues that the trial court erroneously allowed the jury to decide the issue of whether appellant should have received probation. Appellant also argues that the trial judge's comments suggest that he routinely delegated this responsibility to the jury. After the trial court had adopted the jury's sentence, the following colloquy took place:

> DEFENSE COUNSEL: Would the court consider setting aside the jury's three years in prison and put him on three years' probation on the condition that he pay the $5,000 back in a shorter period of time?
>
> DEPUTY PROSECUTING ATTORNEY: Your Honor, we would ask the court to follow the jury's recommendation.
>
> THE COURT: Mr. Thompson [defense counsel], had the jury recommended that I probably would, but I have not gone against a jury yet and I don't think this would be the appropriate time to start.

Looking at the statements made by the trial court, we must determine whether it failed to exercise the discretion vested in it

by Ark. Code Ann. § 5-4-301 (b)(c) (Repl. 1997) when it refused appellant's request for probation.[1]

Appellant argues that our reasoning in *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), dictates that this case be reversed and remanded for resentencing. In *Acklin*, the appellant argued that the trial court failed to exercise discretion in sentenc-

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[1] Arkansas Code Annotated § 5-4-301, in relevant part, provides:

(b) In making a determination as to suspension or probation, the court shall consider whether:

(1) There is undue risk that during the period of a suspension or probation the defendant will commit another offense;

(2) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution;

(3) Suspension or probation will discount the seriousness of the defendant's offense; or

(4) The defendant has the means available or is so gainfully employed that restitution or compensation to the victim of his offense will not cause an unreasonable financial hardship and will be beneficial to the rehabilitation of the defendant.

(c) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of suspension or probation:

(1) The defendant's conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(5) The victim of the offense induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of the offense for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(8) The defendant's conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another offense;

(10) The defendant is particularly likely to respond affirmatively to suspension or probation;

(11) The imprisonment of the defendant would entail excessive hardship to him or his dependents;

(12) The defendant is elderly or in poor health; or

(13) The defendant cooperated with law enforcement authorities in his own prosecution or in bringing other offenders to justice.

Id.

ing him to serve consecutive terms of imprisonment rather than serving concurrent terms of imprisonment. We outlined the trial judge's rationale for imposing consecutive sentences. The judge stated:

> It's my customary rule to run consecutive sentences imposed by jurors, not because it's an expense to the county and not because someone elects to do that; it's just my judgment in the matter that generally that's what the jury intends to do.

Id. We noted that nothing in the colloquy indicated that the trial judge exercised his discretion. *Id.* We also explained that the trial judge's comments suggested that he routinely failed to exercise his discretion, but instead imposed the sentence that he perceived the jury intended. We reversed the case and remanded for resentencing. *Id.*

Appellant contends that we followed our holding in *Acklin* in subsequent cases. Specifically in *Wing v. State*, 286 Ark. 494, 696 S.W.2d 311 (1985), we were asked to evaluate the actions of a trial judge to determine whether he failed to exercise his discretion in sentencing. In refusing to run Wing's sentences concurrently, the trial judge stated:

> [M]y practice has been, if it is left to me in the first instance, I try to use my own judgment both as to guilt or innocence, and also as to punishment. . . . But when a case is submitted. . . to a jury, then I think they have the right and the prerogative. . . to view the case in the manner in which they see it. Now, I feel it is somewhat presumptuous for me to interfere with their judgment as long as it is within the guidelines of the law. I think I have no choice. . . but to accept their verdict. . . and direct they run consecutively.

Id. We determined that the trial judge was attempting to implement what he perceived the jury wanted rather than exercising his own discretion regarding the sentencing. We reversed and remanded for resentencing. *Id.* *See also* *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985); *Lawhon v. State*, 327 Ark. 674, 940 S.W.2d 475 (1997) (both holding that the trial judge failed to exercise discretion in sentencing).

The trial judge's comments in the case *sub judice* are indistinguishable from the comments made by the trial judge in *Acklin* and those made by the trial judge in *Wing*. The trial judge's comments reflect that he had a custom of imposing the sentence recommended by the jury. We hold that the trial court erred by indicating that it routinely deferred to the jury's sentencing recommendation and in failing to exercise its discretion. Without any implication that the sentence imposed by the trial court was unwarranted, we find it best to reverse and remand this case for resentencing according to the trial court's discretion.

Reversed and remanded.

CORBIN, IMBER, and HANNAH, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. I disagree with the majority's conclusion that the trial judge's remarks in this case are indistinguishable from those made by the judges in *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), and *Wing v. State*, 286 Ark. 494, 696 S.W.2d 311 (1985). In *Acklin*, the judge made the following statement in response to defense counsel's request that the sentences run concurrently, because the appellant had five children to support:

> I'm mindful of that, Mr. Holder. And I'm also mindful that . . . he has not been in trouble with the law since 1967. However, I am also mindful that [the appellant] has had no defense to this case and has put the county to substantial expense to try this without a defense which he is entitled to. It's my feeling about it that if you want to see the hole card and go to a jury to see what they will do, then you ought to be willing to run the risk.
>
> There's no defense to this case. There has not been one presented, and it's been an exercise that [the appellant] elected to see what would happen, I guess. . . . It's expensive to see and to look and to try the system. So it's my judgment that he should not be entitled to consideration.
>
> . . . .
>
> He is not being penalized for exercising his right [to a jury trial]. The truth of the matter is that he had no defense to this case. . . . He *could* [not *would*, as the State argues] have gotten the same judgment, the same sentence, the same due process, had he come in here and told the Court that he was guilty.

> I am reminded of Judge J. Smith Henley in federal court, where the federal courts do all the sentencing, and all the guilt or innocence is determined by the jury. "If you've got a legitimate defense, come over here and argue it. It won't cost you anything. But if you come over here and waste my time, the jury's time and the taxpayer's money, it may very well cost you something."
>
> I'm not saying that's what I'm doing. *It's my customary rule to run consecutive sentences imposed by jurors,* not because it's an expense to the county and not because someone elects to do that; it's just my judgment in the matter that generally that's what the jury intends to do.

Id. at 880-81, 606 S.W.2d at 595 (emphasis added). It is clear from these remarks that the trial judge did not exercise any discretion in running the sentences consecutively. He plainly stated that he had adopted a "customary rule" to impose multiple sentences consecutively in every case. Obviously, there can be no discretion where there is such a mechanical rule. Moreover, despite his denial to the contrary, the judge's remarks demonstrated the very real possibility that he imposed consecutive sentences as a way of further punishing the defendant for wasting the court's time by seeking a jury trial when he had no valid defense. Accordingly, this court had no choice but to remand for resentencing in that case.

Similarly, in *Wing*, 286 Ark. 494, 696 S.W.2d 311, this court remanded for resentencing because the trial judge's remarks demonstrated that he had not exercised any discretion in ordering the sentences to run consecutively. There, Judge Gibson explained:

> [M]y *practice* has been, if it is left to me in the first instance, I try to use my own judgment both as to guilt or innocence, and also as to punishment. . . . But when a case is submitted . . . to a jury, then I think they have the right and the prerogative . . . to view the case in the manner in which they see it. Now, *I feel it is somewhat presumptuous for me to interfere with their judgment as long as it is within the guidelines of the law. I think I have no choice . . . but to accept their verdict* . . . and direct they run consecutively.

Id. at 496, 696 S.W.2d at 312 (emphasis added). *See also Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985) (similar com-

ments from the same Judge Gibson). Again, as with the judge in *Acklin*, Judge Gibson's statements reflect an admitted "practice" of imposing whatever sentence is recommended by the jury and a refusal to "interfere with their judgment." Such a practice negates the use of any discretion.

Here, in contrast, the trial judge's comments indicate only that, as of the date of Appellant's case, the judge had not awarded an alternative sentence of probation where the jury had recommended imprisonment. His exact statement was: "had the jury recommended that, I probably would, but I have not gone against a jury yet and I don't think this would be the appropriate time to start." His use of the word "yet" is telling. It indicates that the judge is aware of his discretionary authority and that he would be willing to go against the jury's recommendation in appropriate cases. Moreover, his statement is merely one of fact as to what action he has taken in past cases. Unlike the judges in *Acklin* and *Wing*, the trial judge here did not announce a "customary rule" or a "practice" that he mechanically applies in every case. Additionally, the fact that the judge followed his initial statement with "I don't think this would be the *appropriate time* to start" demonstrates an exercise of discretion. (Emphasis added.) This statement is reflective of the judge's conclusion that the facts and circumstances of Appellant's case did not warrant a departure from the jury's recommended sentence.

Perhaps even more significant is the judge's use of the word "probably": "had the jury recommended [probation], I *probably* would." (Emphasis added.) This indicates to me that even if the jury had recommended probation, the judge would not have automatically accepted that sentence. In other words, he did not think probation was an appropriate sentence for the violent crime committed by Appellant, even if the jury had recommended an alternative sentence.

I would affirm the sentence in this case, as I cannot say that it is apparent from the judge's remarks that he failed to exercise any discretion in sentencing Appellant. *See Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997); *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995); *Brown v. State*, 316 Ark. 724, 875 S.W.2d 828

(1994) (collectively holding that this court will remand for resentencing *when it is apparent* that the trial court did not exercise its discretion). The fact that the remarks in this case are susceptible to more than one interpretation negates the conclusion that it is *apparent* that the judge failed to use his discretion.

Moreover, I cannot ignore the fact that the judge in this case is a seasoned one, with many years of experience on the bench. The sentence imposed was not in any way illegal, nor was it imposed mechanically or out of a desire for retribution, as was the case in *Acklin*, 270 Ark. 879, 606 S.W.2d 594, and, to a lesser extent, *Wing*, 286 Ark. 494, 696 S.W.2d 311. Remand in this case is a waste of precious judicial resources, as it is clear to me that the sentence already imposed was based on the judge's discretionary authority. In sum, because it is not apparent that the trial judge failed to use any discretion in sentencing Appellant, we must give him the benefit of the doubt and affirm the sentence. Accordingly, I must dissent.

Additionally, I disagree with the way in which the majority has addressed the procedural argument raised by the State. In rejecting the State's argument, the majority relies on the case of *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996), wherein this court held that because the defendant made a motion for concurrent sentences and the motion was denied, no further objection was needed to preserve an argument on appeal that the trial court had failed to exercise its discretion. Under this holding, Appellant's objection is sufficient.

However, the majority ignores the case of *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996). There, the defendant objected to consecutive sentences on the ground that they amounted to cruel and unusual punishment. On appeal, however, he contended that the consecutive sentences were erroneous because the trial court had failed to use any discretion in imposing them. This court declined to reach the argument on appeal because it was not made below. This court reasoned that "the alleged error should have been called to the attention of the trial court by timely objection or inquiry so that the trial court could be given the opportunity to correct the error." *Id.* at 60, 931 S.W.2d at 83. Under this hold-

ing, Appellant's argument appears to be procedurally barred because he failed to point out the specific error in the trial judge's ruling. In my opinion, this conflict needs to be resolved for future cases.

IMBER and HANNAH, JJ., join in this dissent.

Terrence D. BOX *v.* STATE of Arkansas

CR 01-698 71 S.W.3d 552

Supreme Court of Arkansas
Opinion delivered April 4, 2002

[redacted]

James H. Phillips, for appellant.

Mark Pryor, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. Terrence D. Box was convicted of aggravated robbery and first-degree battery, and sentenced to twenty-five and ten years respectively. Box raised four issues on appeal before the court of appeals. He argues that (1) there was insufficient evidence to support the robbery convictions; (2) the trial court erred in forcing him to appear before the jury while dressed in prison garb; (3) the trial court improperly commented on the evidence; and (4) the court erred in admitting a letter and envelope into evidence. The court of appeals affirmed on points (1) and (3), but reversed on the other two issues, holding that the trial court erred in compelling Box to stand trial in prison garb and in admitting a letter and envelope into evidence. *See Box v. State*, 74 Ark. App. 82, 45 S.W.3d 415 (2001). The State petitions us for review, addressing the two points on which the court of appeals reversed. Contrary to Box's assertion, Ark. R. App. P.—Crim. 3(c) is inapplicable as this is not an appeal by the State. We granted review under Ark. Sup. Ct. R. 2-4(c) and address the two points on which the court of appeals reversed. We reverse the trial court on the prison-garb issue, and affirm the trial court on the admission of the letter and envelope into evidence.

We need not address the other issues. We agree with the court of appeals in holding that there was sufficient evidence to support Box's robbery conviction and that the trial court did not improperly comment on the evidence.

Facts

This case arises from a robbery of the Triple D. Liquor Store in downtown Dumas. The first issue in this case is whether Box waived his right to appear before the jury dressed in civilian clothing. At the time of his trial in the present case, Box was incarcerated on other convictions in the Arkansas Department of Correction. Box had been told by his attorney that he needed to make the necessary arrangements to have civilian clothing present at the courthouse to wear during trial. Box indicated he could arrange this. Box then got a commitment from his parents that they would have his civilian clothes at the courthouse for him to wear during his trial.

However, when Box arrived at the courthouse, his parents were not there, and he had no civilian clothes to wear. He was dressed in the white uniform of the Arkansas Department of Correction. Before Box was brought into the courtroom, the fact that Box was dressed in prison garb was brought to the trial court's attention by the sheriff's department. The State's attorney also raised the issue with the Court. The trial court then called in defense counsel and affirmed that Box had made arrangements for his parents to deliver his civilian clothing to the courthouse. The trial court concluded that Box had his chance, and by not making successful arrangements, he had waived his right to be tried in civilian clothing. The trial court ordered Box brought to the courtroom, and he appeared in front of the venire panel in his white Arkansas Department of Correction uniform. Shortly thereafter, Box's parents arrived with the clothing, and Box was allowed to change. The trial was then completed.

The second issue involves admission of a letter and envelope that robbery victim Tommy Cantrell received. Cantrell testified that he received the letter after the robbery, that it had a Dermott postmark, and that it appeared to say "Correctional" on the envelope. The letter was unsigned, and upon its mention, defense counsel objected on the basis of authentication. The trial court overruled the objection finding the marks on the envelope and the content of the letter identified Box as the author. The letter began, "This is Terrance Box i just wont you to know. . . ."

Prison Garb

We first note that all the facts regarding the matters immediately preceding trial were not put on the record; however, there is a sufficient record to recognize that Box was trying to obtain a continuance or a delay so he could get civilian clothing. Box arrived at the courthouse for trial in his white Arkansas Department of Correction uniform, and the sheriff's department went to the trial judge to tell him this. The trial court was unwilling to entertain any request for time to get proper clothing. The trial court concluded that Box had waived his right to appear in street clothes because he failed to timely procure any and ordered him brought into the courtroom and into the presence of the venire panel. We hold Box did not waive his right to appear in street clothes. This is apparent when the events and discussion in the trial court that day are considered. We note that the prosecutor also brought this matter to the trial court's attention and that the trial court advised both attorneys that he would allow defense counsel to make his motions "later on." Thereafter, between the court's *voir dire* and counsel's *voir dire*, the following occurred:

DEFENSE COUNSEL: Okay. Secondly, Mr. Box is present in his jail garb, his coveralls. The coveralls are white, which is symbolic of an ADC prisoner. Mr. Box was transported earlier this week to Diagnostic Center in Pine Bluff to serve some time on his revocation. Since he has been brought back, he is being incarcerated in the ADC section of the detention center, which is a white coverall section.

Now, we're dealing with a Delta County jury pool, the jury pool is — it includes persons of law enforcement nature, by law enforcement affiliation, and in fact quite a few prison employees are in the jury pool. Anybody seeing Mr. Box here today in ADC garb should understand that he has a prior conviction. That, alone is prejudicial.

I met with Mr. Box last week at ADC — excuse me, at Delta Regional Center. I informed him that he would have to be here in private, civilian clothes, personal clothing. He told me he had some he could wear that he'd been arrested in, and that he would contact his parents to bring him some clothing for the trial today; however, it has not been supplied, and he's still in court in white prison garb, Your Honor, and it's just an inference that he has been convicted before, that he is in white prison garb, rather than county garb.

. . .

THE COURT: Now, here's the situation the court's put in. Before Mr. Box was brought up the stairs, I asked Mr. Potts [defense counsel] if he had discussed this matter with Mr. Box about wearing civilian clothes, if those were available. He said he had. Mr. Box showed up from the regional jail without any. None had been supplied over to the sheriff's office. Is that correct, Sheriff?

SHERIFF: That's correct.

THE COURT: For him to change into. He had been given that opportunity. It's the defendant's obligation, in my opinion, to have those available, unless it's impossible. It's not been shown to have been impossible. I could have delayed this matter, but I don't think I'm required to delay this matter to search down and hunt for Mr. Box some clothes that he wants to wear. I don't think that's the court's obligation, *and the motion is denied in that regard.* That was his choice as far as I'm concerned. He's waived any complaint about it. (Emphasis added.)

DEFENSE COUNSEL: Your honor, I would make one additional point on that, is that he was not arrested in the garb he's wearing today, that somewhere there's civilian clothes available that he has been locked up and arrested in, and I would have presumed that. . .

THE COURT: It's not been shown that those are unavailable, and additionally, you said that his parents were going to have some here. They haven't done that. I don't know where they are, but again, I'm not going to delay this thing for you to find out, or for me to find out. It's his responsibility. I've got an obligation to move this case along, and that's what I'm trying to do.

The court then proceeded to try Box. What is readily apparent from the above discussion is that Box's attorney tried to delay the trial until Box could be dressed in civilian clothing, but the court expressly denied his motion.

There cannot be any doubt that appellant had a right to appear in civilian clothing. *Miller v. State*, 249 Ark. 3, 457 S.W.2d 848 (1970). In *Miller*, we adopted the rule then held by the majority of States that "absent a waiver accused should not be forced to trial in prison garb." *Miller*, 249 Ark. at 5. This was and remains consistent with Article 2, Section 8, of the Arkansas Constitution. Six years later, the United States Supreme Court noted this court's opinion in *Miller* with approval and adopted a somewhat similar rule in *Estelle v. Williams*, 425 U.S. 501 (1976). The holding of the U.S. Supreme Court in *Estelle* was that under the Fourteenth Amendment, a defendant's constitutional rights were violated when he was compelled to wear identifiable prison clothing. The U.S. Supreme Court's decision in *Estelle* was first noted by this court in *Holloway, Welch & Campbell v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976), *rev'd on other grounds, Holloway v. Arkansas*, 435 U.S. 475 (1978). We have never altered our original holding in *Miller*. The court of appeals in *Washington v. State*, 6 Ark.

App. 23, 637 S.W.2d 614 (1982) stated, "the rule in *Estelle, supra,* was adopted by the Arkansas Supreme Court in *Holloway, Welch and Campbell v. State,* 260 Ark. 250, 539 S.W.2d 435 (1976)." The court of appeals is in error. In *Holloway,* this court noted *Estelle,* but did not overrule *Miller.* This court held in *Miller, supra,* in 1970 that absent a waiver, a criminal defendant may not be tried in prison garb. The rule in Arkansas remains that the accused may not be forced to trial in prison garb absent a waiver. We are bound to follow our prior case law under the doctrine of *stare decisis. Aka v. Jefferson Hosp. Ass'n, Inc.* 344 Ark. 627, 42 S.W.3d 508 (2001). The court of appeals has cited to *Estelle* in its opinions. However, greater protection is afforded under our State constitution than that set out in the rule in *Estelle.* The rule in Arkansas is set out in *Miller, supra,* and that is the law the court of appeals is bound to follow. As the court of appeals correctly stated recently, "More importantly, any inconsistency between precedents set by the supreme court and the court of appeals must be resolved in favor of the precedent announced by the supreme court, and it is well established that this court is without authority to overrule a decision of the supreme court." *Brown v. State,* 63 Ark. App. 38, 44, 972 S.W.2d 956 (1998).

When someone is tried in prison garb, his or her right to a fair trial is placed in serious jeopardy. In *Clemmons v. State,* 303 Ark. 265, 795 S.W.2d 927 (1990), this court stated:

> Central to the issue of a fair trial is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky,* 436 U.S. 478, 485 (1978).

When someone appears in prison garb, the decision of the jury may well be based upon his or her prior conviction or status as someone held in custody. In *Estelle, supra,* the U.S. Supreme Court noted that when an accused is forced to wear prison garb, the jury might be prejudiced, and that the wearing of such attire serves no useful State purpose. *Clemmons, supra.* This is because once the jury sees the defendant in clothing implying he is a criminal, they may assume he is, and the jury will be biased. The dan-

ger in this case is greater than where a prisoner is seen in county-jail clothing. Here, Box appeared in the white uniform of an Arkansas Department of Correction inmate, which showed he was a convicted and incarcerated felon. It might be tempting to enter into argument about whether an average venire member would know the difference in prisoner clothing between that worn by a county inmate and that worn in prison, but such an argument begs the question and discounts the importance of the concern at issue, that of a fair trial. Someone who comes into court in Arkansas in a prison uniform may well be recognized as a sentenced convicted felon, and that is the danger. There is nothing to be gained by trying someone in prison garb. Here, the motivation was to accommodate the jury and save time.

However, before we can delve further, we must first address the issue of whether Box preserved the issue. Box clearly brought to the court's attention that he did not desire to be tried in his white prison uniform. He was asserting his right to be tried in civilian clothing, and he had made arrangements for his parents to deliver his civilian clothing to the courthouse for him to wear during his trial. The State notes there was no motion for a mistrial. None was made. None was needed. A mistrial discharges the jury. *Woods v. State*, 287 Ark. 212, 697 S.W.2d 890 (1985); *Atkins v. State*, 16 Ark. 568 (1855). Here, no jury had been chosen or charged. There was no reason to bring a motion for mistrial because there was nothing as yet that could be mistried. The relief sought is obvious. Box moved for a continuance to allow time to obtain civilian clothing. Without question the issue is preserved for review.

We also note that the trial court overruled Box's objection to being tried in prison garb in denying the motion for a continuance. The trial court ruled and was moving forward with Box in his prison uniform. Even if the jury had been sworn and a motion for mistrial could have been brought, to require Box to move for a mistrial after the trial court had ruled on his objection and motion for a continuance would be to require a vain and useless act. *Logan v. State* , 299 Ark. 266, 773 S.W.2d 413 (1989). The law does not require vain and useless acts. *Noble v. State*, 326

Ark. 462, 932 S.W.2d 752(1996); *State v. Wilhite*, 211 Ark. 1065, 204 S.W.2d 562 (1947).

It is clear the prejudice at issue here attaches from the potential jurors seeing Box. *Miller, supra; Estelle, supra.* A defendant is "entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *Miller,* 249 Ark. at 6 (quoting 21 AM. JUR. 2d *Criminal Law* § 239). The jurors saw Box when he was brought up before the pretrial proceedings began. The proper method to raise the issue was to bring the matter to the court's attention, as was done, and to seek a continuance. The trial had not commenced. The jury had not been sworn. *Phillips v. State*, 338 Ark. 209, 992 S.W.2d 86 (1999). The solution was simply to bring in a fresh jury panel once Box was in civilian clothing.

The facts in this case do not match any of our prior cases on prison garb. In *Holloway, supra*, this court found there was a waiver where clothing was offered to the criminal defendants, and they declined to change. In *Young v. State*, 283 Ark. 435, 678 S.W.2d 435 (1984), this court found a criminal defendant waived his right against being tried in prison clothing by failing to object. The court in *Young* noted the right not to be attired in prison clothing can be waived.

The burden is on the State to establish that appellant waived his rights, and all doubts must be resolved in favor of the individual rights and constitutional safeguards. *Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991); *Sutton v. State*, 262 Ark. 492, 559 S.W.2d 16 (1977); *Smith v. State*, 240 Ark. 726, 410 S.W.2d 749 (1966). The term "waiver" is defined as the "renunciation, repudiation, abandonment, or surrender of some claim, right or privilege, or of the opportunity to take advantage of some claim, right, irregularity or wrong." *Webb v. State*, 318 Ark. 581, 886 S.W.2d 624 (1994) (citing *Black's Law Dictionary* 1580 (6th Ed. 1990)). The record is devoid of any such evidence.

Here, Box clearly did not waive his right to appear in civilian clothing. Box asserted his right to appear in civilian clothing by arranging to have his parents deliver civilian clothing to the courthouse before trial, and this was certainly cor-

roborated by the arrival of the clothing shortly after the proceedings began. The findings by the trial court that something that was not within Box's control, the late delivery of his civilian clothing contrary to Box's arrangement, amounts to a waiver of Box's right to appear in civilian clothing is error. This is a step we are unwilling to take. The issue was squarely before the trial court, which denied the motion for a continuance to allow Box time to obtain civilian clothing to wear and ordered Box to stand trial in prison clothing. It is true that Box changed once the clothing arrived, but the damage was done. *Suggs v. State*, 322 Ark. 40, 907 S.W.2d 124 (1995). When a criminal defendant is seen by the potential jurors or jurors while in prison garb, his right to a fair trial is placed in serious jeopardy because guilt may well be based upon grounds of official suspicion, indictment, or continued custody. *Clemmons, supra; Miller, supra.* This is apparent in *Suggs, supra*, where we stated simply, "In sum, our review of the record fails to show the jury saw Suggs in prison garb or show it was in any way made aware of his incarceration." *Suggs*, 322 Ark. *at* 42. The dissent also appears to try to argue if there was error it was harmless because the jury was asked if it was prejudiced by having seen Box in prison garb. We also note that whether Box showed prejudice is not at issue. The rule is that absent a waiver, a criminal defendant may not be tried in prison garb. Any resort to harmless error is inapplicable to this case and would avoid addressing the real issue. A waiver is required by the precedent of this court. There was no waiver. The impression the jury received in seeing Box in white Arkansas Department of Correction garb could not be erased by allowing Box to change into civilian clothing and appear for the remainder of the proceedings in civilian clothes. The bell had been rung, and it could not be unrung. We should not sacrifice a fundamental constitutional right — the right to a fair trial — for the sake of expediency. Here, the facts are clear that the right was asserted and denied by the trial court, and the delay the trial court should have granted would have been of a very short duration.

The trial court erred in finding Box had waived his right to be tried in civilian clothing, and the case is reversed and remanded for a new trial on that basis.

The Letter

After the robbery, Tommy Cantrell received a letter in the mail with the name of T. Box on the return address. A stamp on the outside showed it came from "Correctional." Inside, it began, "This is Terrance Box i just wont you to know it wasn't me. . . ." Box objected to the introduction of this letter asserting a lack of foundation and lack of authentication. The letter is not signed but, as noted, begins with the assertion that the writer is Box. Within the letter, the writer asserts that he got the camera from Phillip Gober and that he had nothing to do with the robbery. At the time Cantrell received the letter, Box was an inmate in the Department of Correction. Also, the camera was a key piece of evidence connecting Box to the crime and on that basis would have been of great concern to Box and would be a motive for why he wrote the letter. Arkansas Rule of Evidence 901(b)(4) allows authentication by "Appearance, contents, substance, characteristics, internal patterns, or other distinctive characteristics. . . ." Box denied writing the letter. There was no attempt to show that the letter was in Box's handwriting.

[redacted] On appeal, we will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion; nor will we reverse absent a showing of prejudice. *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996); *Vanesch v. State*, 343 Ark. 381, 37 S.W.3d 196 (2001).

[redacted] The letter states:

> This is Terrance Box i just wont you to know that it wasn't me some body just wont me to take the blame. That camera i bought it from Phillis Golder that is the truth. I got a son just turn 2 year old don't wont to leave him like my daddy left me so please believe me on this one. I sorry for what happen but this is something that i never had nothing to do with it. Deep in your son heart he know that it's not me i pray to God about what I'm going threw wish that he'll take me from this place. I pray everyday that God will let some one see that have nothing to do with that Tom how long you know my grandad Topcat the one who ride the bike i got so much respect to do you like that. If you feel

> in your heart that you think it was me understand/ All i can do is give you my word so my God bless you bye.
>
> You know my mom Darlen every time she come to your store i be with so i can't do nothing like that.

The letter contains no admission of guilt. In general, it shows Box knew he was suspected and wished to do what he could to convince Tommy Cantrell he was innocent. The most damaging thing about the letter is the mention of the camera found in his girlfriend's apartment; however, in the letter, Box asserts he purchased it from Phillip Gober. Gober was called to testify and testified consistent with the letter that he had found it and sold it to Box. The issue of the camera was not raised for the first time at trial by the letter. The jury knew of the camera and that it had been seized in Box's girlfriend's apartment. That evidence came in by way of the first witness, Michael Donigan of the Dumas Police Department, who testified that the camera was seized at Box's girlfriend's home. The evidence of the camera in the letter was thus not prejudicial and was not needlessly cumulative. Ark. R. Evid. 403.

With respect to how the letter impacted the case, it can be argued that the letter may have benefitted Box in that it brought before the jury evidence of his two-year-old son whom they would deprive of a father if they imprisoned Box, and evidence of what it was like to be incarcerated. This is evidence criminal defendants often try to introduce without success.

[redacted] To be prejudicial, the letter would have to have some adverse impact on Box in the eyes of the jury. *Sasser v. State*, 321 Ark. 438, 902 S.W.2d 773 (1995). No prejudice was shown. Based upon the arguments presented, we find no basis on which to reverse the trial court's admission of the letter and envelope.

Reversed and remanded.

MICHELLE C. HUFF, SPL. J., joins in this opinion.

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

IMBER, J., not participating.

TOM GLAZE, Justice, dissenting. The majority opinion is clearly wrong, thus, I dissent. The controlling rule is found in the case of *Estelle v. Wilkins*, 425 U.S. 501 (1976), where the Court held that, while the State cannot "consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."

Here, the evidence clearly shows the trial judge did not *compel* Box to be tried before a jury while Box was in prison garb. In fact, it is *undisputed* that, before his counsel began conducting his *voir dire* of the jury pool and his jury trial, Box, indeed, was in civilian clothes. How then, the reader might ask, do we find ourselves dealing with the prison-garb issue? Good question.

The record reflects that the trial judge acted within his discretion when he required the parties to proceed with *voir dire* and the trial. On the day trial was scheduled, the State, not Box or his counsel, informed the trial judge that Box was in prison clothes. In response, defense counsel said that, one week prior to the trial date, he had instructed Box to make arrangements for obtaining civilian clothes, and Box had told his attorney that Box had private, civilian clothes in which he had been arrested. At the beginning of *voir dire* on the day of trial, neither Box nor his attorney gave the trial judge any excuse or reason why he was not wearing those clothes left at prison or why he did not request those clothes from prison personnel.

Also, it was only at this stage of trial that the trial judge became aware through Box's counsel that Box had asked his parents to bring civilian clothes for the trial. When they failed to show, neither Box nor his counsel gave an excuse why Box's parents were not present when the trial proceedings commenced; nor did Box or his attorney offer any prospects as to when (or whether, for that matter) the parents might appear. With this lack of information, the trial judge did all he could — he denied any delay. Contrary to the majority opinion, the trial judge, when deciding the trial should continue, did not know a continuance

would be "of very short duration" because no one told him when or if Box's parents would appear. Clearly, in these circumstances, the trial judge did not abuse his discretion in requiring the parties to proceed to trial.

I also point out that, when Box's parents did finally show up, the trial judge promptly granted Box's request to get into his civilian clothes. Afterwards, defense counsel proceeded with his *voir dire* of the jury panel and later participated in selecting the jury.[1] In sum, the trial judge did not compel Box to be tried in prison clothes — he permitted Box to change into civilian clothes as soon as the judge learned the clothes were available.

Box (and the majority opinion) relies on the case of *Miller v. State*, 249 Ark. 3, 457 S.W.2d 848 (1970), where this court held it was reversible error to compel Miller to be tried before a jury when Miller was in prison clothes. There, Miller had not been afforded any opportunity to obtain civilian clothes; nonetheless, the trial judge compelled him to go to trial. Unlike in *Miller*, Box had plenty of time to acquire civilian clothes in a timely fashion, but failed to do so and provided no reason for having failed to do so. The majority opinion in its discussion of *Miller* makes reference to Ark. Const. art. 2, § 8, but the holding in *Miller* is not premised on the Arkansas Constitution, but instead, on common law. Neither Box nor the State argues the Arkansas Constitution in this appeal. Still, the majority plunges onward, trying to draw a distinction between *Miller* and *Estelle* when none exists. The majority asserts that the court in *Holloway, Welch & Campbell v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976), "noted" *Estelle*, but did not overrule *Miller*. There was no need to overrule *Miller*, as the rules in both cases are not inconsistent. Further, the majority mistakenly asserts our court has never adopted this rule in *Estelle*. *See, e.g., Holloway, supra*. One merely needs to read this court's opinions in *Young v. State*, 283 Ark. 435, 678 S.W.2d 329 (1984),

[1] During their respective *voir dires*, both the prosecutor and defense counsel reminded the jury of the presumption of innocence Box enjoyed prior to trial. In fact, the State specifically asked if "anybody [was] thinking, right now, because he sits here today charged with these crimes, that Mr. Box is guilty." No juror responded, and on more pointed, individual questioning, at least three jurors specifically indicated that they had "no problem" with the presumption of Box's innocence.

Clemmons v. State, 303 Ark. 265, 795 S.W.2d 927 (1990), and *Tucker v. State*, 336 Ark. 244, 9983 S.W.2d 956 (1999), to be reassured that Arkansas has adopted the *Estelle* rule. *See also Washington v. State*, 6 Ark. App. 23, 637 S.W.2d 614 (1982), where the court of appeals first correctly recognized our court adopted the rule in *Estelle*. Both *Miller* and *Estelle* stand for the proposition that a trial judge cannot compel a defendant to be tried in prison garb, and both provide that a defendant can waive that right — in *Miller* that right was not waived, but here, Box waived his right by not timely obtaining civilian clothes when he was given ample time to do so.

Again, to summarize, Box was in civilian clothes at the time his counsel *voir dired* the jury panel, after the jury was selected, and when he was tried. Thus, the only issue to consider is whether Box was prejudiced by the "possibility" the jurors saw Box in prison garb during the time the State first *voir dired* the jury pool. Even at that early stage of the trial, the trial judge asked defense counsel if he wanted the trial judge to *voir dire* the jury panel to determine if the jurors, having seen Box in prison garb, would be able to still render a fair decision. Box, however, claimed that questioning the panel on this point, alone, would be prejudicial.

Of course, our law is well settled that Arkansas does not recognize plain error. This court, in fact, has held that it is not prejudicial *per se* when a defendant is brought into a courtroom in prison clothes, handcuffed, or even legcuffed. *Lynch v. State*, 315 Ark. 47, 863 S.W.2d 834 (1993). Moreover, while the *Estelle* court recognized the potentially prejudicial effect of a prison uniform, that Court did not rule the practice inherently prejudicial absent the element of compulsion. *See Young v. State*, 283 Ark. 435, 678 S.W.2d 329 (1984). The instant case is much like *Young*, where the defendant Young made no objection throughout the jury selection process and not until the jury was seated did he object. The *Young* court concluded as follows:

> [A]lthough [Young] argues that he had no other clothes available to him, he made no showing whatsoever that he was forced to wear the prison attire, that a continuance was requested or that any request for other clothes was denied or that any such request was ever made. And as pointed out in *Estelle*, there was no duty

> on the part of the trial court to make any inquiry. "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of the trial judges and counsel in our legal system." *Estelle* at 512.

Young, 283 Ark. at 437. Here, Box never made an effort to show any prejudice ensued because some jurors might have seen him in prison garb at the initial part of the *voir dire* of the jury pool. Based on the record as discussed above, Box must take the responsibility for any delay in acquiring civilian clothes, but also, once jurors saw him briefly in prison garb, it was his burden to show this somehow tainted the jury later chosen to decide his case. He had the opportunity during *voir dire* to question potential jurors about what, if any, impact his clothing might have had on them, but he chose not to exercise this option. He rejected the trial judge's invitation to question the jury panel on the prison-garb issue. On this point, the majority opinion alludes to the metaphor that once Box was seen in prison clothes that "the bell had been rung, and it could not be unrung." This is an unfortunate misuse of a good figure of speech, which is often employed when a jury has heard inadmissible and prejudicial evidence. Obviously, the time to challenge a juror or jury panel is at *voir dire* and prior to those jurors being selected to serve on the jury selected to try a defendant's case. This principle is so fundamental in our jurisprudence, no citation is required.

In conclusion, the record bears out that Box was properly tried in clothes of his choice and received a fair trial while wearing them. It is also clear that he made no attempt to show any juror was prejudiced against him because they may have sen him in prison garb — a situation which he, himself, had a hand in creating. I would affirm the trial judge.

ARNOLD, C.J., joins this dissent.

Wes BOOTH *v.* Suzanne P. BOOTH

02-165 71 S.W.3d 586

Supreme Court of Arkansas
Opinion delivered April 4, 2002

Gary D. McDonald, for appellant.

Shackleford, Phillips, Wineland & Ratcliff, P.A., by: *Brian H. Ratcliff*, for appellee.

PER CURIAM. Wes Booth petitions for review of an unpublished court of appeals opinion, affirming as modified the lower court's division of Wes and Suzanne P. Booth's property. We deny Mr. Booth's petition; however, we are obliged to note that both parties acknowledge that the court of appeals failed to address Mr. Booth's issue on appeal concerning whether he should be given a credit regarding a loan from First National Bank of El Dorado as to the parties' boat, motor, and trailer. Because this point for reversal was not mentioned or considered by the court of appeals, we remand this matter to the court so it may decide that issue.

Robert WHITE, *et al.* *v.* Sharon PRIEST, *et al.*

02-284 73 S.W.3d 572

Supreme Court of Arkansas
Opinion delivered April 10, 2002

[redacted]

Oscar Stilley, for appellant.

No response.

TOM GLAZE, Justice. On March 26, 2002, petitioner, Robert White, filed a petition captioned "An Original Action for Immediate Review and Such Other Relief to Which He May be Entitled under Amendment 7 to the Arkansas Constitution and its Implementing Act 877 of 1999 (codified at Ark. Code Ann. §§ 7-9-501 -507 (Repl. 2000)) and under Art. 16, § 13 of the Arkansas Constitution." In his petition, White names as respondents: all Supreme Court Justices, individually and in his or her official capacity; the Secretary of State, the Attorney General, and the State Treasurer, in their official capacities; the Department of Finance and Administration and Revenue Commissioners, in their official capacities; and named members of the State Board of Election Commissioners. In his petition, White sets out a number of counts which we consider in the order he presents them.

In his Count I, White requests this court to immediately review the Secretary of State's Declaration issued on February 27, 2002, whereby, after consulting with the Attorney General, she concluded the popular name and ballot title contained in an initiative petition submitted by White were fair and accurate and

facially valid. That initiative petition contains a proposed amendment to cap the salaries and regulate benefits of all state officers and employees who are paid in whole or in part from state or local taxes and fees, fines, penalties, tuition, or rents of state and local property. The salaries would be limited to $100,000 and the fringe benefits could not exceed the amount of 25% of the "direct salary." Before the Secretary of State issued the Declaration, the Attorney General had delivered an opinion, approving the popular name and ballot title of White's proposed amendment. The Declaration and Attorney General's opinion are marked Exhibits 1 and 2, respectively. Significantly, the Attorney General added a caveat in his opinion concerning particular hazards attendant to lengthy and complex proposals, such as the one submitted. In doing so, the Attorney General pointed out that, with any proposed amendment of considerable length and complexity such as White's, the sponsor runs the risk of a challenge and a finding by the court that the ballot is unacceptable, either because it is too "complex, detailed, and lengthy," or because it has "serious omissions."

[redacted] Pursuant to Ark. Code Ann. § 7-9-506, White seeks review of the Secretary of State's Declaration and requests a declaratory judgment, finding White's ballot title and popular name sufficient. We grant review and direct this court's clerk to establish an expedited and appropriate briefing schedule for all parties, including amici curiae briefs, if any, permitted under Ark. Sup. Ct. R. 4-6. *See also Stilley v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000).

Before leaving this count raised by White, we note his "motion for recusal" filed on March 28, 2002, wherein he requests the recusal of all supreme court justices. White asserts that, because of his proposed amendment limiting salaries and other benefits of public servants, including those of the justices, there is an appearance of bias on the part of the justices since they have a financial interest in this matter that requires our recusal. White asks us to direct the Governor to appoint disinterested judges who have no interest in higher taxes or high salaries for public servants, and who are not employed by the State or local government. White further claims each justice is a defendant from whom money damages are sought.

White's claim is rather unclear, but he seems to be suggesting that the justices could be liable for illegal exactions in the nature of salaries received that exceed caps or limitations under the amendment he proposes. In this respect, he generally requests injunctive relief as well.

White's claim is not only premature, it is also a claim for illegal exactions under Ark. Const. art. 16, § 13, and can only be commenced in a trial court; such a suit cannot be commenced in the appellate courts. *See Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). White offers no brief, citation of authority, or argument to support his underlying argument for the justices' recusal, and we are unaware of any. Thus, this court is without original jurisdiction to hear any of the alleged claims for illegal exactions, and we dismiss Count 1.

Even if this court had original jurisdiction to initially consider a claim based on illegal exactions, the justices still would be empowered and duty bound to consider and decide these issues White strives to raise. Under Ark. Code of Judicial Conduct Canon 3(E)(1), while a judge must disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, the "Rule of Necessity" may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute. *See* Commentary to Canon 3(E)(1); *see also* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 20.2.2, at 591-592 (1996) (the Rule of Necessity is most likely to be invoked in situations where the filing of a suit whose resolution will directly affect the pecuniary well-being of judges as a whole, such as a suit seeking to increase judicial pay or retirement benefits); and Jeffery M. Shaman *et al.*, *Judicial Conduct and Ethics* § 4.03, at 111-112 (3d ed. 2000).

In addition, we point out that Ark. Const. art. 7, § 9, in pertinent part, provides that when all or any of the justices are disqualified, the Governor must immediately commission the requisite number of men (or women) learned in the law to sit in the trial or determination of the supreme court's cases. In other words, this court does not direct who the Governor commissions

to perform his duties as a justice, like White suggests in his motion. More important, it is significant to mention that in the review White seeks here, the Governor would have the same or similar conflict White asserts the justices have, since there are countless employees in the executive branch of government that are paid salaries exceeding the $100,000 cap established under White's proposal. *See* Acts 4, 234, 1238, 1612, 1636, 1638, 1668, 1669 of 2001. Here, each justice, individually, rejects White's motion to recuse under the "rule of necessity."

In his Count 2, White requests us to review the Secretary of State's Declaration issued on February 27, 2002, whereby, after consulting with the Attorney General, she declared the popular name and ballot title on White's Arkansas Prison System Amendment proposal to be fair and accurate and facially valid. As was the case in the "salary cap" proposal, the Attorney General's opinion issued on January 20, 2002, added a caveat that particular hazards exist because of the length and complexity of White's ballot title. We grant review, and as with the "salary cap" proposal, we direct the clerk to establish an appropriate briefing schedule for all parties, including amici curiae briefs authorized, if any, under Ark. Sup. Ct. R. 4-6.

In Count 3, White's petition asks this court to enroll as law the proposed Used Car Tax of 2000 which this court, in *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), found insufficient because of the proposed amendment's misleading popular name and ballot title and because it conflicted with the Arkansas and United States Constitutions. As a part of our holding in *Kurrus*, we ordered that the Used Car Tax Amendment of 2000 not be placed on that year's General Election ballot, or alternatively, that any votes cast on that amendment not be counted.

Here, White merely raises the same arguments we thoroughly considered in *Kurrus*. Offering no new argument or citations, and totally ignoring the holding in *Kurrus*, White states the following:

> The [*Kurris*] Supreme Court based its order denying the validity of the amendment upon *two flagrantly unlawful considerations*:

> (1) That the ballot title was defective even though the ballot title plainly and certainly would have been sufficient if it had been approved by the General Assembly for an amendment proposed by same and
>
> (2) that the amendment violated a substantive provision of the Constitution of Arkansas. The court also *claimed* that the petition violated the United States Constitution, but this *claim* was so clearly baseless that the court could not cite a single federal case of any kind in support of its contention. (Our emphasis.)

White further reflects his disagreement with the *Kurrus* decision saying, "The Arkansas Supreme Court [in *Kurrus*] was wholly without jurisdiction to declare a ballot title defective based upon *its own created 'law'* which created an extremely harsh test for citizens' initiatives, while using a test for measures referred by the Arkansas General Assembly that is so lenient that nothing has ever failed the test." He adds (again without new argument) that "any attempt to strike an initiative petition upon a claimed possible illegality of the substantive provisions of the initiative before the vote is had, canvassed, and certified, is a *nullity*." (Our emphasis.)

White's present counsel, Oscar Stilley, is well aware that this court dealt with these two foregoing issues in *Kurrus*, and that Stilley also continued his argument in a petition for rehearing in that case. His arguments were rejected on both occasions. We also point out that, even before *Kurrus*, this court in *Thiel v. Priest*, 342 Ark. 292, 28 S.W.3d 296 (2000), stated very clearly the rationale behind why initiatives by the General Assembly and by the voters are constitutionally different and permissible. *See also Kurrus*, at 440.

[redacted] It is not this court's duty to review issues it has already considered or decided when no good reason has been shown to do so. We are, once again, troubled by Mr. Stilley's unwillingness to recognize precedent and his attempt to breathe life into decisions he previously lost. *See Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001). We are always ready to reconsider the court's prior precedents if proper argument demonstrates that reconsideration and review are needed. *See Shannon v. Wilson*, 329 Ark. 143, 151, 947 S.W.2d 349, 353 (1997). That is not the case at hand. Thus, as provided under Ark. R. App. P.—Civ. 11,

we are compelled to order Mr. Stilley to show cause in writing why a sanction should not be imposed against him. Such writing shall be no later than seven days after the date of this opinion. The Attorney General and other state or constitutional parties Mr. Stilley named in this matter may have four days to respond from the date Stilley files his writing. *Id.* With regard to the bare and untimely allegations White attempts to assert in Count 3 of his petition, we dismiss that count in toto because those allegations, as explained above, have been previously decided by this court.

Before leaving the Count 3 matter, we note White's mention that this court is not at liberty to fault the work (opinion) of the Attorney General after the Attorney General had approved the proper name and ballot title of the Used Car Tax of 2000, but White cites no authority to support his contention. The authority, of course, is wholly contrary to such an assertion. *See Arkansas Prof'l Bail Bondsman Lic. Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 865; *Bailey v. McCuen*, 318 Ark. 227, 884 S.W.2d 938 (1994); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990).

Also, we note White's reference in Count 3 to his theory that, since the Used Car Tax amendment should have been enrolled by the Secretary of State in 2000, the State Finance & Administration (contrary to the text of the 2000 proposal) collected illegal taxes. White claims he and other taxpayers should be entitled to refunds from these illegal exactions. Again, even if Count 3 stated a viable cause of action, that alleged illegal exaction claim would have been required to be commenced in trial court under Ark. Const. art. 16, § 13. *See Franz*, 296 Ark. 181, 754 S.W.2d 839. This court has no original jurisdiction to decide the matter, and we dismiss it.

In White's Count 4, he again questions the *Kurrus* decision, but limits this part of his argument to say that this court erred in invalidating the Used Car Tax of 2000 on the basis of constitutional provisions of the State and U. S. Constitutions which prohibit the impairment of contracts. Of course, this court indeed held that the proposed amendment violated such constitutional prohibitions, even though three justices did register different

views on this issue. White expands his allegations in Count 3 to point out that, if his theory is correct that Ark. Const. amend. 43 cannot supersede provisions of Ark. Const. amend. 9, then any compensation the supreme court justices here received that exceeded their starting salaries would constitute illegal exactions.[1] In turn, White uses this theory as the basis to ask all justices to recuse, alleging they have a pecuniary interest involved. As we have already stated, any illegal exaction action must be commenced in trial court, and we have no original jurisdiction over this matter. Therefore, we dismiss it. But as we have explained above, the "rule of necessity" compels that we not recuse in this case even if this court had original jurisdiction to decide this matter. *See* Commentary to Canon 3(E)(1).

Next, White requests in his Count 5 that "this court enjoin and prohibit all defendants from the use of any standard more restrictive that the 'manifest fraud' standard used for General Assembly ballot titles." Once again, this allegation and prayer for relief was considered in the *Thiel* and *Kurrus* cases. Thus, we dismiss this claim for the reasons already discussed above.

In Count 6, White's allegations are particularly confusing, but he refers to an Attorney General Opinion No. 2001-391, marked "exhibit 6," which, among other things, sets out the popular name and ballot title of a proposed amendment that would abolish all ad valorem taxes on personal property. The Attorney General's opinion, dated January 11, 2002, rejected the popular name and ballot title due to ambiguities in the "text" of the proposed measure. The Attorney General instructed Mr. Stilley to "redesign" the proposed measure and ballot title and resub-

[1] White cites Ark. Const. amend. 9, § 2 for the proposition that the amendment prohibits supreme court justices from receiving compensation greater than that authorized at the beginning of the term to which the judge was elected. He then refers to Amendment 43 which he says permits the increase of salaries of justices of the supreme court during the term for which the justice has been elected. White concludes that, if *Kurrus* is the law, then Amendment 43 is plainly and facially unconstitutional as violating or conflicting with an existing substantive provision of the Arkansas Constitution. Of course, Amendments 9 and 43 are not in issue here, but we would merely observe at this point that the Publishers Notes to Amendment 43 suggest Amendment 43 probably supersedes Amendment 9.

mit it. Apparently, Stilley did not do so. Also, it appears the proposal with ballot and popular name was not sent to the Secretary of State for Declaration, as is provided under Act 877 of 1999. *See* Ark. Const. amend. 7, Ark. Code Ann. §§ 7-9-505 and 7-9-107(d) and (e)(B)(2) (If the Attorney General or Secretary of State refuse to act or if the sponsors feel aggrieved by his acts, in such premises, the sponsors may, by petition, apply to the supreme court for proper relief.). Because the Secretary of State has not determined the sufficiency of this ad valorem tax proposal, this court has no jurisdiction to consider this matter and, therefore, we dismiss this count in White's petition.

In Count 7, White submits for review another proposed measure which is an amendment to abolish taxes on used goods. As was the situation with the ad valorem tax prohibition in Count 6 above, the Attorney General rejected Mr. Stilley's request to resubmit his proposal, which the Attorney General rejected as ambiguous. The Secretary of State has not made her determination as to sufficiency or issued a Declaration. We dismiss this count, since we do not have jurisdiction to review it for the reasons stated in dismissing Count 6.

In conclusion, White submits a Count 10 (*sic*) which lists nine paragraphs under the caption, "Petition Sponsors Have the Right to Cure, Including Cure of the Language of the Ballot Title and Popular Name."[2] Six of the paragraphs include what only can be described as general legal principles that White claims to be true, without providing the court with citations of authority or argument. For example, after White proceeds by saying he incorporates all general allegations in the other counts, he states the following:

> 100. The legitimate interest of the state in the regulation of speech in the form of ballot titles, namely the prevention of fraud however denominated, is not advanced by the refusal to permit improvements, corrections, or changes to ballot titles, popular names, or the text of the measure, as to matters which do not

[2] White sets out Counts 1 through 7, omits stating Counts 8 and 9, but continues with Count 10, which apparently should be numbered Count 8.

affect the general meaning and purpose of the amendment, after suit is filed by a challenger.

101. To the extent that the state has an interest extending beyond fraud prevention, to the provision of greater detail, accuracy, completeness, or concision to the voters, that interest is best protected by a modification of the language of the ballot title, popular name, or text of the measure, as to matters that do not materially alter the purpose and effect of the measure, rather than the striking of the ballot title and popular name. This would be the alternative least restrictive of free speech rights and thus meeting constitutional muster for restrictions on core political speech.

102. Ballot titles and popular names are core political speech.

103. The text of citizen initiated measures is core political speech.

104. The ballot titles and popular names of all statewide initiatives are approved by the Arkansas Attorney General. In some cases the ballot title is a ballot title substituted by the Attorney General. The Arkansas Supreme Court is not at liberty to fault the work of the Attorney General, a member of the Executive Branch, and therefore to punish the sponsor of any amendment or the electorate, by removing the amendment on the basis of a supposed error by the Attorney General.

105. Alternatively, the Attorney General, in issuing an opinion, becomes a guarantor of the ballot title and popular name, and thus any subsequent striking of the amendment renders the officers of the State of Arkansas liable for any damages to the sponsors or the taxpayers for the failure to properly certify the rectitude of the ballot title and the matter which it describes, thus rendering the officers of the state, and especially the Treasurer of the State, Commissioner of Revenues, and Director of the Department of Finance and Adminsitration liable to repay all damages suffered by the sponsor or by taxpayers as a result of the defective ballot title opinion.

At the end of his Count 10, White *demands* an oral argument.

After reading the foregoing list, we can only conclude no further consideration and reflection is needed on this court's part other than the issues we already decided in Counts 1 through 7, except to say this court will later consider granting an oral argument when a timely request is made under Ark. Sup. Ct. R. 5-

1(a), and this court decides the request meets the requirements of that rule.

In sum, this court grants review of White's Counts 1 and 2, and dismisses his Counts 3, 4, 5, 6, and 7. An expedited briefing schedule shall be made regarding the counts granted and on review. The court issues a show-cause order for White's counsel, Oscar Stilley, to show in writing why a sanction under Rule 11 should not be imposed against him.

Ron and Ramona DAVENPORT, as the Administrators of the Estate of Linda Kay Moore, *Deceased*, or, in the Alternative, Ron and Ramona Davenport, Individually and as the Heirs at Law of Linda Kay Moore, *Deceased*, on Behalf of Themselves and All Other Heirs at Law of the Deceased, or All Who are Entitled to Legal Redress for the Death of Linda Kay Moore, *Deceased v.* Tyrone LEE, M.D.; Conway Regional Medical Center; Craig Cummins, M.D.; and James Throneberry, M.D.

01-456 72 S.W.3d 85

Supreme Court of Arkansas
Opinion delivered April 11, 2002

[redacted]

Charles Phillip Boyd, Jr., and *Christopher D. Anderson*, for appellants.

Wright, Lindsey & Jennings LLP, by: *Patricia Sievers Harris* and *Jane Weisenfels Duke*; *Anderson, Murphy & Hopkins, LLP*, by: *Overton S. Anderson* and *Scott D. Provencher*; and *Armstrong Allen, PLLC*, by: *Ken Cook* and *Jeffrey L. Singleton*, for appellees.

DONALD L. CORBIN, Justice. This appeal is before us on a petition for review from a decision by the Arkansas Court of Appeals concluding that a non-attorney personal representative is not authorized to file a *pro se* complaint in a wrongful-death action, but that such a defect did not render the complaint a nullity. *See Davenport v. Lee*, 73 Ark. App. 247, 40 S.W.3d 346 (2001). We granted the petition, pursuant to Ark. Sup. Ct. R. 1-2(e)(iii). We affirm the trial court's order.

This appeal stems from events surrounding the death of Linda Kay Moore. On February 11, 1997, Moore went to the emergency room at Conway Regional Medical Center ("CRMC") seeking treatment for pneumonia. She was admitted to the hospital and subsequently scheduled for surgery. On February 15, Moore was intubated by hospital staff in preparation for her surgery, but died minutes after the intubation. Surviving Moore were her sister, Appellant Ramona Davenport, and three adult children.

Following the death of Moore, the Faulkner County Probate Court appointed Ramona and her husband, Appellant Ron Davenport, as administrators of Moore's estate. On February 10, 1999, Appellants filed a *pro se* complaint for wrongful death alleging negligence on the part of Appellees Dr. Tyrone Lee, Conway Regional Medical Center, Dr. Craig Cummins, Dr. Greg Lewis,

and Dr. James Throneberry.[1] Thereafter, on May 28, 1999, the Boyd Law Firm filed an entry of appearance, as well as a pleading entitled "Addendum to Complaint." This addendum purported to change the case styling to reflect the addition of Dr. Throneberry's first name. It was the first pleading signed by an attorney in this action.

Dr. Cummins filed an answer denying Appellants' allegations and asserting that the complaint should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6) and because the statute of limitations had run on the cause of action. Likewise, Dr. Throneberry denied all allegations and averred that the complaint should be dismissed because it was a nullity, as it had been signed by the estate's administrators who were non-lawyers and that any further claims were time barred. Dr. Lee and CRMC initially filed answers denying Appellants' allegations, but later filed amended answers also asserting the affirmative defense of limitations.

On June 21, 1999, Dr. Throneberry filed a motion to dismiss that was subsequently adopted by each of the other Appellees. In support of his motion, Dr. Throneberry argued that the filing of the complaint by non-lawyers resulted in a nullity, and thus, no valid complaint was filed prior to the expiration of the two-year statute of limitations under the Arkansas Medical Malpractice Act. Appellants responded that as administrators they were authorized to file a complaint on behalf of Moore's estate. Moreover, they argued that under Ark. R. Civ. P. 17, they were allowed to cure any defect in the original complaint through inclusion or ratification by the real party in interest.

Following a hearing on Appellees' motions, the trial court determined that Appellants, as administrators of the estate, could not file a valid complaint for wrongful death where neither of them was an attorney. The trial court also determined that Appellants were not acting on their own behalf, but rather, as representatives of all the statutory beneficiaries. Finally, the trial court ruled that subsequent pleadings filed by attorneys could not relate

[1] Pursuant to Ark. R. Civ. P. 41(a), the trial court granted Appellants' motion to dismiss without prejudice their claim against Dr. Lewis on June 23, 1999.

back to the original complaint under the circumstances in the present case. On November 24, 1999, the trial court entered an order dismissing with prejudice Appellants' cause of action.

At the conclusion of the hearing on November 3, 1999, Appellants requested time to file a motion for reconsideration. Several letters followed, each requesting additional time to file the motion. The motion and supporting brief were not filed, however, until November 26, 1999. Therein, Appellants argued that Appellees had not suffered any surprise or prejudice by the filing of the original complaint and that Appellants were actually represented by counsel at the time the case commenced. According to Appellants, the case commenced when the summons and complaint were served upon Appellees. On November 17, 1999, prior to the filing of the motion for reconsideration, Appellants also filed a fifth amended complaint, alleging for the first time that CRMC had fraudulently concealed part of Moore's medical records. Appellees moved to strike the amended complaint arguing that the trial court correctly ruled that Appellants were prohibited from amending the original complaint. The trial court subsequently entered orders granting Appellees' motions to strike and denying Appellants' motion for reconsideration.

Appellants filed a timely notice of appeal, alleging seven points of error. The court of appeals determined that Appellants, as administrators, were not authorized to file a complaint on behalf of the statutory beneficiaries. According to the court of appeals, however, such an irregularity amounted to an amendable defect, not a nullity. Appellees then petitioned this court for review. When we grant review following a decision by the court of appeals, we review the case as though it had been originally filed in this court. *See Regions Bank & Trust v. Stone County Skilled Nursing Facil., Inc.*, 345 Ark. 555, 49 S.W.3d 107 (2001); *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). Thus, we review the trial court's judgment, not that of the court of appeals.

In reviewing a trial court's decision on a motion to dismiss, this court must treat the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff. *Goff v.*

Harold Ives Trucking Co., Inc., 342 Ark. 143, 27 S.W.3d 387 (2000); *Arkansas Tech Univ. v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000). In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *Id.* With this standard in mind, we now turn to Appellants' arguments on appeal.

I. No Waiver of Limitations Defense

As an initial matter, Appellants argue that the trial court erred in refusing to deny the motions to dismiss filed by Drs. Cummins and Lee and CRMC. Appellants base this argument on the contention that those parties waived their right to assert the defense of limitations when they failed to raise it in their initial responsive pleadings. We disagree.

[redacted] Arkansas has long recognized the common-defense doctrine, holding that the answer of one defendant inures to the benefit of the other co-defendants. *See Sutter v. Payne*, 337 Ark. 330, 989 S.W.2d 887 (1999); *Richardson v. Rodgers*, 334 Ark. 606, 976 S.W.2d 941 (1998); *Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991); *Bruton v. Gregory*, 8 Ark. 177 (1847). In determining whether the common-defense doctrine is applicable, this court focuses on whether the answer of the non-defaulting defendant states a defense that is common to both defendants, because then "a successful plea . . . operates as a discharge to all the defendants, but it is otherwise where the plea goes to the personal discharge of the party interposing it." *Richardson*, 334 Ark. at 612, 976 S.W.2d at 944-45 *(quoting Southland Mobile Home Corp. v. Winders*, 262 Ark. 693, 694, 561 S.W.2d 280, 280-81 (1978)). In other words, the doctrine is applicable where the asserted defense would discharge all of the defendants.

[redacted] Here, the affirmative defense at issue is the running of the statute of limitations. Each of the claims raised against Appellees is subject to the two-year statute of limitations set forth in the Arkansas Medical Malpractice Act. Thus, the defense of one Appellee that Appellants failed to timely file their action is common to the remaining Appellees and would serve to discharge

each of them from this action. Accordingly, Dr. Throneberry's answer inured to the benefit of the other Appellees, thus preserving their rights to assert the defense of limitations.

II. Complaint was a Nullity

We next turn to Appellants' argument that the trial court erred in ruling that their original complaint was a nullity. According to Appellants, the absence of counsel is a procedural defect that does not interfere with the subject-matter jurisdiction of the trial court, and thus, the complaint is simply defective, not void *ab initio*. Appellees counter that the filing of a *pro se* complaint on behalf of statutory beneficiaries constituted the unauthorized practice of law, and thus, rendered the complaint a nullity. Appellees further argue that because there was no valid complaint filed prior to the expiration of the two-year limitations period, Appellants were time-barred from bringing suit against them. We agree with Appellees.

a. Commencement of the Action

Before discussing the issue of the unauthorized practice of law, we must first address some separate issues raised by Appellants that are directly related to the question of whether the *pro se* complaint was a nullity. First, Appellants contend that they were represented by counsel at the time this action commenced, and therefore, there is no basis for declaring the complaint a nullity. Appellants' base this contention on the theory that an action does not commence until service of process is completed under Ark. R. Civ. P. 4(i). According to Appellants, because service was completed after counsel entered an appearance, Appellants were not acting *pro se*. This argument is without merit.

[redacted] Appellants offer no authority in support of this argument, and in fact, acknowledge that Ark. R. Civ. P. 3 specifically provides that an action commences with the filing of a complaint with the court clerk. This court has explained that the touchstone for a limitations defense is when the cause of action was commenced. *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997); *Green v. Wiggins*, 304 Ark. 484, 803 S.W.2d 536 (1991).

While it is true that the effectiveness of the commencement of an action is dependent on the plaintiff completing service of process as provided for in Rule 4(i), for purposes of tolling the statute of limitations, this court looks to the time that the complaint was filed. *Id.* Therefore, the filing of the complaint commenced this action, and the fact that Appellants were represented by counsel at the time service was completed does not toll the statute of limitations. Instead, we must focus on whether Appellants were represented by counsel at the time the complaint was filed.

Under Ark. R. Civ. P. 11(a), "[a] party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address and telephone number, if any." In addition, Ark. R. Civ. P. 64(a), provides that, when additional counsel is employed to represent any party in a case, that counsel shall immediately cause the clerk to enter his name as attorney of record in the case and then shall notify the court and opposing counsel that he has been employed. Here, the lack of any signature by an attorney on the complaint is indicative of Appellants' *pro se* status at the time this action commenced. Moreover, the fact that an attorney did not file an entry of appearance in this matter until May 28, over three months after the filing of the complaint, is further proof that Appellants were not represented by counsel. We are mindful that counsel for Appellants now argues that his firm represented Appellants at the time the complaint was filed, but did not sign the complaint due to an inability to verify the allegations set forth in the pleading. If we accepted this argument, we would in effect be condoning counsel's attempt to circumvent the rules of civil procedure, and we will not do so.

b. Role of Administrators

Next, Appellants contend that they were authorized to proceed *pro se* because as administrators of Moore's estate they were vested with broad powers to manage a wrongful-death claim on behalf of the decedent. This argument is entirely contrary to this court's established law regarding the role of administrators. An administrator acting on behalf of an estate does so in a fiduciary capacity. *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954). At issue in that case was

whether a bank acting as the personal representative of an estate had engaged in the unauthorized practice of law. This court concluded that "a person who is not a licensed attorney and who is acting as an administrator, executor or guardian cannot practice law in matters relating to his trusteeship on the theory that he is practicing for himself." *Id.* at 51-52, 273 S.W.2d at 410. In reaching this conclusion, the court noted that a trustee or personal representative is not acting for himself and in connection with his own affairs, but to the contrary is acting for others who would ordinarily be the beneficiaries.

This court further discussed the nature of the administrator's role in *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990), and stated that an administrator acts only as a "trustee of conduit." *Id.* at 362, 784 S.W.2d at 158 (citing *Dukes v. Dukes*, 233 Ark. 850, 853, 349 S.W.2d 339, 341 (1961); Ark. Code Ann. § 16-62-102(f) (1987)). This court further explained that proceeds from a wrongful-death action are for the sole benefit of the statutory beneficiaries and are held in trust by the administrator "for the benefit of the widow and next of kin." *Douglas v. Holbert*, 335 Ark. 305, 314, 983 S.W.2d 392, 396 (1998); *see also Brewer*, 301 Ark. 358, 784 S.W.2d 156. Thus, Appellants as the administrators of Moore's estate were acting on behalf of all the heirs at law when they filed this wrongful-death action. Their attempts to distinguish the above-cited cases on the grounds that no proceeds have yet been awarded are meritless.

c. Rights of Individual Heirs

Appellants also argue that it was error for the trial court to dismiss the complaint because Ramona filed suit in both her capacity as an administrator and as an individual heir at law. This argument fails for two reasons. First, this court has held that an individual may not file suit where a personal representative has been appointed. Pursuant to Ark. Code Ann. § 16-62-102(b) (1987), every wrongful-death action must be brought by and in the name of the personal representative. *See also Brewer*, 301 Ark. 358, 784 S.W.2d 156. The wrongful-death code does not create an individual right in any beneficiary to bring suit. *Id.* (citing *Cude v. Cude*, 286 Ark. 383, 691 S.W.2d 866 (1985)).

Moreover, where no personal representative has been appointed, a wrongful-death suit must be filed with all of the statutory beneficiaries joined as parties to a suit. *Ramirez v. White Cty. Cir. Ct.*, 343 Ark. 372, 38 S.W.3d 298 (2001); *Thompson v. Southern Lbr. Co.*, 113 Ark. 380, 168 S.W. 1068 (1914). This rule dates back to this court's decision in *McBride v. Berman*, 79 Ark. 62, 94 S.W. 913 (1906). There, the court stated, "[t]hat in default of a personal representative an action brought under Lord Campbell's Act must make the widow (if there be one) and the heirs at law parties thereto." *Id.* at 65, 94 S.W. at 914.

Like the appellant in *Ramirez*, Appellants here argue that under this court's decision in *Murrell v. Springdale Mem. Hosp.*, 330 Ark. 121, 952 S.W.2d 153 (1997), an individual heir at law may bring suit for wrongful death even when there are other heirs at law. In *Murrell*, the widower filed suit as the surviving spouse and subsequently took a voluntary nonsuit. There were also three surviving children. The widower refiled the lawsuit as the personal representative of the estate and as the surviving spouse. The widower died and the couple's son was appointed successor administrator. This court held that the widower's action for wrongful death of his wife did not survive his death, and that the children's claims were barred by the statute of limitation because they were not parties to the first action. In reaching this conclusion, however, we erroneously stated that a complaint filed by an individual heir "was appropriately brought according to Ark. Code Ann. § 16-62-102(b)." *Id.* at 124, 952 S.W.2d at 155. We clarified this statement in *Ramirez*, 343 Ark. 372, 38 S.W.3d 298, expressly holding that where there is no personal representative, any action for wrongful death shall be brought by all the heirs at law of the deceased. Accordingly, Ramona would have no standing to bring an individual claim for the wrongful death of Moore. In sum, any argument that Appellants were authorized to pursue a wrongful-death action *pro se* is without merit. Thus, we must next determine whether the filing of the *pro se* complaint constituted the unauthorized practice of law.

d. Unauthorized Practice of Law

The issue of what constitutes the unauthorized practice of law was thoroughly discussed by this court in *Arkansas Bar Ass'n*, 224 Ark. 48, 273 S.W.2d 408. There, this court stated:

> It has been said in many opinions that it is not possible to give a definition of what constitutes practicing law that is satisfactory and all inclusive, and we make no such attempt. We do hold however that when one appears before a court of record for the purpose of transacting business with the court in connection with any pending litigation or when any person seeks to invoke the processes of the court in any matter pending before it, that person is engaging in the practice of law. To us this conclusion is obvious. Courts are constituted for the purpose of interpreting and administering the laws passed by the law making body and the rules announced by the judiciary, and they must necessarily be governed in their operation by rules of procedure. Attorneys are officers of the court and are able by special training and practice to know the law and rules of procedure, and are thereby in position to render a service to the court. Therefore anyone who assumes the role of assisting the court in its process or invokes the use of its mechanism is considered to be engaged in the practice of law.

Id. at 53, 273 S.W.2d at 411. Thus, the issue turns on a determination of whether Appellants attempted to transact business with or invoke the processes of the court.

In *Arkansas Bar Ass'n*, this court specifically prohibited the bank, either in its individual or fiduciary capacity, from preparing motions, pleadings, or other documents to be filed in the courts on behalf of any beneficiaries. Similarly, this court held that the filing of motions constituted the unauthorized practice of law. *See Abel v. Kowalski*, 323 Ark. 201, 913 S.W.2d 788 (1996). Accordingly, Appellants filing with the court a complaint constituted the unauthorized practice of law.

Finally, we are unpersuaded by Appellants' attempts to distinguish the present case from *Arkansas Bar Ass'n* and its progeny. Appellants contend that those cases are inapplicable because they involved the unauthorized actions of banks or corporations that are specifically prohibited by statute from engaging in the practice

of law. The crux of our prior decisions, however, is that administrators or other fiduciaries cannot proceed *pro se* in their representative capacity. Accordingly, our prior decisions are squarely on point with the present situation.

Having determined that Appellants engaged in the unauthorized practice of law, this court must next decide whether such action renders their original complaint a nullity. It is axiomatic that it is illegal to practice law in Arkansas without a license. *See* Ark. Code Ann. § 16-22-206 (1987); *All City Glass & Mirror, Inc. v. McGraw Hill Info. Sys. Co.*, 295 Ark. 520, 750 S.W.2d 395 (1988). In discussing the appropriate remedy for such illegal practice, this court has stated:

> It is widely held in other jurisdictions that proceedings in a suit instituted or conducted by one not entitled to practice are a nullity, and if appropriate steps are timely taken the suit may be dismissed, a judgment in the cause reversed, or the steps of the unauthorized practitioner disregarded.

McKenzie v. Burris, 255 Ark. 330, 333, 500 S.W.2d 357, 359-60 (1973). This court further stated that appropriate steps for dealing with the unauthorized practice of law included: a motion to strike a complaint; a motion to strike an answer; a motion for mistrial; or a motion to strike a petition. *Id.*

Moreover, this court has denied a motion for a writ of certiorari filed on behalf of a corporation by a non-attorney. *McAdams v. Pulaski Cty. Cir. Ct.*, 330 Ark. 848, 956 S.W.2d 869 (1997). This court has also affirmed a trial court's order striking an answer filed by a corporation's president, who was not a licensed attorney. *All City Glass*, 295 Ark. 520, 750 S.W.2d 395. Finally, in *Abel*, 323 Ark. 201, 913 S.W.2d 788, this court ruled that a person not licensed to practice law in this state could not represent another and ordered the court of appeals to strike any motions filed by the non-attorney on remand. Since this court's decision in *McKenzie*, however, there have been no cases where this court has specifically held an action to be a nullity because it constituted the unauthorized practice of law.

A review of other jurisdictions faced with similar issues reveals that there is a split of authority as to whether the unautho-

rized practice of law renders a proceeding a nullity or merely amounts to an amendable defect. Generally, those jurisdictions holding that the unauthorized practice of law results in a nullity have done so after concluding that the proscription on the unauthorized practice of law is of paramount importance in that it protects the public from those not trained or licensed in the law. *See Ghafary v. Korn*, 738 So. 2d 778 (Ala. 1998) (holding that an attempt by a non-attorney executrix, acting *pro se*, to represent the interest of an estate in a wrongful-death action constituted the unauthorized practice of law, and as such, the *pro se* complaint was a nullity); *Black v. Baptist Medical Ctr.*, 575 So. 2d 1087 (Ala. 1991) (holding that the filing of complaint by person not admitted to practice law in Alabama was a fatal defect for purposes of the statute of limitations); *Ratcliffe v. Apantaku*, 318 Ill.App.3d 621, 742 N.E.2d 843 (2000) (holding that a non-attorney personal representative could not represent the legal interest of the decedent's estate in a *pro se* capacity in a wrongful-death action); *Waite v. Carpenter*, 1 Neb. Ct. App. 321, 496 N.W.2d 1 (1992) (holding that personal representative was acting in a representative capacity for the estate and could not proceed *pro se* in a wrongful-death action).

On the other hand, those jurisdictions holding that the unauthorized practice of law results in an amendable defect have done so in an attempt to avoid what they deem to be the unduly harsh result of dismissal on technical grounds. *See Mikesic v. Trinity Lutheran Hosp.*, 980 S.W.2d 68 (Mo. Ct. App. 1998) (holding that dismissal of claim not filed by proper person was unwarranted where the purpose of a statute of limitations is to assure fairness by prohibiting stale claims); *Richardson v. Dodson*, 832 S.W.2d 888 (Ky. 1992) (holding that *pro se* complaint filed by a decedent's son in his individual capacity was an amendable defect, as the purpose of statutes of limitation is served when notice of the litigation is given within the time period allowed).

While we too disfavor dismissing actions on technical grounds, this court must remain cognizant of our duty to protect the interests of the public through the regulation of the practice of law. The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divi-

sions of government. *See Wilson v. Neal*, 341 Ark. 282, 16 S.W.3d 228 (2000), *cert. denied*, 121 S. Ct. 1355 (2001); *Weems v. Supreme Ct. Comm. on Prof. Conduct*, 257 Ark. 673, 523 S.W.2d 900, *reh'g denied*, 257 Ark. 685-A, 523 S.W.2d 900 (1975). Amendment 28 to the Arkansas Constitution specifically details our duty in this regard and states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." This court accepted the responsibility assigned to it by the constitution and set the standards high in order to protect the public, as well as the integrity of the legal profession. *Wilson*, 341 Ark. 282, 16 S.W.3d 228. In light of our duty to ensure that parties are represented by people knowledgeable and trained in the law, we cannot say that the unauthorized practice of law simply results in an amendable defect. Where a party not licensed to practice law in this state attempts to represent the interests of others by submitting himself or herself to jurisdiction of a court, those actions such as the filing of pleadings, are rendered a nullity.

Having determined that the original *pro se* complaint was a nullity, it is unnecessary for us to analyze Appellants' arguments that Ark. R. Civ. P. 15 or 17 should be applied to salvage their cause of action. These rules can not apply, because the original complaint, as a nullity never existed, and thus, an amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected.

III. Fraudulent Concealment

Finally, Appellants argue that the trial court erred in failing to find that the two-year statute of limitations period had been tolled by Appellees' actions of fraudulently concealing the decedent's medical records. Appellants aver that the affidavits submitted by them and the facts in this case should have prevented the trial court from granting a motion to dismiss. In other words, Appellants allege that there was a material question of fact at issue here. There is no merit to this argument.

Pursuant to Rule 15, a party may amend his pleadings at any time without leave of the court. The rule further provides:

> Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding.

Ark. R. Civ. P. 15(a). This court has held that a trial court is vested with broad discretion in allowing or denying amendment to pleadings. *Ultracuts, Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000); *Stoltz v. Friday*, 325 Ark. 399, 926 S.W.2d 438 (1996).

In *Stoltz*, the plaintiff filed an amended complaint that attempted to raise a new theory of recovery and defendants filed a motion to strike. The trial court granted the defendants' motion, and this court affirmed. There, the amendment was filed nearly one year after the original complaint was filed, and it was filed while the defendant's motion for summary judgment was pending. Under those facts, this court declined to hold that the trial court abused its discretion in striking this pleading.

Stoltz is analogous to the present situation. Here, Appellants did not raise the issue of fraudulent concealment until the filing of the fifth amended complaint, almost nine months after this action commenced. This amended complaint was also filed after the trial court orally granted Appellees' motions to dismiss, but then granted Appellants additional time to file a motion for reconsideration. Counsel for Appellants conceded in oral argument before this court that they were aware of the alleged concealment of records, but failed to raise it at an earlier time because it did not appear to be necessary to raise that issue. Under these facts, we cannot say that the trial court abused its discretion in striking the amended complaint.

In sum, the trial court's order dismissing this case was proper as Appellants failed to file a proper cause of action prior to the expiration of the two-year statute of limitations.

Circuit court affirmed; court of appeals reversed.

HOWARD W. BRILL, Spl. J., joins in this opinion.

IMBER, J., concurs.

GLAZE, J., not participating.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur with the result reached in this case because I agree that our regulatory duty under Amendment 28 to the Arkansas Constitution mandates our holding set forth in the majority opinion: "Where a party not licensed to practice law in this state attempts to represent the interests of others by submitting himself or herself to jurisdiction of a court, those actions such as the filings of pleadings, are rendered a nullity."

I write separately to voice the same concerns that I expressed in *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 01-1311 (April 11, 2002) (IMBER, J., concurring). The federal appellate courts have construed Rules 15(c) and 17(a) of the Federal Rules of Civil Procedure to permit relation back of amendments to pleadings adding entirely new plaintiffs under circumstances that do not evince a tactical or strategic decision, but rather, an understandable and excusable mistake. *See Advanced Magnetics, Inc., v. Bayfront Partners, Inc.*, 106 F.3d 11 (2d Cir. 1997); *Scheufler v. General Host Corp.*, 126 F.3d 1261 (10th Cir. 1997); *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967).

The Arkansas survival wrongful-death statutes, respectively codified at Ark. Code Ann. §§ 16-42-101 and 16-42-102 (Supp. 2001), provide very clear and precise language delineating the proper party to bring suit. In the instant case, the attorney's instruction to his clients to file *pro se* and his failure to sign the pleading cannot be condoned as an understandable mistake. The appellants' conduct in this case was in fact a deliberate and tactical choice.

THREE SISTERS PETROLEUM, INC.; Larry Oswald; James Morris; and Union Producing, L.L.C.
v. Jerry LANGLEY, Individually and d/b/a Jerry Langley Oil Company; Jerry Langley Oil Company, L.L.C.; J.C. Langley; Gary Sewell; Richard Hill; Russell Clay Murphy; Rodney Landes Sr.; Steve Rogers; John Milam; and Glenn Sams

02-162 72 S.W.3d 95

Supreme Court of Arkansas
Opinion delivered April 11, 2002

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Marcella J. Taylor*, *Sherry P. Bartley*, and *L. Kyle Hefley*; *Patton, Haltom, Roberts, McWilliams & Greer, L.L.P.*, by: *David P. Cotten*; and, *Of Counsel, Wiener, Weiss & Madison, A Professional Corporation*, by: *John M. Madison, Jr.*, and *Mark L. Hornsby*, for appellants.

Compton, Prewett, Thomas & Hickey, L.L.P., by: *William I Prewett*, for appellees.

DONALD L. CORBIN, Justice. This is an interlocutory appeal of a temporary restraining order. Appellants Three Sisters Petroleum, Inc.; Larry Oswald; James Morris; and Union Producing, L.L.C., argue that the Union County Circuit Court abused its discretion in granting an *ex parte* restraining order in favor of Appellees Jerry Langley, individually and doing business as Jerry Langley Oil Company; Jerry Langley Oil Company, L.L.C.; J.C. Langley; Gary Sewell; Richard Hill; Russell Clay Murphy; Rodney Landes Sr.; Steve Rogers; John Milam; and Glenn Sams. This case was originally submitted to us on Three Sisters's motion to expedite the appeal and to stay the lower court proceedings. This court granted the motion on February 21, 2002. Our jurisdiction over this interlocutory appeal is pursuant to Ark. R. App. P.—Civ. 2(a)(6). For reversal, Appellants argue that the trial court abused its discretion in granting the temporary restraining order because Appellees failed to show (1) that they would suffer irreparable harm if an injunction was not granted, and (2) that there was a likelihood that they would succeed on the merits of their case. We agree with Appellants, and we reverse.

Facts and Procedural History

The subject of this litigation is a dispute over the ownership of oil leases on wells located in Arkansas. The leases were previously owned by Phillips Petroleum, and were purchased in October 1999 by Appellant Three Sisters, a Louisiana corporation. Thereafter, Three Sisters assigned its rights in the leases to Appellant Union Producing, a Louisiana limited-liability company, which Three Sisters or its principals, including Appellants Oswald and Morris, own or control. On March 3, 2000, Appellee Jerry Langley, by and through his attorney, sent a letter to Three Sisters claiming that he had a contract with Three Sisters to purchase the leases from Phillips. The letter proposed that Three Sisters sell some of the leases to Langley for $9,000 per net barrel. Three Sisters rejected the proposal and maintained that they had no valid contract with Langley regarding the leases.

On March 15, 2000, Appellants filed suit in state court in Caddo Parish, Louisiana, seeking a declaratory judgment as to whether any contract existed between Three Sisters and Appellee

Langley. On May 18, 2000, Appellees removed that case to federal district court in Louisiana, based on a claim of diversity of citizenship. That same date, Appellees filed suit in federal district court in Arkansas. On March 29, 2001, the Louisiana federal court granted Appellees' motion to transfer the declaratory-judgment action to the Arkansas federal court.

About one month later, on April 23, 2001, Appellants took a voluntary nonsuit of their declaratory-judgment action, which had been transferred to the Arkansas federal court. The decision to nonsuit was based on Appellants' discovery that one of Langley's partners, Appellee Richard Hill, was a resident of Louisiana. Because there was no longer diversity of citizenship, Appellants filed a new declaratory-judgment action in Louisiana state court on April 24, 2001.

Appellees, once again, removed the Louisiana state-court case to federal court in Louisiana. Eventually, however, the Louisiana federal court concluded that jurisdiction was in state court, and it granted Appellants' motion to transfer the case back to the Louisiana state court. The Arkansas federal court also concluded that jurisdiction belonged in Louisiana state court, and it likewise granted Appellants' motion to dismiss Appellees' federal suit. One week later, Appellees filed the present suit in Union County, Arkansas. At that point, there were only two cases pending: (1) the declaratory-judgment action filed by Appellants on April 24, 2001, in Louisiana state court and (2) the civil complaint filed by Appellees on September 26, 2001, in the Union County Circuit Court.

On November 21, 2001, Appellants filed a motion to dismiss the Union County case or, alternatively, to stay that case until the Louisiana state case was resolved. Appellants urged that under principles of comity, the Arkansas court should allow the Louisiana court, which was the first to acquire jurisdiction over the parties and the subject matter, to conclude its proceedings first. The circuit court denied the motion on December 13, 2001. On February 8, 2002, Appellees filed a petition for an *ex parte* injunction in the circuit court, asking the court to restrain and enjoin Appellants from proceeding further in their suit in Louisiana. The cir-

cuit court granted the petition that same date, without a hearing, and issued a temporary restraining order. Appellants timely filed a notice of appeal from that order, and we granted a stay of the proceedings pending our resolution of this appeal.

Before we reach the merits of this case, we must first address Appellees' motion to dismiss this appeal. Appellees contend that an interlocutory appeal will not lie from the grant of a temporary restraining order issued pursuant to Ark. R. Civ. P. 65. Appellants argue that such an appeal is specifically authorized by Ark. R. App. P.—Civ. 2(a)(6), which provides that an appeal may be taken from "[a]n interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused." Appellees acknowledge this rule, but they contend that a temporary restraining order is not the equivalent of an injunction. Rather, they urge that a temporary restraining order is a lesser order that may ripen into an injunction following a hearing in the trial court. Thus, according to Appellees, there can be no appeal from a temporary restraining order issued under Rule 65 until the restrained party first exercises its right to apply for a hearing in the trial court. We are not persuaded by Appellees' arguments.

In the first place, we disagree that application for a hearing to dissolve a temporary restraining order is a prerequisite to appeal. Rule 2(a)(6) is clearly written in the alternative, providing for an interlocutory appeal from the grant of an injunction and also for an interlocutory appeal from an order refusing to dissolve an injunction. Obviously, the second alternative anticipates that application has been made in the trial court to set aside or dissolve the injunction, but the first alternative does not. Accordingly, the argument on this point lacks merit.

In the second place, this court's decisions have not drawn a distinction between temporary restraining orders and injunctions when accepting appeals. *See, e.g., Amalgamated Clothing v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994); *American Trucking Ass'n v. Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983); *Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980); and *Boyd v. Dodge*, 217 Ark. 919, 234 S.W.2d 204 (1950). For

example, in *Gray*, 280 Ark. 258, 657 S.W.2d 207, this court concluded that the interlocutory order granting a temporary or preliminary injunction was appealable pursuant to Rule 2(a)(6), and it proceeded to apply the standard of review for the granting or denial of a "temporary *restraining* order." *Id.* at 260, 657 S.W.2d at 208 (emphasis added). Similarly, in *Boyd*, 217 Ark. 919, 234 S.W.2d 204, this court used the terms "temporary restraining order" and "injunction" interchangeably:

> [A] majority of the Justices are of the opinion that the petition filed herein should be treated as an appeal from the interlocutory order of the Chancellor granting a *temporary restraining order*. . . . Ark. Stats. 27-2102 provides that an appeal may be taken to the Supreme Court from an interlocutory order granting or refusing an *injunction*.

Id. at 922, 234 S.W.2d at 205-06 (emphasis added). These cases demonstrate that this court has not heretofore differentiated between temporary or preliminary injunctions or restraining orders for purposes of determining jurisdiction on appeal. Interestingly, Appellees do not even differentiate between the two; their motion is styled "Petition for Injunction," but the body of the motion asks the court to issue a "preliminary restraining order."

Finally, we conclude that Appellees' argument must be rejected based on the Reporter's Notes (as modified by this court) to Rule 65, which clearly reflect this court's intention to treat temporary restraining orders the same as preliminary injunctions:

> 1. Rule 65 marks a significant departure from [Federal Rule of Civil Procedure] 65. Whereas the latter makes a distinction between preliminary injunctions and temporary restraining orders, *this rule treats them equally* insofar as the procedures are concerned for obtaining either remedy. [Emphasis added.]

Based on the foregoing authorities, we conclude that we have jurisdiction of this interlocutory appeal, and we deny Appellees' motion to dismiss. We now turn to the issues on appeal.

Appellants argue that the trial court abused its discretion in granting the temporary restraining order because (1) the allegations and findings of irreparable harm are insufficient as a matter of

law, and (2) there is no finding at all regarding the likelihood that Appellees would succeed on the merits of their suit. Appellants also argue that the restraining order impermissibly infringes on the respect and deference due to courts of other jurisdictions.

We note at the outset that the issuance of a temporary restraining order is a matter addressed to the sound discretion of the trial court, and its decision will not be reversed on appeal unless it is clearly erroneous. *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 42 S.W.3d 453 (2001). In determining whether to issue a preliminary injunction or temporary restraining order pursuant to Rule 65, the trial court must consider two things: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Id.*

Regarding the first necessary showing, this court has held: "Essential to the issuance of a temporary restraining order is a finding that a failure to issue it will result in irreparable harm to the applicant." *Kreutzer*, 271 Ark. at 244, 607 S.W.2d 670, 671 (citing Ark. R. Civ. P. 65). "The prospect of irreparable harm or lack of an otherwise adequate remedy is the foundation of the power to issue injunctive relief." *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 302, 954 S.W.2d 221, 224 (1997).

Regarding the second thing that must be shown, this court has held: "Of course, in order to justify a grant of preliminary injunction relief, a plaintiff must establish that it will likely prevail on the merits at trial." *W.E. Long Co. v. Holsum Baking Co.*, 307 Ark. 345, 351, 820 S.W.2d 440, 443 (1991) (citing *Smith v. American Trucking Ass'n*, 300 Ark. 594, 781 S.W.2d 3 (1989)). The test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation. *Custom Microsystems*, 344 Ark. 536, 42 S.W.3d 453. Such a showing "is a benchmark for issuing a preliminary injunction." *Id.* at 542, 42 S.W.3d at 457-58.

The record in this case is devoid of evidence supporting a finding of irreparable harm or of a likelihood of success. First, the temporary restraining order itself contains no factual findings of irreparable harm to Appellees. The closest thing to a finding of

fact on this issue is the trial court's conclusion that it "is not in the best interest of the parties financially" to continue litigating this matter in multiple courts. This finding is insufficient. Harm is normally only considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Kreutzer*, 271 Ark. 243, 607 S.W.2d 670. Obviously, financial harm is not irreparable, as it can be adequately compensated by money damages. Furthermore, financial concerns aside, the fact that "some inconvenience will be occasioned" by litigation in multiple courts is not sufficient reason to justify judicial restraint. *Standard Oil Co. of Louisiana v. Reddick*, 202 Ark. 393, 396, 150 S.W.2d 612, 614 (1941).

The only other mention of irreparable harm in the restraining order is as follows:

> Defendants are engaging in a race to the courthouse which may cause irreparable harm to Plaintiffs by forcing Plaintiffs to defend in a foreign court wherein:
>
> (a) the issue of personal jurisdiction has not been resolved;
>
> (b) all necessary parties are not before the court, and
>
> (c) all relief cannot be granted for all parties.

None of these claims of irreparable harm can be substantiated. In the first place, the issue of personal jurisdiction has been resolved by the Louisiana state court. The fact that Appellees have appealed that ruling does not make it an unresolved issue. Moreover, both the Arkansas and Louisiana federal courts came to the same conclusion — jurisdiction belongs in Louisiana state court. In the second place, the only "necessary" party that has not been included in the Louisiana case is Langley's father, J.C. Langley, who is a ward of Langley. Appellees do not explain how J.C. Langley is a necessary party to the action.[1] If, however, he is an investor-partner, like the other individual Appellees, then he certainly may be joined in the Louisiana litigation.

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[1] In paragraph 13 of the complaint, J.C. Langley is listed as one of the persons to whom Jerry Langley offered the opportunity to purchase an interest in the oil leases. In paragraph 16, however, J.C. Langley is omitted from the list of investors who had entered into a written agreement with Jerry Langley to invest in the leases.

[redacted] In the third place, the allegation that relief cannot be granted to all parties in Louisiana is not accurate. All of the claims filed by Appellees in the Union County court have been filed as counterclaims in the Louisiana state-court action. Appellees' assertion that the Louisiana court could not order a constructive trust on property located in Arkansas is a red herring. The bottom line is that this case comes down to a single issue: Whether a contract existed between Langley and Three Sisters to purchase the oil leases from Phillips Petroleum. This issue is squarely presented to the Louisiana court, which has authority to decide it. Undoubtedly, the Louisiana court has the authority to order Appellants to convey part of the leases to Appellees, should Appellees prevail, under the theory of specific performance. In *Reddick*, 202 Ark. 393, 150 S.W.2d 612, this court quoted with approval the following holding from the United States Supreme Court:

> Where the necessary parties are before a court of equity, *it is immaterial that the* res *of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal.* It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam.*

Id. at 396, 150 S.W.2d at 614 (emphasis added) (quoting *Phelps v. McDonald*, 99 U.S. 298, 308 (1878) (citations omitted)). Because all the necessary parties are before the court in Louisiana, it is immaterial that the oil wells are located in Arkansas. Accordingly, we conclude that Appellees have failed to demonstrate that they would suffer irreparable harm if the restraining order was not granted.

Likewise, Appellees have also failed to demonstrate a reasonable probability that they would succeed in their suit. Appellants assert that there was an initial agreement between the parties to attempt to purchase the oil leases from Phillips. They initially agreed that they would split the leases 50-50, and that Langley's

company would be the record purchaser. However, that agreement was not acceptable to Phillips, as it wanted assurances that the purchaser would indemnify it for any environmental claims arising out of its ownership of the leases. Phillips did not believe that Langley had the financial strength or operations experience to stand behind such an indemnity obligation. As a result of Phillips's concerns, Three Sisters proposed an 85-15 split between the parties. According to Appellants, the exact terms of the proposal were never agreed upon, and Langley was not successful in obtaining financing to purchase his share of the leases. After repeated inquiries regarding his ability to secure financing, and even one attempt at assisting him in obtaining a loan, Langley finally told Three Sisters to "count me out." Thereafter, Three Sisters purchased the leases from Phillips and subsequently assigned them to Appellant Union Producing.

[redacted] The facts as told by Appellees are quite different. They contend that a valid agreement existed between Langley and Three Sisters to purchase the oil leases 50-50. They claim that Three Sisters unilaterally altered the agreement to an 85-15 split. They claim further that Three Sisters never provided Langley with any documentation from Phillips regarding Phillips's alleged unwillingness to do business with him. They also claim that Langley was able to obtain financing, but that Three Sisters purchased the oil leases on its own behind his back. Given these two contradictory versions of what occurred between the parties, we cannot say that the record demonstrates a reasonable probability that Appellees will succeed on the merits of their suit.

[redacted] Finally, we agree with Appellants that the restraining order issued in this case ignores common principles of comity between courts of sister states. "'Judicial comity' is the principle in accordance with which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect." 16 AM. JUR. 2D *Conflict of Laws* § 16 (1998) (footnote omitted). The principle of comity requires that courts exercise the power to enjoin foreign suits sparingly. *See* 42 AM. JUR. 2D *Injunctions* § 195 (2000). This is particularly true where suit has already been brought in the foreign court. Generally, "[a] court

of one state will not enjoin the prosecution of an action in a second state when the court of the second state was the first to acquire jurisdiction of the parties and the right to adjudicate the controversy, in the absence of some peculiarly equitable ground for granting such relief." 42 AM. JUR. 2D *Injunctions* § 206 (2000) (footnote omitted). This general principle was recognized in *Pickett v. Ferguson*, 45 Ark. 177, 189 (1885), wherein this court held that restraining a party from proceeding in the courts of another state "is a matter of very great delicacy, almost inevitably leading to the distressing conflicts of jurisdiction." This court concluded that such restraint should only be imposed "where the foreign suit appears to be ill calculated to answer the ends of justice," such as where the court lacks jurisdiction over all of the parties or the subject matter of the case. *Id.* (citations omitted).

In *Pickett*, the subject of the litigation was title to property located in Arkansas. A suit was filed by the original landowner, Mrs. Pickett, in Tennessee. She later filed suit in Arkansas because she was not able to obtain service on one of the defendants in Tennessee, as he had since moved to Arkansas. The defendants asked the Arkansas court for an injunction preventing Mrs. Pickett from proceeding further in her Tennessee suit. The trial court granted the injunction and this court upheld it. The decisive factor supporting the injunction was not that the property was located in Arkansas, but that the Tennessee court did not have, and could not obtain, personal jurisdiction over an indispensable party. This court held:

> The fact that the real estate, which is the subject of controversy, was situate in Arkansas, was not an insuperable obstacle in the way of doing complete justice by the Tennessee court. But as a court of equity in such cases acts *in personam*, it must have jurisdiction over the parties in order to administer the cause. Ferguson, an indispensable party to the litigation, was absent.

Id. at 189-90. This holding demonstrates this court's respect for the courts of our sister states and its caution in upholding injunctions that preclude parties from maintaining and prosecuting suits in other states.

Following *Pickett*, this court demonstrated even more caution when reviewing an injunction prohibiting a resident of another state from proceeding with a suit in that other state. In *Greer v. Cook*, 88 Ark. 93, 113 S.W. 1009 (1908), this court refused to uphold an injunction prohibiting a creditor who lived in Missouri from proceeding with a suit in Missouri against a debtor who lived in Arkansas. This court concluded that the case turned on the right of the creditor to proceed with the suit in his home state. It was thus immaterial that suit had already been brought by the creditor in Arkansas. This court explained:

> The fact that an action was first instituted and was pending here when the new action was commenced in Missouri does not alter the case. Whether or not the bringing of a new action in a foreign jurisdiction operates as an abatement of the action here, we need not decide. The result turns upon the right of the creditor to bring his action in another State without being open to the charge of having fraudulently evaded the laws of this State; and *if he had the right, in the first instance, to sue in another State, the fact that he had already instituted suit here does not cut off that right.* The fact that the creditor instituted the suit in a foreign jurisdiction for the sole purpose of vexation and oppression does not authorize the interposition of a court of equity by injunction. The remedy, if any, is at law for the malicious abuse of process.

Id. at 96, 113 S.W. at 1010 (citation omitted) (emphasis added).

Here, unlike the facts in *Pickett*, the Louisiana state court has jurisdiction over all of the parties. In fact, the issue of jurisdiction has been repeatedly litigated, with the Louisiana state court and both the Arkansas and Louisiana federal courts ruling that jurisdiction belonged in Louisiana state court, due to the fact that Louisiana residents were on both sides of the suit. Although Appellees have appealed the most recent jurisdiction ruling by the Louisiana state court, it is not apparent that they will succeed on that issue. Moreover, the holding in *Cook* clearly demonstrates this court's historic reluctance to support an injunction restraining a resident of a sister state from proceeding with a suit already instituted in that state. In short, the circuit court's authority to issue injunctions of foreign suits should only be exercised in the rarest of circumstances. This is not such a rare circumstance.

In sum, we conclude that the trial court abused its discretion in issuing the restraining order in this case. The Louisiana state court has jurisdiction over the parties and the subject matter of the dispute. There has been no showing of irreparable harm to Appellees that would justify an order restraining Appellants, residents of Louisiana, from proceeding with a suit filed in their home state, a suit that was filed first. Moreover, Appellees have failed to make the requisite showing that they would likely prevail on the merits of their suit. Under the circumstances, judicial comity must prevail. Accordingly, we reverse and remand with instruction to the trial court that the restraining order be dissolved, thus allowing Appellants to proceed with their suit in Louisiana.

Reversed and remanded.

Alex WARE *v.* STATE of Arkansas

CR 01-910 75 S.W.3d 165

Supreme Court of Arkansas
Opinion delivered April 11, 2002

Durrett & Coleman, by: *Gerald A. Coleman*; and *Raymond Abramson*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Alex Ware appeals the judgment of the St. Francis County Circuit Court convicting him of two counts of capital murder and sen-

tencing him to a term of life imprisonment without the possibility of parole. On appeal, Ware argues that the trial court erred in: (1) denying his motion to quash the information and in failing to grant his motion for a directed verdict; (2) denying his motion for severance; (3) finding him competent to stand trial and denying his motion for a continuance; and (4) refusing to impose sanctions for a violation of the court's order limiting pretrial publicity. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and affirm.

On June 18, 1999, Chantilly Harrell took her two sons, four-year-old K-Von and one-year-old Alexander, to visit Ware, their father, for the Father's Day weekend. Both Harrell and Ware lived in Memphis, Tennessee, at that time. Harrell had recently left Ware after a five-year relationship, because he had been abusive to her. On June 19, Ware phoned Harrell and stated, "I don't know what I've done with the children. You'll never see them again. You'll never trust me again. I don't know what I've done." Thereafter, Harrell contacted Memphis police and reported her conversation with Ware to Officer Christopher Wages. After being paged by Wages, Ware contacted police and told them that he would bring the children to the police department within a couple of hours, but he never appeared with the children.

On June 28, 1999, Memphis Police Officer Troy Shields received another call from Harrell regarding the whereabouts of her sons. Shields went to Ware's residence and discovered that it had been abandoned. Shields then contacted Ware expressing concern about the children's safety. Ware was evasive during this conversation and told Shields that he had not seen the boys since he returned them to their mother. Shields contacted Ware again the next day requesting assurances that the children were safe, but Ware was uncooperative, stating that he would not bring the children in until he cleared his name.

Harrell spoke with Ware on several different occasions between the time the boys disappeared in June and late August 1999. During one conversation, Ware told Harrell that he had thrown K-Von into a pond and that he had abandoned Alexander in some weeds. By the end of August, however, Ware's story

changed, and he told Harrell that if she wanted to see her children alive again, she would have to go with him to pick them up. Harrell notified her mother that she was going with Ware and asked her to contact police if a day passed without hearing from her. According to Harrell, Ware picked her up in Memphis at Court Square and initially drove her to a park located near the Mall of Memphis. Ware then pulled a gun on Harrell and told her that the children were alive, but that he had been trying "to break her spirit."

After leaving the park, Ware drove Harrell to Chicago, Illinois. During the drive, Ware repeatedly told Harrell that the children were fine and with nice people. Once in Chicago, Ware took Harrell to a cousin's house where two of Ware's children from a previous relationship, Shenna and Perez, were located. Harrell attempted to question Ware's children about the whereabouts of her own sons, but Ware retrieved his gun and a struggle ensued between him and Harrell. Ware then told Harrell that their children were dead and that she was never going to see them again. Immediately thereafter, Ware recanted and told Harrell that he would take her to the children the following day.

The next day, Ware drove Harrell and his two children to Detroit, Michigan, to the home of a great-aunt, but the two missing boys were not there. Ware again drove back to Chicago and dropped off his children. He and Harrell then went back to Detroit, before returning to Memphis. Ware told Harrell that he had some business to take care of in Memphis before he took her to Florida to get the children. Once in Memphis, Ware and Harrell checked into a room at the Bellevue Inn. Harrell then called her mother who in turn contacted the police and informed them that her daughter was being held against her will at the motel.

Memphis Police Officers Max Howard and Billy Smallwood went to the Bellevue Inn and made contact with Ware at approximately 2:00 a.m. on September 2, 1999. Initially, Ware gave officers a false name. Harrell informed the officers that Ware had taken her children somewhere, and she was trying to get them back. Ware then claimed that he had custody of the children. According to Smallwood, he initially believed that he was a deal-

ing with a situation involving parental kidnapping, but grew suspicious after Ware made repeated comments about death and parents who kill their children. After discovering that he was wanted for questioning regarding the whereabouts of two of his children, Howard and Smallwood took Ware into custody. While en route to the Shelby County Jail, the officers were discussing different situations involving murders and kidnappings when Ware interrupted them. According to Smallwood, Ware asked, "[I]f they can't find the bodies, can they still charge me with murder?" Smallwood stated that he did not initiate any conversation with Ware. Howard also testified that neither he nor Smallwood attempted to initiate a conversation with Ware, and that Ware interrupted their conversation. The only other statement made by Ware while in the patrol car was, "I might as well just kill myself, 'cause I'm not gonna go to prison like that."

Once at the police station, Ware was questioned by Sergeants Marcus Worthy and Donald Ray Dickerson. The officers advised Ware of his *Miranda* rights and asked if he would mind answering some questions. Worthy told Ware that the officers' primary concern was the whereabouts of the children. Initially, Ware told the officers that the kids were safe and happy. After Worthy made comments that the children deserved a proper burial by an ordained minister, Ware changed his story to state that Harrell had killed the children and that he had witnessed it. Ware then signed a typed copy of his statement and told the officers that he would show them where the children's bodies were located.

Thereafter, Ware took the officers to Arkansas, where they were met by officers from the St. Francis County Sheriff's Office. Ware first directed the officers to an area known as Blackfish Lake. Upon arriving at the scene, Ware attempted to remove his clothes and shoes and stated that he wanted to go into the lake to retrieve K-Von's body. Ware then took police to a wooded area next to a levee north of Widner Junction where Alexander was abandoned. After searching the lake, investigators were unable to locate the remains of K-Von, but did discover several bone fragments at the wooded site. A later search of this area also uncovered a child's sock and a t-shirt for a twelve- to eighteen-month-old child.

Initially, both Ware and Harrell were charged with two counts of capital murder and were transported from Memphis to St. Francis County on September 7, 1999. The pair were questioned separately by Officers Glenn Ramsey and Herbert Neighbors, beginning with Harrell. After giving an oral statement, Ware agreed to allow Ramsey to reduce the statement to writing. After reading it and verifying that it was accurate, Ware signed the statement. In that statement, Ware claimed that a couple of days after Harrell moved out with the children, she contacted him stating that she felt tied down at a young age by the two children and was stressed out. Ware then stated that Harrell came to his house on the morning of June 16 wanting to go for a ride over to Arkansas. During the drive, Harrell told Ware that she no longer wanted the children. Ware then described exiting Interstate 40 near Albert's Junkyard and turning down a gravel road where he stopped the car. According to Ware, Harrell got out of the car with Alexander, took off the child's shoes, kissed him on the head, and then threw him into some weeds. Ware stated that he and Harrell then returned to Memphis, first stopping to buy a sundae, and he dropped Harrell off at her mother's house and took K-Von home with him.

According to Ware, three days later, on June 19, he and Harrell went back to Arkansas with K-Von. After traveling through West Memphis, Ware stated that they first turned onto a road with a big S-curve, and then turned down a second road near a generator. Ware then stated that Harrell got out of the car with K-Von and walked around a curve. After a minute or two, Ware followed Harrell and saw K-Von's head bobbing up and down in the water. Four or five days after this initial statement, Ware asked to speak with Officer Ramsey. Ware asked if K-Von's body had been discovered. When told that it had not been found, Ware stated, "Y'all have to keep looking, y'all have to find that child. He deserves a decent burial."

As the investigation proceeded, the State dropped the charges against Harrell, but proceeded with its case against Ware. The State's position during the trial was that Ware committed the murders as an act of revenge against Harrell. Prior to trial, Ware underwent a mental evaluation and was found to be competent to

stand trial. The record reflects that from the beginning of this case Ware refused to cooperate with his court-appointed counsel. The trial court granted a motion by Ware to hire his own investigator, as well as a motion to hire his own psychiatrist to make a determination regarding his competency. Although Ware's expert, Dr. Rebecca Caperton, testified during a pretrial hearing that Ware seemed to be delusional and refused to cooperate in his own defense, the trial court determined that he was fit to proceed to trial.

At trial, the jury heard testimony from Harrell and various law enforcement personnel involved in the investigation. The State also introduced scientific evidence regarding the analysis of the remains discovered at the wooded site. Dr. Cheryl May, a forensic anthropologist with the Arkansas State Crime Lab, testified that the remains, consisting primarily of fragments from the cranium and spine, were human and came from the same individual. Dr. May further stated that some additional human remains, as well as some non-human remains, were discovered at a secondary site about 150 feet away from the initial discovery site. The human remains located at the second site consisted of part of the boney spine, the vertebral arch, and the right ischim, which is part of the pelvis. According to Dr. May, these remains were those of a young child. Dr. May further testified that additional skeletal elements were discovered on a subsequent search of the crime scene. Dr. May stated that these bones were consistent in size, coloration, and age as the previously recovered bones. May opined that the remains were those of a child ranging in age from twelve to sixteen months.

John Stewart, Program Manager of the National Missing Person DNA Database for the FBI, testified that he conducted a mitochondrial DNA test on the bones recovered in this case and compared them to a blood sample taken from Harrell. The test revealed that the bone fragments matched Harrell's blood sample. According to Stewart, Alexander Harrell could not be excluded or eliminated as being the contributor of the bone sample. Stewart further opined that 99.4% of the African-American population could, however, be excluded as a contributor.

Ware also testified at trial and for the first time alleged that Alexander's death was accidental and that K-Von was alive and with a friend. Ware stated that he came home to discover Alexander lying at the bottom of a staircase not moving or breathing. According to Ware, he did not seek medical help out of fear that his other children, Shenna and Perez, would be charged with a crime. Ware recounted how he decided to drive to West Memphis, passing a junkyard and a generator, arriving at a wooded spot where he left Alexander's body in some tall weeds. Ware then stated that he did not tell Harrell what had happened, because she would have retaliated against his other children. Ware further claimed that he had given K-Von to a woman named Cherise DeBarg, whom he had previously met in a grocery store, because he did not want Harrell to take his son away from him. According to Ware, he gave DeBarg his pager number and waited for her to call him about his son. Finally, Ware stated that he had previously told the police and Harrell that the children were dead, because he was angry.

Ware moved for a directed verdict both at the close of the State's case and again at the close of all the evidence. The motions were denied, and the case was submitted to the jury. After returning a verdict of guilty on both counts of capital murder, Ware was sentenced to life imprisonment. This appeal followed.

I. Corpus Delicti

For his first argument on appeal, Ware contends that the trial court erred in failing to quash the information and later in failing to direct a verdict in his favor, because the State failed to prove the *corpus delicti.* According to Ware, there was insufficient evidence to support either the information or his conviction, because the State failed to produce any proof, other than his own statements, that the children were murdered. Specifically, Ware argues that there was no evidence that the death of Alexander was the result of a criminal act, as the State did not prove the cause of death. As for K-Von, Ware argues that the State failed to prove that a death even occurred or that a criminal act occurred. We disagree.

First, Ware is incorrect in asserting that the trial court erred in failing to quash the information. As the State correctly points out, there was no authority for the trial court to grant the motion to quash based on an allegation of insufficient proof. Lack of probable cause is not a statutory ground for a motion to set aside an indictment or, by implication, to quash an information. Ark. Code Ann. § 16-85-706 (1987); *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114, *cert. denied*, 519 U.S. 847 (1996). In *State v. Garrison*, 272 Ark. 470, 615 S.W.2d 371 (1981), this court reversed a trial court's dismissal of an information for insufficient proof, stating that there was no constitutional or statutory authority for a hearing when charges had already been filed by the prosecutor. Here, as in *Garrison*, the charges against Ware had already been filed in the circuit court and the issue of his pretrial detention had been judicially determined. Accordingly, the trial court did not err in denying Ware's motion to quash the information.

Likewise, the trial court did not err in denying Ware's motions for directed verdict on the grounds that the State failed to prove the *corpus delicti*, as required to corroborate his statements about the crimes. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Branscum v. State*, 345 Ark. 21, 43 S.W.3d 148 (2001). The test on appeal is whether there is substantial evidence to support the verdict. *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000). Where, however, the challenge is limited to the sufficiency of the evidence corroborating a defendant's confession, our review is governed by Ark. Code Ann. § 16-89-111(d) (1987). *See Tinsley v. State*, 338 Ark. 342, 993 S.W.2d 898 (1999). Section 16-89-111(d) provides: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed." The requirement for other proof is sometimes referred to as the *corpus delicti* rule and requires only proof that the offense occurred and nothing more. *Id.* Thus, the State must prove (1) the existence of an injury or harm constituting a crime and (2) that the injury or harm was caused by someone's criminal activity. *Id.* (citing *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996)). This court has held that it

is not necessary to establish any further connection between the crime and the particular defendant. *Hart v. State*, 301 Ark. 200, 783 S.W.2d 40 (1990).

In a murder case, this rule requires the State to prove that the deceased came to his death at the hands of another person. *Ferrell*, 325 Ark. 455, 929 S.W.2d 697. This court has recognized, however, that there is no requirement that medical testimony be provided regarding the cause of death. *Sims v. State*, 258 Ark. 940, 530 S.W.2d 182 (1975); *Glover v. State*, 211 Ark. 1002, 204 S.W.2d 373 (1947). Both elements, the fact of death and the cause of death, may be shown by strong and unequivocal circumstantial evidence such as to leave no ground for reasonable doubt; thus, where there is some proof of the *corpus delicti*, its weight and sufficiency is properly left to the jury. *Sims*, 258 Ark. 940, 530 S.W.2d 182 (citing *Edmonds v. State*, 34 Ark. 720 (1879)). *See also Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981).

Here, Appellant led police officers to a remote wooded area near a murky pond in St. Francis County. There, the decomposed remains of the body of Alexander were found. While the body of K-Von was never found, Ware inquired of police if it had been found and pleaded with them to continue looking for it, so that his son could have a proper burial. In addition, when Ware was initially taken into custody, he asked Officers Smallwood and Howard if he could be charged with murder "if they can't find any bodies." Ware also had made veiled comments regarding death and parents who kill their children. These statements combined certainly create circumstantial evidence that both boys had died as the result of a criminal act of another. Moreover, this is not a situation involving victims old enough to disappear, in a secluded area far from their home, of their own accord. The fact that K-Von has never been seen alive after being left in the care of his father is circumstantial evidence of both the fact of his death and Ware's responsibility for that death.

Ware's actions leading up to and following his arrest are also corroborative of his guilt. When contacted by the police regarding the children's whereabouts Ware was evasive and

uncooperative. He also abandoned his home and took his other two children out of state. When police finally caught up with him, Ware attempted to evade detection by giving police a false name and then claiming to have custody of K-Von and Alexander. All of these actions combined could be considered by the jury as corroborative of guilt. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001); *Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000). Finally, Ware's trial testimony that he gave K-Von to DeBarg conflicted with his prior statements to police that Harrell had killed the boys and that he had witnessed it. This trial testimony is also not credible in light of the fact that when Ware led the police to Blackfish Lake where K-Von was allegedly thrown in by Harrell, he immediately tried to remove his clothes and go into the lake to retrieve his son's body. It is well settled that a defendant's improbable explanations of suspicious circumstances may be admissible as proof of guilt. *Ross*, 346 Ark. 225, 57 S.W.3d 152; *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

In sum, the State did establish that Alexander and K-Von were dead as a result of the criminal acts of Ware, thereby proving the *corpus delicti*. Accordingly, the trial court did not err in refusing to grant the motions for directed verdict.

II. Severance

For his second point on appeal, Ware argues that the trial court erred in refusing to sever the two charges of capital murder. According to Appellant, the charges constituted two separate incidents, and there was no evidence that they were part of a single scheme or plan. The State correctly avers that Ware failed to preserve this argument for review.

Pursuant to Ark. R. Crim. P. 22.1(b), "If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all of the evidence. Severance is waived by the failure to renew the motion." *See also Gray v. State*, 327 Ark. 113, 937 S.W.2d 639 (1997). Here, a review of the record reveals that Ware failed to renew his motion for a severance at any time during the trial.

Accordingly, his argument on this point was waived, and we will not consider it on appeal.

III. Competency

Next, Ware argues that the trial court erred in finding him competent to stand trial where he was unable to assist in his defense. In the same vein, Ware argues that the trial court also erred in refusing to grant him a last-minute continuance when he decided to provide his court-appointed counsel with information related to his defense. This court will affirm a finding of fitness to stand trial if there is substantial evidence to support the trial court's finding. *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996).

A person lacking the capacity to understand the proceedings against him or to assist in his defense shall not proceed to trial as long as the incapacity endures. Ark. Code Ann. § 5-2-302 (Repl. 1997). A criminal defendant is presumed to be competent, however, and the burden of proving incompetence is on the accused. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001); *Baumgarner v. State*, 316 Ark. 373, 872 S.W.2d 380 (1994). The test for determining an accused's competency to stand trial is whether he is aware of the nature of the proceedings against him and is capable of cooperating effectively with his attorney in the preparation of his defense. *Id.*; *Key*, 325 Ark. 73, 923 S.W.2d 865.

Prior to trial, counsel filed a motion requesting the trial court to find Ware not competent to stand trial. This motion was based on the opinion of Dr. Rebecca Caperton that Ware suffered from a delusional disorder and was unable to assist his attorneys. The State countered Caperton's opinion with that of Dr. Charles Mallory of the Arkansas State Hospital who opined that the only disorder Ware suffered from was antisocial personality disorder. Mallory also testified that Ware scored an eighty-six out of a possible 100 on the Georgia Court Competency Test. According to Mallory, Ware understood the charges against him, as well as the role of the trial judge, prosecutor, and defense counsel. Mallory opined that Ware was competent to participate in the trial process.

Moreover, while Ware did consistently refuse to talk with his counsel until the eve of his trial, there was insufficient proof that this lack of cooperation stemmed from any type of mental incapacity. In fact, the record reveals that Ware was knowledgeable of the legal system. At one point, Ware stated in open court that he had instructed his attorneys to file a motion to dismiss. In another instance, Ware wrote a letter to the trial judge seeking new counsel and discussing the nature of judicial proceedings. In light of this evidence, we cannot say that the trial court erred in finding Ware competent to stand trial.

Ware further asserts that the trial court should have granted him a continuance to allow him time to prepare a defense consistent with his last-minute admission that Alexander died accidentally and that K-Von was alive. When reviewing the grant or denial of a motion for continuance, this court employs an abuse-of-discretion standard. *Anthony v. State*, 339 Ark. 20, 2 S.W.3d 780 (1999). An appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance, but also show prejudice that amounts to a denial of justice. *Id.* When a motion for continuance is based on a lack of time to prepare, we will consider the totality of the circumstances. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). This court has held that a lack of diligence alone is a sufficient basis to deny a motion for a continuance. *Id*; *Anthony*, 339 Ark. 20, 2 S.W.3d 780.

Considering the totality of the circumstances, it is clear that the trial court properly denied Ware's motion for a continuance. He did not request the continuance until after the eleventh juror had been selected for his trial. Ware was given sufficient time to prepare his defense. In fact, he was granted a court-appointed psychiatrist and investigator to assist him in his defense. Ware knew all along what happened to the children, but chose to wait until the last second to provide his counsel with information necessary to defend him. This is a prime example of lack of diligence and, as such, was a sufficient basis for denying the motion for a continuance.

IV. Pretrial Publicity

For his final point on appeal, Ware argues that the trial court erred in refusing to exclude all evidence related to the remains of Alexander for violation of a pretrial order limiting publicity. At issue here was a statement made by Officer Ramsey prior to trial that DNA tests confirmed that the previously discovered remains were those of Alexander. As a result of this statement, Ware requested that Ramsey be barred from testifying at trial and that the DNA results be suppressed. According to Ware, the trial court had the authority to fashion a remedy for this violation, but failed to do so. The State asserts that this court should not consider this argument on appeal, as Ware has failed to provide any convincing legal argument or authority in support of this contention. We agree with the State.

[redacted] This court has said on numerous occasions that it will not consider the merits of an argument if the appellant fails to cite any convincing legal authority in support of that argument. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001); *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). Accordingly, we decline to address the merits of Ware's argument on this point.

V. 4-3(h) Review

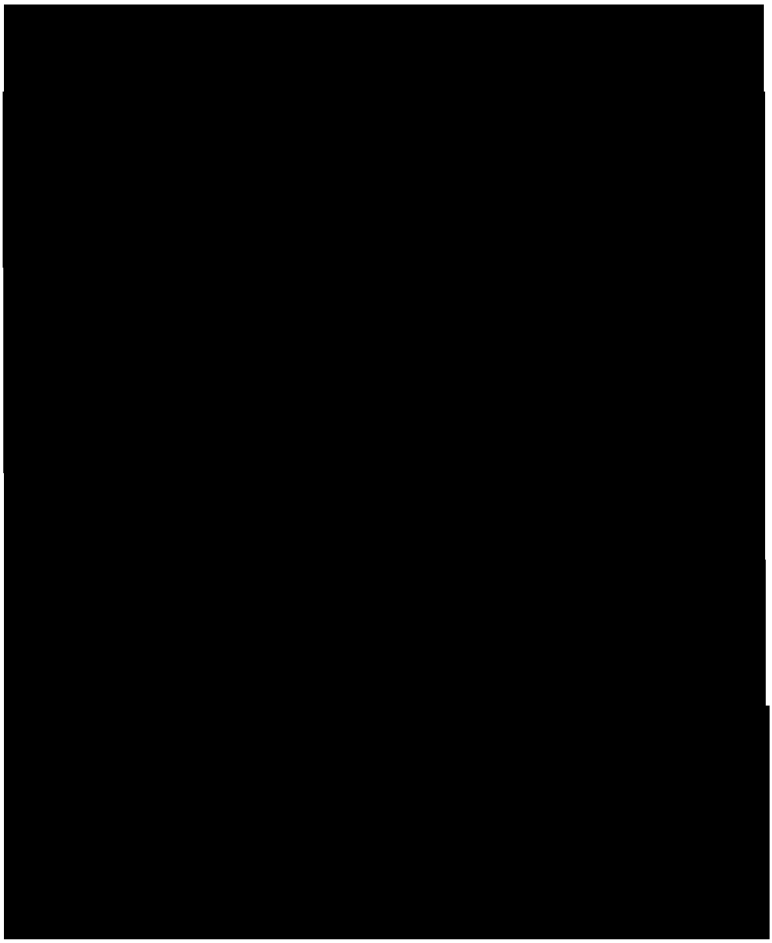
The record has been reviewed in this case for other reversible error pursuant to Ark. Sup. Ct. R. 4-3(h), and none has been found.

Affirmed.

ST. PAUL MERCURY INSURANCE COMPANY *v.*
CIRCUIT COURT of CRAIGHEAD COUNTY,
Western Division

01-1311 73 S.W.3d 584

Supreme Court of Arkansas
Opinion delivered April 11, 2002



Barrett & Deacon, by: *Paul D. Waddell, D.P. Marshall, Jr.*, and *Leigh M. Chiles*, for appellant.

Orr, Scholtens, Willhite & Averitt, PLC, by: *M. Scott Willhite*, for appellee.

JIM HANNAH, Justice. St. Paul Mercury Insurance Company seeks a writ of prohibition to stop the Craighead County Circuit Court from hearing a medical-malpractice action. Because a writ of prohibition is sought, jurisdiction lies in this

court pursuant to Ark. R. Sup. Ct. 1-2(a)(3). The petition asserts that the trial court is wholly without jurisdiction.

St. Paul brought a motion to dismiss that included exhibits and reference to matters outside the pleadings. This converted the motion to a motion for summary judgment as provided for under Ark. R. Civ. P. 12(b). The motion was denied by the trial court. Therefore, absent a writ from this court, the case will proceed below.

The petition for a writ of prohibition is granted. The trial court erred in concluding that the amended complaint filed in May 2001 related back to the original *pro se* complaint. Because the amended complaint does not relate back to the original *pro se* complaint, the action is barred by the statute of limitations on medical-malpractice claims.

At the time that the *pro se* complaint was filed by the deceased's parents and some of the other heirs at law, the probate court had already appointed an administrator. Under Ark. Code Ann. § 16-62-101 (Supp. 2001), only the administrator could file a survival action. She did not do so. The *pro se* plaintiffs were without standing, and their complaint was a nullity. Additionally, even if the complaint were not a nullity, the filing of the amended complaint in May 2001 substituted entirely new plaintiffs and, therefore, constituted a new suit subject to the two-year statute of limitations. The action is barred by the statute of limitations.

Facts

On February 26, 1999, Timothy Thomas was taken to St. Bernard's Hospital where he was treated for stab wounds and died that same day. On July 19, 1999, Timothy's daughter, Stephanie Thomas Hart, was appointed special administrator of his estate. On February 23, 2001, a *pro se* complaint alleging medical malpractice was filed by Timothy's parents and his other heirs-at-law with the exception of Ms. Hart. On February 26, 2001, the limitations period on any malpractice action expired. On March 13, 2001, St. Bernard's filed a motion to dismiss based in part on a lack of standing. On April 24, 2001, Timothy's parents were substituted for Stephanie as special administrators. On May 9, 2001,

Timothy's parents filed an "amended complaint" as plaintiff special administrators. On June 5, 2001, St. Bernard's filed a motion to dismiss based upon the statute of limitations. The motion was denied, and this petition followed.

Writ of Prohibition

St. Paul's filed a motion to dismiss. Matters outside the pleadings were considered. Exhibits were attached to the motion. As such, it is considered a motion for summary judgment as provided for under Ark. R. Civ. P. 12(b). However, as with a motion to dismiss, the denial of a motion for summary judgment is not appealable. *Brinker v. Forrest City School District*, 344 Ark. 171, 40 S.W.3d 265 (2001). *See also, Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996).

Therefore, St. Paul seeks a writ of prohibition to stop the trial court from proceeding. In *State v. Circuit Court of Lincoln County*, 336 Ark. 122, 125, 984 S.W.2d 412, 414 (1999), this court stated:

> A writ of prohibition is extraordinary relief which is appropriate only when the trial court is wholly without jurisdiction. *Henderson Specialties, Inc. v. Boone County Circuit Court*, 334 Ark. 111, 971 S.W.2d 234 (1998); *Nucor Holding Co. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996). The writ is appropriate only when there is no other remedy, such as an appeal, available. *Henderson Specialties, Inc. v. Boone County Circuit Court, supra; West Memphis Sch. Dist. No. 4 v. Circuit Court*, 316 Ark. 290, 871 S.W.2d 368 (1994) (quoting *National Sec. Fire & Cas. Co. v. Poskey*, 309 Ark. 206, 828 S.W.2d 836 (1992)). When deciding whether prohibition will lie, we confine our review to the pleadings in the case. *The Wise Company, Inc. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6(1993).

See also, Willis v. Circuit Court of Phillips County, 342 Ark. 128, 27 S.W.3d 372 (2000); *Pike v. Benton Circuit Court*, 340 Ark. 311, 10 S.W.3d 447, 448 (2000). Jurisdiction is the power of the court to hear and determine the subject matter in controversy between the parties. *Circuit Court of Lincoln County*, 336 Ark. at 125.

Prohibition is a proper remedy when the jurisdiction of the trial court depends upon a legal rather than a factual question. *Western Waste Indus. v. Purifoy*, 326 Ark. 256, 930 S.W.2d 348 (1996); *Fausett and Co. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153 (1985); *Titsworth v. Mayfield, Judge*, 241 Ark. 641, 409 S.W.2d 500 (1966). When jurisdiction depends on the establishment of facts or turns on facts which are in dispute, the issue is one correctly determined by the trial court. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995).

The issue before the trial court was the interpretation of Ark. Code Ann. § 16-62-101, and the applicability of Ark. R. Civ. P. 15 and 17. Therefore, this was a legal question. So, if there is no jurisdiction, the only way petitioners can obtain review by this court is by way of a petition for a writ of prohibition. Therefore, a petition for a writ of prohibition is a proper method to obtain review of jurisdiction by this court. *Ramirez v. White County*, 343 Ark. 372, 38 S.W.3d 298 (2001).

The Amended Complaint

In Arkansas, a medical-malpractice action must be brought within two years of "the date of the wrongful act complained of and no other time." Ark. Code Ann. § 16-114-203 (Supp. 2001). The medical malpractice act applies to all causes of action for medical injury arising after April 2, 1979, including wrongful-death and survival actions arising from the death of a patient. *See Pastchol v. St. Paul Fire & Marine Ins.* 326 Ark. 140, 929 S.W.2d 713 (1996).

In this case, all treatment was provided on February 26, 1999. On February 23, 2001, a *pro se* complaint was filed, which was filed within the two-year limitations period. On May 9, 2001, an "amended complaint" was filed by new plaintiffs. This second complaint was not filed within the two-year limitations period. Thus, the "amended complaint" can not be valid if it does not relate back to the *pro se* complaint.

The *pro se* complaint was filed by Timothy's two sisters and his parents, who constituted part, but not all, of Timothy's heirs at law. On February 23, 2001, when the *pro se*

complaint was filed, an estate had already been opened for Timothy. As noted, Stephanie Hart had been previously appointed administrator on July 19, 1999.

The *pro se* complaint asserted damages based upon injuries suffered by Timothy prior to his death. Thus, a survival action is asserted. A survival action is a statutory action, which may be brought after the person's death by his or her executor or administrator. Ark. Code Ann. § 16-62-101. *See also, First Commercial Bank v. United States of America*, 727 F. Supp. 1300 (E.D. Ark. 1990). Because the survival action, just as a wrongful-death action, is a creation of statute, it only exists in the manner and form prescribed by the statute. *Ramirez, supra.* It is in derogation of the common law and must be strictly construed, and nothing may be taken as intended that is not clearly expressed. *Id.* The right to amend a complaint in circumstances such as we are dealing with is substantive, and not procedural, and the right to recover under the statute is dependent upon the complaining party bringing himself within the terms of the statute, as construed by this court. Ark. Code Ann. § 16-62-101; *Ramirez, supra.* Thus, the survival action could only be brought by Ms. Hart.

The conclusion we are compelled to reach is that the *pro se* complaint was a nullity. Had the motion to dismiss been heard before the amended complaint was filed, the complaint should have been dismissed based upon a lack of standing. *Ramirez, supra.* The *pro se* complaint was not permitted under the statute. Ark. Code Ann. § 16-62-101. Thus, there was no complaint to amend in May 2001.

The trial court relied on the relation back doctrine, which is a reference to Ark. R. Civ. P. 15(c). Rule 15 provides that "a party may amend his pleadings. . . ." However, Rule 15 is a procedural rule that controls how a party may amend existing pleadings. Before the rule can apply, there must be pleadings to amend.

Rule 15 applies, for example, when an amendment permissibly changes the party against whom the claim is asserted or adds a party after the statute of limitations has run, and it may relate back to the time of filing of the original complaint.

Southwestern Bell Tel. Co. v. Blastech, 313 Ark. 202, 852 S.W.2d 813 (1993). Rule 15 makes liberal provision for amendments to pleadings and even allows a plaintiff to amend to add new claims arising out of the conduct alleged in the initial valid complaint. *Jim Halsey Co. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985). These cases, and the cited case law, all deal with a plaintiff amending an existing valid pleading to state a new cause of action against a defendant or to add a new defendant where proper. Rule 15 simply would not help the appellees in this case because there was no pleading to amend when the Thomases filed their "amended complaint" as administrators.

The *pro se* plaintiffs were without standing. This court has stated that where the plaintiff has no standing, but prevails anyway, the prejudice to the defendant is obvious. *Daughhetee v. Shipley*, 282 Ark. 596, 669 S.W.2d 886 (1984). A survival action is a statutory action, and pursuant to the statute, only an administrator or executor could bring suit. Ark. Code Ann. § 16-62-101. The *pro se* plaintiffs were, therefore, without standing.

The trial court found that the two sets of plaintiffs were substantially the same parties. They were the same persons, but they were not the same parties. They had no standing when they filed the *pro se* complaint, and they did when they filed the amended complaint as appointed administrators. Unfortunately, the statute of limitations had expired in the meantime. The Thomases as individual heirs at law are entirely distinct legal persons from the Thomases in their later capacity as appointed administrators, and thus different parties. An action for wrongful death brought by a plaintiff in his capacity as an administrator pursuant to Ark. Code Ann. § 16-62-102 involves neither the same action, nor the same plaintiff as in a survival action brought by the same person in his individual capacity pursuant to Ark. Code Ann. § 16-62-101. *Murrell v. Springdale Me. Hosp.*, 330 Ark. 121, 952 S.W.2d 153 (1997).

Arkansas Rules of Civil Procedure 15(c) cannot be used to somehow relate the administrators' suit back to the *pro se* suit. This rule permits the amendment of a pleading to "relate back" to the date of the original pleading. Its purpose is not to

permit the relation back of an entirely separate lawsuit as appellants attempt in this case. *Elzea v. Perry*, 340 Ark. 588, 12 S.W.3d 213 (2000). The amended complaint substituted out the plaintiffs, and substituted in entirely new plaintiffs. Where the amended complaint substituted out all the plaintiffs, and put in their place entirely new plaintiffs, it was not an amendment, but rather was a new suit. *Floyd Plant Food Co. v. Moore*, 197 Ark. 259, 122 S.W.2d 463 (1938).

In concluding the trial court erred, we are not unaware that the amended complaint asserted a cause of action for wrongful death and that this is a remedial statute that should be interpreted liberally with a view toward accomplishing its purposes. *Chatelain v. Kelly*, 322 Ark. 517, 910 S.W.2d 215 (1995). However, with respect to whether such a cause of action is stated, the action is one that is of statutory creation, and is in derogation or at variance with the common law, and therefore, we construe the statute strictly. Nothing is to be taken as intended that is not clearly expressed. *Lawhorn Farm Serv. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998).

The *pro se* plaintiffs could not bring the action. In Arkansas, only a real party in interest may bring a cause of action. Ark. R. Civ. P. 17. *See also, TB of Blytheville v. Little Rock Sign & Emblem*, 328 Ark. 688, 946 S.W.2d 930 (1997). The real party in interest is considered to be the person or corporation who can discharge the claim on which the allegation is based, not necessarily the person ultimately entitled to the benefit of any recovery. *Forrest Const. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001). However, Rule 17 specifically notes that an administrator, however, may bring suit for the benefit of another without joining a party for whose benefit the action is being brought. The real parties in interest were the heirs at law; however, under the statute, the administrator had to file suit and did not do so.

Because the *pro se* complaint was not permitted under the survival statute, there was no complaint to amend in May. Also, as already discussed, the amended complaint was the filing of a new lawsuit. The attempted substitution of the only parties that could maintain the action in place of parties that could not, was in

the nature of the filing of a new action. *Floyd Plant Food Co., supra.* The new action in May 2001 was barred by the statute of limitations. Ark. Code Ann. § 16-114-203.

The writ of prohibition is granted.

IMBER, J., concurring.

GLAZE, J., not participating.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur with the majority's decision in this case; however, I write separately because the majority understates the effect of Arkansas Rules of Civil Procedure 15(c) and 17(a) with respect to permitting the substitution of a new plaintiff to relate back under circumstances not implicated in this case.

Rule 15(c) of the Arkansas Rules of Civil Procedure, with the exception of minor wording changes, is identical to Rule 15(c) of the Federal Rules of Civil Procedure. The Reporter's Notes to Rule 15(c) states the following with respect to the rule's adoption and effect:

> The question of relation back of pleadings normally does not arise unless the statute of limitations is involved. Under this and the Federal Rule, an amendment always relates back when it arises out of the conduct, transaction or occurrence set forth in the original pleading. Under prior Arkansas law, the question of whether a pleading related back was determined by whether the amendment asserted a new cause of action against the defendant. If it did, the amended pleading could not stand or relate back.

Ark. Rule Civ. P. 15, Reporter's Notes to Rule 15 (2001). Thus, the adoption of Rule 15(c) represented a substantial departure from prior Arkansas procedural law in its shift away from the "new cause of action" analysis of amended pleadings.

The majority cites a pre-rule case, *Floyd Plant Food Co. v. Moore*, 197 Ark. 259, 122 S.W.2d 463 (1938), for the proposition that where the amended complaint substituted out all the plaintiffs and put in their place entirely new plaintiffs, the amendment constituted a new suit that could not relate back to the original complaint. In *Floyd Plant Food*, the question answered by this court was whether an amendment could relate back when a new plain-

tiff was substituted in a case that was filed prior to the running of the statute of limitations. *Floyd Plant Food Co. v. Moore*, 197 Ark. 259, 122 S.W.2d 463 (1938). We held, relying on the "new cause of action" reasoning, that Federal Chemical Company could not, after the statute of limitations had run, substitute itself for Floyd Plant Food Company, which Federal Chemical had subsumed in a merger. *Id.* The suit had been filed in the name of Floyd Plant Food Company before the running of the statute of limitations. *Id.* This court reasoned that, "if the attempted substitution of the new plaintiff, the only one who could maintain the suit, has any effect it was in the nature of a *new action* begun at the time of the filing of the amendment which was after the statute bar had attached." *Id.* at 267, 122 S.W.2d 466-467 (emphasis added). We elaborated by answering the following hypothetical proposition:

> It is a matter of extreme doubt that the St. Louis S. W. R. Co. could maintain a suit in the name of the Cotton Belt Railroad Company, though the two names designate only one person. *It would not be a matter of mistake* if it filed a suit under such name or style, because it must recognize its own corporate existence and corporate name. There is a difference in being made a defendant under one or two or more names by which a person or corporation might be known and in suing and attempting to maintain litigation under such an appellation which it, itself, knew was not correct.

Id. at 265, 122 S.W.2d 465-466 (emphasis added).

As the Reporter's Notes to the Arkansas Rules of Civil Procedure plainly state, with the adoption of these rules we abandoned the analytical framework of "new cause of action" with respect to the relation back of certain types of amendments. The new rule permits relation back much more liberally so long as there is a transactional nexus with the original pleading. Rule 15 states in relevant part:

> (c) *Relation Back of Amendments.* An amendment of a pleading relates back to the date of the original pleading when:
>
> (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

> (2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and, within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, *but for a mistake concerning the identity of the proper party*, the action would have been brought against the party.

Ark. Rule Civ. P. 15(c)(emphasis added). Clearly, the rule not only permits the addition of claims and defenses arising out of the same transaction, but also permits the substitution of parties so long as the amendment is related to the same transaction, service is perfected, and there is no prejudice to the other party. Although this court has not addressed this precise issue, the federal courts have construed the effect of Rule 15(c) where new plaintiffs are concerned. Our rules of civil procedure are modeled on the federal rules of civil procedure, and we have consistently held that where our rules are nearly identical or substantially the same, federal precedent and commentary should be accorded "significant precedential value." *See Smith v. Washington*, 340 Ark. 460, 10 S.W.3d 877 (2000) (reasoning that "based upon the similarities of our rules with the Federal Rules of Civil Procedure, we consider the interpretation of these rules by federal courts to be of significant precedential value.").

The commentary to the 1966 amendments to Fed. R. Civ. P. 15(c), which have been adopted by this court, states that the rule applies by analogy to plaintiffs in order to effectuate the policy of liberalized requirements of pleading.

> The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in

> interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

Fed. R. Civ. P. 15, Advisory Committee Notes to the 1966 Amendments (2002). Thus, the commentary indicates that Rule 15(c) may operate to permit amendments changing plaintiffs to relate back and illustrates that intent by pointing to related provisions in revised Rule 17(a). *See* Fed. R. Civ. P. 17. Rule 17 of the Arkansas Rules of Civil Procedure is a slightly modified version of Fed. R. Civ. P. 17. *See* Ark. R. Civ. P. 17, Reporter's Notes to Rule 17 (2001).

The interaction between Rule 15(c) and Rule 17(a) in the context of new plaintiffs has been addressed by the federal appellate courts. In that regard, these rules have been construed as being designed for a twofold purpose: 1) to further a lenient and permissive purpose with respect to a real party in interest; and 2) to protect the defendant against a subsequent action by another party, and to insure generally that the judgment will have its proper effect as res judicata. *See Scheufler v. General Host Corp.*, 126 F.3d 1261 (10th Cir. 1997); *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967); *see also* Fed. R. Civ. P. 17, Advisory Committee Notes to the 1966 Amendments (2002).

In the *Crowder* case, the Eighth Circuit Court of Appeals allowed an administratrix to amend her timely-filed wrongful-death complaint after the statute of limitations had run and to substitute herself as the mother and next friend of the decedent's two minor children. *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967). The appellate court stated that Rules 15(c) and 17(a) were designed for relation back "to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." *Id.* at 418 (citing 28 U.S.C.A. Rule 17, Cum. P.P. Notes p. 5). The *Crowder* court determined that the plaintiff's mistake in bringing the action initially in the name of the administratrix was "understandable and excusable." *Id.* at 419. That case included a conflicts-of-law question with respect to whether Arkansas or Missouri law governed, and each state's wrongful-death statute placed the cause of action in a different party.

Likewise, in the *Schuefler* decision, the Tenth Circuit Court of Appeals permitted an amended pleading to relate back when a group of landlord plaintiffs substituted tenant plaintiffs as the real party in interest in a water-rights action. *Schuefler v. General Host Corp.*, 126 F.3d 1261 (10th Cir. 1997). The appellate court noted that the failure to name the real party in interest was not "some tactic designed to prejudice defendants, but instead was the result of a mistake as to the legal effectiveness of the documents allegedly assigning the tenants' claims to their respective landlords." *Id.* at 1270. *See also Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11 (2d Cir. 1997)(holding that district court erred in failing to permit the substitution of plaintiffs to relate back where AMI had been mistaken about the legal effect of a shareholder assignment, observing that the "history of the Rules makes clear not only that Rule 15 was meant to be generally applicable to a proposed change of plaintiffs, but that in this regard Rule 17(a) is implicated as well." *Id.* at 19.)

Furthermore, the federal appellate courts have looked to Rule 17(a)'s express provision for the substitution of the real party in interest and analogized that Rule 15(c) permits this kind of amendment to relate back. *Advanced Magnetics, supra; Schuefler, supra; Crowder, supra.* Rule 17 of the Arkansas Rule of Civil Procedure provides in relevant part that:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian (conservator), bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or the State or any officer thereof or any person authorized by statute to do so may sue in his own name without joining with him the party for whose benefit the action is being brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder *or substitution* of, the real party in interest; and such ratification, joinder *or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.*

Ark. R. Civ. P. 17(a)(2001) (emphasis added). As already noted, Arkansas's Rule 17 is virtually identical to the federal rule. Thus,

Rule 17(a) may operate to permit a plaintiff to be substituted for another plaintiff and the substitution would have the "same effect as if the action had been commenced by the real party in interest." *Id.* The Advisory Committee Notes to Rule 17 of the Federal Rules of Civil Procedure delineate the governing principles: "Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed. . . "; and the rule is "intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." Fed. R. Civ. P. 17(a), Advisory Committee Notes to the 1966 Amendments (2002).

This case does not involve the substitution of the real party in interest following an "understandable mistake" made in the initial pleading. Both the survival statute, Ark. Code Ann. § 16-62-101 (Supp. 2001), and the wrongful-death statute, Ark. Code Ann. § 16-62-102 (Supp. 2001), are very clear with respect to which party has the right to bring the cause of action.[1] A survival action under Section 16-62-101 may only be brought by an administrator or executor of the decedent's estate. A wrongful-death action under Section 16-62-102 must be brought by and in the name of the personal representative of the decedent unless there is no personal representative, in which event the action must be brought by all of the heirs at law. *Ramirez v. White County*, 343 Ark. 372, 38 S.W.3d 298 (2001). Here, Timothy's daughter, Stephanie

[1] The majority concludes that the *pro se* complaint filed by some of the heirs merely stated a survival action claim and did not also sufficiently plead a wrongful death action. I disagree. The Arkansas Rules of Civil Procedure state that "[a]ll pleadings are to be liberally construed so as to do substantial justice." Ark. Rule of Civ. P. 8(f) "Construction of Pleadings" (2001). Similarly, the rules state that "[e]ach averment of a pleading shall be direct and stated in ordinary and concise language. No technical forms of pleadings or motions are required." Ark. R. Civ. P. 8(e)(1)(2001).

The *pro se* complaint in this case states in Paragraph No. 2 that "the cause of action involves medical negligence and wrongful death." The complaint then seeks, as a result of the alleged negligence of the defendant, compensation for pain, suffering, and anguish sustained by Timothy Thomas prior to his death; funeral expenses; and "*all other damages entitled under Arkansas law.*" The final portion of the prayer for relief, when viewed in conjunction with Paragraph No. 2 of the complaint, should be liberally construed to state a claim under Ark. Code Ann. 16-62-102 for wrongful death.

Thomas Hart, was appointed special administrator of her father's estate on July 19, 1999. When the *pro se* complaint was filed on February 23, 2001, by less than all of the heirs at law, there had been no change in Stephanie Hart's status. She was still the appointed special administrator for her father's estate. The mistake in bringing the action initially in the name of less than all of the heirs was neither "understandable" nor "excusable." For this reason, I concur with the result reached in this case.

Danny RIDLING *v.* STATE of Arkansas

CR 01-934 72 S.W.3d 466

Supreme Court of Arkansas
Opinion delivered April 18, 2002

[redacted]

[redacted]

[redacted]

[redacted]

John Wesley Hall, Jr., for appellant.

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

TOM GLAZE, Justice. Appellant Danny J. Ridling was charged under Ark. Code Ann. § 5-14-103(a) (Repl. 1997) with the rape of a girl (Kimberly) who was less than fourteen years old. He was originally charged with carnal abuse, but the State upgraded the offense when the girl informed the prose-

cutor that the incidents of sexual intercourse commenced earlier than she had originally revealed. It is undisputed that before Ridling was charged, Kimberly was pregnant and had given birth on March 19, 1997, to a child that Ridling later acknowledged to be his. The child was born approximately nine months after Kimberly's fourteenth birthday. Kimberly stopped seeing Ridling just after her fourteenth birthday. At a jury trial, Ridling was convicted of the rape charge and sentenced to 420 months in prison.

Ridling raises three points for reversal, the first of which is his argument that the trial court erred in excluding allegedly false statements, made by Kimberly, under the rape-shield statute, Ark. Code Ann. § 16-42-101 (Repl. 1999). Subsection (b) of 16-42-101 provides in pertinent part as follows:

> *In any criminal prosecution under § 5-14-103* through § 5-14-110, or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of those sections, opinion evidence, reputation evidence, or *evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person*, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations *is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose*. (Emphasis added.)

Notwithstanding the prohibition in subsection (b) above, subsection (c) of § 16-42-101 provides that evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of the evidence is determined in the following manner:

> (1) A written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence prohibited by

subsection (b) of this section and the purpose for which the evidence is believed relevant;

(2)(A) A hearing on the motion shall be held *in camera* no later than three (3) days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.

(B) A written record shall be made of the *in camera* hearing and shall be furnished to the Arkansas Supreme Court on appeal.

(C) *If, following the hearing, the court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence*[.] (Emphasis added.)

* * *

In the instant case, Ridling requested an *in camera* hearing where he proffered nine statements attributed to Kimberly. The trial judge found three of these statements to be relevant, and at trial, he allowed Ridling to cross examine Kimberly regarding them.[1] These statements, or "areas of inquiry" as characterized by Ridling, were:

(1) She told the police that she was fourteen years old when she started having sex with the defendant.

(2) She told [deputy prosecuting attorney] John Hout that she was twelve years old when she first had sex with the defendant.

(3) She testified in Sixth Division Chancery that she was eleven years old when she first had sex with the defendant.

The six remaining statements attributed to Kimberly that the trial judge ruled inadmissible are the following:

(4) She told Michael Loftin, Sr., she was eighteen years old.

(5) She told Billy Owens (Ridling's roommate) that she was eighteen years old.

(6) She told Daniel Ridling (Ridling's son) that she was playing college basketball.

(7) She told Ridling that she was eighteen years old.

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[1] The prosecuting attorney conceded these three statements of Kimberly were admissible.

(8) She told Chris Ridling (Ridling's other son) that she was eighteen years old and getting ready to play college basketball.

(9) She told the hospital that the father of her child was Michael Lofton, Jr.

At the pretrial hearing, the prosecuting attorney objected to statements 4 through 8 because what age Ridling believed Kimberly to be was completely irrelevant to the offense. The prosecutor cited Ark. Code Ann. § 5-14-102(b) (Repl. 1997), which specifically provides that "[w]hen the criminality of conduct depends on a child being below the age of fourteen (14) years, it is no defense that the actor did not know the age of the child, or reasonably believed the child to be fourteen (14) years of age or older." Defense counsel conceded that Ridling's belief as to Kimberly's age was not relevant to the rape charge, but argued the six excluded statements went "towards this young woman's credibility and her propensity for (lack of) truthfulness." In support of these arguments, counsel, in part, relies on the case of *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986), *reh'g denied* 290 Ark. 340-A, 722 S.W.2d 284 (1987). We believe the trial court ruled correctly in excluding the six statements proffered by Ridling.

[redacted] On appeal, Ridling first relies on the case of *Fowler v. State*, 339 Ark. 207, 5 S.W.3d 10 (1999), where this court, citing Ark. R. Evid. 402, stated the general rule that all relevant evidence is admissible. The court further set out the definition of relevant evidence as "any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Ark. R. Evid. 401. The court also stated a witness's credibility is always an issue, subject to attack by any party, and the scope of cross-examination extends to matters of credibility. Ark. R. Evid. 611. The *Fowler* court cited *Davis v. Alaska*, 415 U.S. 308 (1974), for the following proposition:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested . . . . The cross-examiner is not only permitted to delve into the [witness's] story to test the [witness's] perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

[redacted] In *Bowden v. State*, 301 Ark. 303, 783 S.W.2d 842 (1990), this court relied on *Delaware v. Fensterer*, 474 U.S. 15 (1985), in stating the following:

> The sixth amendment to the United States Constitution and Art. 2, § 10 of the Arkansas Constitution guarantee the right of an accused in a criminal prosecution to be confronted with the witnesses against him. The right of confrontation provides two types of protection for a criminal defendant: the right physically to face those who testify against him and the opportunity to conduct effective cross-examination.

[redacted] However, the *Bowden* court went on to say that the right to cross-examine the prosecution's witnesses is not unlimited, and that trial judges have wide latitude insofar as the Confrontation Clause is concerned "to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." The court added that the Confrontation Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Id.*

[redacted] Keeping the above-established principles in mind, we first note that we agree with the trial court, and the State on appeal, that the core issue to be decided in this part of Ridling's argument is whether Ridling had sexual intercourse with Kimberly when she was under fourteen years of age. It is also clear that it was no defense that Ridling did not know Kimberly's age, or that he reasonably believed Kimberly to be fourteen years of age or older. *See* § 5-14-102(b). Turning to the six statements Ridling asked to pursue on cross-examination of Kimberly, statements 4 through 8 had no relevance as to whether Ridling had sex with Kimberly when she was under fourteen years of age. Certainly, even if he had been apprised that she told the other men that she was over the age of fourteen, such knowledge would be of no benefit to his defense in light of § 5-14-102(b). We now turn to the State's case against Ridling before the trial court, so we can evaluate the probative and prejudicial value of that evidence and

Ridling's proffered statements when considering the trial court's ruling in this case.

Kimberly was the only witness to testify at trial. Kimberly testified that she first met Ridling at Baring Cross Park in North Little Rock, as she was watching her brother and some friends playing basketball. Ridling approached Kimberly and her friend and asked if they would like to come to his house to see some paintings and drawings; the girls declined to go. A few weeks later, Kimberly was roller skating to the store to buy candy when Ridling again approached her and asked if she wanted to see some of his new paintings; this time, because she was by herself, Kimberly agreed. When they arrived at his home, they sat on his bed, and he showed her some paintings; he then told her she was pretty and started touching her face and kissing her. They then had sex that day. Kimberly did not tell anyone what had happened. She testified that she was eleven and in sixth grade at the time. Kimberly next saw Ridling about a year later, in the summer of 1996. She saw him on the street a few times, and he did not say anything to her, but a few weeks later, he spoke and asked if she wanted to see some new paintings and a t-shirt he had designed. She went to his house, but "nothing happened that time." Ridling asked her to come back, and the next time she went back to his house, they had sex. She continued going to his house for about a year or a year and a half. Kimberly stated that she was fourteen when she stopped seeing Ridling, and that he had given her a gift for her fourteenth birthday. She found out that she was pregnant during the summer between the eighth and ninth grade, and she gave birth in March of 1997.

Kimberly stated that she did not tell anyone about her relationship with Ridling for a long time, and when she did finally speak to the police, she told them that she was fourteen when she started her relationship with Ridling because she was scared and ashamed. During her first interview with the prosecutor, John Hout, she also told Hout that she was fourteen. The next time she saw Hout, she spoke with him alone, and she told him that she was eleven when she first had sex with Ridling. She also testified in a chancery court proceeding that she was eleven when the relationship began.

On cross-examination, Kimberly conceded that she had initially lied to the police, to her mother, and to the prosecutor, but said that, at the time, she was still talking with Ridling and that they had plans to get married and move to Memphis; she was protecting him, she claimed. She claimed that the only people she ever told about being under fourteen were the prosecutor and her parents. She acknowledged that she did not tell anyone that she was under fourteen until John Hout came to her and started pushing her for more information. She also noted that she knew before she came into court the day of trial that the issue of how old she was at the time was going to be an issue; she admitted that she said she was fourteen initially and had changed her story, but asserted that she had been protecting Ridling at first.

When questioned about when she became pregnant, Kimberly agreed that she told her doctor that her last menstrual period had started on June 21, 1996, which was two days before her fourteenth birthday. She stated that she had the baby when she was fourteen, in March of 1997, and that the child was not conceived when she was fourteen.

On redirect, Kimberly asserted again that she was eleven when she began her relationship with Ridling, and that the day the baby was conceived was not the first time she had had sex with him. She acknowledged that she had lied at first, but said it was because she was young, ashamed, and scared to say that she had been with a fifty-year-old man. She claimed she and Ridling had discussed what they would do "if anything ever came up to where . . . I got pregnant or anything, to say I was fourteen so he wouldn't get in trouble [and] I wouldn't get in trouble." At the end of her testimony, she agreed that she had lied to her mother, to the police, and to the prosecutor, but said that she was telling the truth that day because she was under oath. Kimberly concluded, "I can lie any time I get ready to."

Again, with regard to the statements 4 through 8, those statements do not pertain to Kimberly's prior sexual conduct under the rape-shield statute, and were irrelevant to the issue of whether Ridling had sexual intercourse with Kimberly before her fourteenth birthday, which was the only issue for the jury to

decide. The trial judge allowed Ridling to elicit testimony from Kimberly showing that she admitted lying any time she got ready, and that she specifically lied to her mother, the police, and the prosecutor. As already discussed, the Confrontation Clause guarantees an opportunity for effective cross-examination, and here the trial court permitted Ridling to vigorously cross-examine Kimberly to show she was a liar. However, in balancing the evidence under Ark. R. Evid. 403, the trial court did not allow Ridling to confuse the jury by going into matters that were collateral to the issue of Kimberly's age at the time Ridling began having sex with her. *See Evans v. State*, 317 Ark. 532, 878 S.W.2d 750 (1994) (when consent is not an issue, the trial court did not abuse its discretion by disallowing evidence of matters that were "entirely collateral" to the issue of sexual relations between this victim and the accused under Ark. R. Evid. 403).

Ridling further argues that the trial court should have permitted him to question Kimberly about her allegations of sex involving Michael Lofton, Jr. When she went to the hospital to give birth, Kimberly named Lofton, Jr., as the father of her baby. However, she later admitted that she had never had sex with Lofton, Jr., but instead had engaged in sexual intercourse with Michael Lofton, Sr. Ridling cites *West*, 290 Ark. 329, 719 S.W.2d 684, in support of his argument that evidence of similar allegations that are later admitted or proven to be false are not "sexual contact" as defined by the rape-shield statute, and such evidence is therefore not excluded under the statute.

After this court's decision in *West*, however, the General Assembly amended the rape-shield statute so that it prevented admission of "evidence of a victim's prior allegations of sexual conduct with the defendant or any other person which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations[.]" Ark. Code Ann. § 16-42-101(b) (as amended by Act 943 of 1993). In *Booker v. State*, 334 Ark. 434, 976 S.W.2d 918 (1998), this court noted that the General Assembly had expressed its intent to broaden the rape-shield law to exclude both of these kinds of evidence. The *Booker* court further pointed out

that, at a pretrial hearing, no evidence was presented to show that the victim's prior allegation of rape was true, nor was there evidence provided that she denied having made the prior allegation. Consequently, the rape-shield statute as amended did not apply to defendant Booker's situation. *Booker*, 334 Ark. at 438. Thus, this court held that the trial court did not abuse its discretion in its Ark. R. Evid. 403 analysis or in its ruling that, if Booker's proffer was admitted, it would be unfairly prejudicial and misleading. *Id.*

The same is true in the present case. At the *in camera* hearing, Ridling offered only the piece of paper in which he listed Kimberly's statements to prove that she told the hospital that Michael Lofton, Jr. was the father of her baby; no other evidence was introduced at trial to prove or disprove this statement. In fact, the only exhibit in the record dealing with the baby's paternity was the joint stipulation that Ridling was the father. In addition to the fact that there was no proof as to whether or not Kimberly actually made this claim, there was also no proof or proffer of whether or not Kimberly would have confirmed or denied the allegations. Thus, as in *Booker*, the proposed evidence did not fall under the rape-shield statute; the trial court properly engaged in a 403 balancing test, and concluded that the statement would have been more prejudicial than probative of anything, especially since the paternity of the baby was not at issue. This ruling was not an abuse of the trial court's discretion.

In a sub-point, Ridling argues that the trial court should have permitted him to introduce Kimberly's testimony in the carnal abuse case against Michael Lofton, Sr., and he asserts that he was denied the opportunity to cross-examine her on this issue. Such cross-examination, Ridling claims, could have permitted him to challenge Kimberly's credibility and point out that she may have been mistaken about the time frame in which she was having sex with Ridling. "Essentially, she would have had to have agreed that she was having sex with both grown men in the same time frame," he asserts.

Ridling cites *Hubbard v. State*, 271 Ark. 937, 611 S.W.2d 526 (1981), for the proposition that evidence of sexual contact between the victim and a third party can be admissible where it

occurs in close proximity of time and location, in that it bears on material elements of the offense; he claims that evidence of Kimberly's relationship with Lofton, Sr., "bears on the issue of whether it was Lofton, Sr. or [Ridling] that had sexual contact with the victim before she turned fourteen years old."

[redacted] It is difficult to understand what relevance Kimberly's other sexual encounters have to do with whether *Ridling* was having sex with her before her fourteenth birthday. Unfortunately, the fact that she was having sex with one older man does not prevent her from having sex with a second older man at the same time. Evidence that she was having sex with Lofton, Sr., therefore, could not have been relevant to the jury's determination of whether or not she was having sex with Ridling before reaching the age of fourteen. The judge ruled that such evidence could be admissible if Kimberly claimed she was a virgin when she began her relationship with Ridling, but the State never pursued this theory, and such evidence was never presented. Because Kimberly's relationship with Lofton, Sr. was irrelevant to the question of Kimberly's age when she began having sexual intercourse with Ridling, the trial court did not abuse its discretion in excluding it.

Finally, Ridling argues that he should have been permitted to introduce the above evidence during sentencing. The trial court denied his request to question Kimberly about her statements on the grounds that the rape-shield statute also applies during sentencing. Ridling asserts in his brief that he should have been allowed to introduce his proffered testimony "to show lack of any substantial harm to [Kimberly]. She may have been [age twelve to fourteen] when this was going on with Ridling, but she was sexually active with others of her own choosing and holding herself out to everyone to be an adult, and Lofton, Sr., was also convicted of having sex with her. A jury could easily have found that [Ridling] should have been sentenced to something less than the thirty-five years and that is his substantial prejudice." He concludes that the trial judge's failure to make a separate determination of the admissibility of this evidence at sentencing amounted to a failure to exercise discretion.

Ark. Code Ann. § 16-97-103 (Supp. 2001), dealing with evidence admissible during sentencing, provides as follows:

> Evidence relevant to sentencing by either the court or a jury may include, but is not limited to, the following, *provided no evidence shall be construed under this section as overriding the rape-shield statute, § 16-42-101*[.]

Thus, it is clear that the rape-shield law applies to sentencing as well as to the guilt phase, and because the trial court had already conducted an *in camera* hearing on the admissibility of the evidence, there was no need to conduct a second, identical hearing. The trial court did not fail to exercise its discretion, and further did not err in refusing to permit Ridling to introduce this evidence at the sentencing phase of his trial.

In his second major point for reversal, Ridling contends that the trial court erred in proceeding without Ridling's presence at the rape-shield hearing. He cites the case of *Bell v. State*, 296 Ark. 458, 757 S.W.2d 937 (1988), which quoted from *Kentucky v. Stincer*, 479 U.S. 1303 (1986), the rule 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. Ridling argues that, while he absented himself from the rape-shield hearing by failing to attend after receiving notice, it was error to proceed without him because it was a "critical stage" in the proceeding against him.

When a significant step in the case is taken in an accused's absence, the case must be reversed, if it appears that he has lost an advantage or has been prejudiced by reason of a step taken in his absence. *Bell*, 296 Ark. at 465. The reason for the rule is to secure to the accused a full and adequate defense at his trial. Where there is no possibility of prejudice, however, there is no reason for requiring the presence of the defendant. *Id.* at 465-66. The *Bell* court applied this harmless-error rule when the defendant "had an absolute right to demand to be present at the hearings on his [pretrial] motions, but did not do so." *Id.* at 467. This court has also held that a defendant had waived his presence *at trial* when he admitted that he overslept. *See Reece v. State*, 325 Ark. 465, 928 S.W.2d 334 (1996).

Before leaving this point, we merely note that the Federal Rules of Criminal Procedure provide that, although a defendant "shall be present" at every stage of the trial, he may waive his absolute right to be present if he voluntarily absents himself. Fed. R. Crim. P. 43. The Supreme Court, in *Taylor v. United States*, 414 U.S. 17 (1973), pointed out that this rule "reflects the long-standing rule recognized by this Court in *Diaz v. United States*, 223 U.S. 442 (1912)," which states as follows:

> [W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

The *Taylor* Court further stated that a defendant has "no right to interrupt the trial by his voluntary absence. . . . The right at issue is the right to be present, and the question becomes whether that right was effectively waived by his voluntary absence." *Id.* at 20. The Court concluded that the right was waived, pointing out the "governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337 (1970) (Brennan, J., concurring)).

Thus, if a defendant may waive his right to be present *at the trial itself*, then surely he can be said to have waived his right to be present at a pretrial hearing, especially in the instant case, when Ridling acknowledged to his attorney that Ridling knew he was supposed to be there and signed a notice that he would be present. Further supporting this conclusion is the fact that there were no witnesses called, and his attorney did not protest that Ridling had any testimony to offer; Ridling's Sixth Amendment right to confront his accuser and his right to be heard were thus not violated. Ridling's counsel, in fact, even offered to formally waive Ridling's presence, and it was counsel who plunged ahead with the merits of the hearing even before the trial judge ruled on whether or not Ridling had to be there. Ridling knew he was supposed to be present at the hearing, and he voluntarily chose

not to be there. It seems clear that Ridling was not prejudiced by his decision to be absent from the hearing, and he should not be heard to complain on appeal that his own choice not to show up should result in the reversal of his conviction. *See, e.g., Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001).

In his final point, Ridling argues that the trial court erred in sustaining the prosecutor's objection to a portion of defense counsel's closing argument, as follows:

> DEFENSE COUNSEL: I'm just telling you she hasn't proven it. She's lying. I tell you what. I'm wondering what she's going to do when she has to tell her son ten years from now when he gets older that he put her [*sic*] daddy in prison cause she was lying.
>
> PROSECUTOR: Objection, your Honor. . . . This is the second time Mr. James has mentioned prison in his closing argument, your Honor, and the jury is. . .
>
> THE COURT: Mentioned what?
>
> PROSECUTOR: Prison in his closing argument. And they are not to consider punishment at this stage.
>
> THE COURT: Sustained.

Citing *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989), Ridling submits that an objection not made until the second reference is not timely, and, therefore, waived by the State. Ridling says that he was entitled to get prison before the jury in the guilt-innocence phase, which he did, and it was too late to object. He further posits that defense counsel was free to argue his case as he saw fit, and this was denied him.

Even if the trial court erred in sustaining the State's belated objection, it was Ridling's burden, as appellant, to produce a record sufficient to demonstrate prejudicial error. *See Coulter v. State*, 343 Ark. 22, 31 S.W.2d 826 (2000). He simply fails to do so.

We first note that the transcript does not contain the remainder of Ridling's closing argument, so it is not possible to determine whether the trial court admonished the jury to disregard anything that defense counsel said, and from argument

made by Ridling and the State, defense counsel referenced the prison remarks twice before any objection was made. In addition, without the remaining portion of Ridling's closing argument, we cannot determine whether defense counsel was able to otherwise continue as he saw fit. He certainly fails in this appeal to point to the record and demonstrate how he was prejudiced, and this court will not reverse in the absence of prejudice. *See Ramaker v. State*, 345 Ark. 225, 46b S.W.3d 519 (2001); *Bledsoe v. State*, 344 Ark. 86, 39 S.W.2d 760 (2001). In sum, we hold that Ridling fails to show the trial court committed reversible error.

For the reasons above, we affirm.

Darrell G. SPENCER *v.* STATE of Arkansas

CR 01-619 72 S.W.3d 461

Supreme Court of Arkansas
Opinion delivered April 18, 2002

Philip C. Wilson, for appellant.

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

TOM GLAZE, Justice. Appellant Darrell G. Spencer was charged under Ark. Code Ann. § 5-14-103(a)(4) (Repl. 1997) with the rape of his five-year-old stepson, C.S. The State alleged Spencer engaged in sexual intercourse with C.S., who was less than fourteen years of age at the time. Spencer was specifically charged with having inserted his penis into C.S.'s mouth and anus. The State averred that, upon learning of this occurrence, C.S.'s mother called the Child Abuse Hotline and reported that Spencer had molested her son. Spencer was convicted of the charge and sentenced to life imprisonment. Our court has appellate jurisdiction of criminal appeals where life sentences are imposed. *See* Ark. Sup. Ct. R. 1-2(a)(2). Spencer raises three points for reversal, but none has merit.

We first consider Spencer's argument that the trial court erred in denying his motion for directed verdict, claiming the evidence was insufficient to prove rape. Interestingly, Spencer fails to discuss any of the evidence introduced at trial, much less suggest how the State's evidence was deficient. This fact aside, Spencer has failed to preserve this issue.

At the end of the State's case-in-chief, Spencer made a motion for a directed verdict, stating, "At this time I move for a directed verdict on the rape charge. The evidence is insufficient to where a reasonable jury could come back with a guilty finding on this. Therefore, it should be dismissed." The trial court denied the motion. At the conclusion of all of the evidence, Spencer renewed his motion for directed verdict, stating only that "I do need to renew my motion for a directed verdict and also to

renew all the objections that I have for the previously stated reasons." The trial court again denied Spencer's motion.

Ark. R. Crim. P. 33.1(a) states that, "[i]n a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. *A motion for directed verdict shall state the specific grounds therefor.*" (Emphasis added.) Further, Rule 33.1 states, in pertinent part, the following:

> The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above *will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.*

(Emphasis added.)

This court has repeatedly addressed this issue and held that a directed-verdict motion "requires [a] movant to apprise the court of the specific basis on which the motion is made." *Bowen v. State*, 342 Ark. 581, 30 S.W.3d 86 (2000). Clearly, Spencer's motion for directed verdict, stating only that the evidence was insufficient, but not specifying in what respect it was deficient, was not specific enough to preserve the issue for review.

Next, we consider Spencer's assertion that the trial court abused its discretion in refusing to grant his motion *in limine* whereby he sought to exclude evidence of prior sexual acts with other children or of any pending charge of a similar nature. At pretrial hearings on Spencer's motions, the State presented the testimony of two of his daughters, S.S. and D.S., and of his first cousin, Cynthia Brown. S.S., who was almost twelve at the time of the hearing, testified that Spencer lived with her family until she was about five years old and he "made her touch his private areas," and on another occasion, "he stuck his private area in mine . . . and when he got through he squirted white stuff all on my

stomach." S.S. also said that the first of these acts occurred when she was three years old. D.S. testified that "Darrell Spencer touched me in a bad way by touching my pee-pee when I was three years old." The trial court ruled that this was admissible testimony because it fell within the pedophile exception to Ark. R. Evid. 404(b) and "involved similar dynamics." The trial court further ruled that the testimony had more probative value than prejudicial effect.

Just prior to trial, the State also offered the testimony of Cynthia Brown, Spencer's first cousin. Brown was thirty-three years old at the time of the pretrial hearing. She testified that she first had sexual contact with Spencer when she was four or five years old, and he was ten or twelve. She said that she was seven or eight years old when she started sexual intercourse with Spencer; he was fourteen. She related that she continued intercourse with him through her teen years. Brown further averred it had been ten years or longer since she had any contact with Spencer and longer than that since they had sexual contact with one another. Spencer objected to Brown's testimony as being so remote in time that the prejudicial effect would far outweigh any probative value. Spencer also complained that, unlike the present case, Spencer was a minor, not an adult, when some of Spencer's sexual conduct with her occurred. The court ruled that Brown's testimony would be admissible during the trial, because it showed a continuing episode on Spencer's part, and fell within Rule 404(b). The court also found that Brown's testimony was more relevant than prejudicial. At trial, S.S. and Brown testified, but D.S. did not. On appeal, Spencer argues that the trial court's ruling to admit the testimony of S.S. and Brown was error because the evidence was more prejudicial than probative. He asserts that the remoteness in time of these other events should have kept them from being admitted into evidence.

[redacted] Rule 404(b), dealing with evidence of other crimes, wrongs, or acts, provides as follows:

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

> tion, plan, knowledge, identity, or absence of mistake or accident.

It is settled that the list of exceptions set out in Rule 404(b) is exemplary and not exhaustive. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996). It is also well established that the rule permits introduction of testimony of other criminal activity if it is independently relevant to the main issue, that is, relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal. *Id.*

In *Mosley*, the defendant was charged with having committed rape and incest against his nineteen-year-old daughter. During the State's case-in-chief, the trial court additionally admitted proof that, eleven years earlier, Mosely had pled guilty to carnal abuse of his six-year-old stepdaughter. The *Mosley* court concluded that evidence of a prior similar offense in cases where the charge involves unnatural sexual acts shows not that the accused is a criminal but that he has a depraved sexual instinct. In addition, in *Thompson v. State*, 322 Ark. 586, 910 S.W.2d 694 (1995), the court held that evidence of other sexual acts is admissible when it tends to show a proclivity towards a specific act with a person or class of persons with whom the accused has an intimate relationship. Stated another way, in *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998), the court held that when the charge concerns the sexual abuse of a child, evidence of other crimes, wrongs, or acts, such as sexual abuse of that child or other children, is admissible to show motive, intent, or plan pursuant to Ark. R. Evid. 404(b). The admission or rejection of evidence under Ark. R. Evid. 404(b) is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Munson*, 331 Ark. at 48.

From our review of the evidence before the trial court, it is clear that it did not abuse its discretion in admitting the testimony of S.S. because S.S.'s testimony showed Spencer's proclivity toward incestuous sexual contact with children. Also, evidence shown by S. S.'s testimony demonstrates that Spencer's depraved sexual instinct was not substantially outweighed by the danger of unfair prejudice to Spencer.

Regarding Brown's testimony, Spencer places emphasis on dissimilar facts that, unlike the situations with C.S. and S.S., Spencer's sexual contact with Brown commenced when Spencer was a minor, age fourteen, and it extended to when Brown was seventeen or eighteen years old. However, we conclude that, even if we were to hold that the trial court erred in admitting Brown's testimony, the error was harmless, because the evidence was overwhelming as to Spencer's guilt. *See Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996). In this respect, we set out the following evidence presented at trial.

C.S., the five-year-old victim, testified that Spencer "touched me on my body with his pee-pee. He put it in my mouth and peed in it. He put his pee-pee in my butt in the bedroom . . . . When Darrell put his pee-pee in my butt, he washed my butt with a washcloth after that. Darrell put his pee-pee in my butt more than once on different days." This testimony alone constitutes substantial evidence to support Spencer's conviction, since it is well settled that the testimony of a child rape victim alone constitutes substantial evidence to support a rape conviction. *See Miller v. State*, 318 Ark. 673, 887 S.W.2d 280 (1994). However, much more was shown by the State.

C.S.'s mother, for example, said that she had given C.S. a bath, dressed him in pull-ups, boxer shorts, and a t-shirt and put him to bed the night before the rape. The next morning, he was wearing only his pull-ups and they were inside out. She asked C.S. what happened, and he started telling her some things that "horrified her." The mother called SCAN and took C.S. to the Arkansas Children's Hospital where a rape kit was conducted. At the hospital, Dr. Henri-Ann Norman, a pediatric physician at the hospital, conducted a rape kit, and, in examining C.S., the doctor found semen on the child's face, mouth, groin area, and rectum. Kermit Channel, the supervisor at the forensic department at the State Crime Lab, testified that the DNA from the rectal swab from C. S. was consistent with the DNA from Spencer's blood sample. Clearly, the evidence of Spencer's guilt was so overwhelming as to render harmless any error that may have been committed by allowing the introduction of Brown's testimony.

Spencer's last point for reversal is that the trial court abused its discretion by refusing to strike venire-person Sarah Whitworth for cause. During voir dire, Whitworth revealed she had a niece who had been sexually abused, and she added that she had also worked with several young women who had been sexually abused by family members. Whitworth stated she could "set aside these things and decide the case on the testimony and exhibits introduced." When defense counsel inquired, Whitworth stated it would be "very difficult" to put aside her knowledge of the sexual abuse of her relative. Spencer then moved to strike Whitworth for cause. The State responded that Whitworth said she could set aside those experiences and decide the case on the evidence presented. The court then asked Whitworth if she could "tell the court absolutely that you can be fair and impartial and base a decision only on the evidence presented." She said, "I will tell you that I will."

[redacted] This court has held that an appellant must demonstrate that he was prejudiced by the jury being seated. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Further, the court has stated that the decision to excuse a juror for cause rests within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of that discretion. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). Persons comprising the venire are presumed to be unbiased and qualified to serve, and the burden is on the party challenging a juror to prove actual bias. *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998). When a juror states that he or she can lay aside preconceived opinions and give the accused the benefit of all doubts to which he is entitled by law, a trial court may find the juror acceptable. *Id.* Here, the trial court denied Spencer's motion, and we hold that having done so in these circumstances was not an abuse of its discretion. Because Spencer has shown no reversible error, we affirm.

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

IMBER, J., not participating.

Cartrell Lewan McCOY *v.* STATE of Arkansas

CR 01-762 74 S.W.3d 599

Supreme Court of Arkansas
Original opinion delivered March 14, 2002[1]

[Supplemental opinion on denial of rehearing delivered April 18, 2002.][2]

William R. Simpson, Jr., Public Defender; *Brett Qualls* and *Steve Abed*, Deputy Public Defenders, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

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

DONALD L. CORBIN, Justice. Our decision reversing the judgment of conviction was delivered on March 14, 2002. *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002). The

[1] *Reporter's note*: *McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

[2] *Reporter's note*: The supplemental opinion was issued after the printing contract had been awarded to a new vendor; hence, the text appears separately, in a different volume.

State filed a petition for rehearing on April 1, 2002. In the petition, the State asserts that we erred as a matter of law by refusing to reach the merits of its alternative argument for affirmance. Particularly, the State argued that this court could have affirmed Appellant's conviction, even though he was wrongly denied the right to have the jury consider his guilt on a lesser-included offense, on the ground that the instruction proffered by Appellant for the lesser offense did not accurately state the law. The State contends that our decision on this issue effectively abolishes the affirmance rule, wherein an appellate court may affirm the trial court's ruling if it was the right result, though it announced the wrong reason. We deny rehearing in this case, but we issue this supplemental opinion to clarify this issue for future cases.

Contrary to the State's urging, our opinion in this case did not hold that the State must raise every possible alternative ground for affirmance in the trial court, before it may be considered on appeal. Rather, our holding was that, based on the particular facts of this case and the specific issue raised by the State, the affirmance rule was not applicable. As we pointed out in the opinion, this court has consistently recognized that a trial court is *required* to give a model instruction unless it finds that the instruction does not accurately state the law. *See In Re: Arkansas Model Criminal Instructions*, 264 Ark. Appx. 967 (1979) (*per curiam*). Thus, our holdings have created a presumption that the model instruction is a correct statement of the law. As such, any party who wishes to challenge the accuracy of a model instruction, be it the State or a defendant, must rebut the presumption of correctness. Undeniably, a party cannot rebut the presumption if the issue is not even raised in the trial court.

In the present case, the trial court's ruling was such that Appellant was not entitled to have the jury consider *any* instruction on the lesser-included offense of attempted second-degree murder. We concluded that this ruling was erroneous. Notwithstanding, the State invited us to affirm Appellant's conviction on the ground that the *model* instruction proffered by him was not a correct statement of the law. The State did not, however, challenge the instruction in the trial court. Because a presumption of accuracy attends all model jury instructions, the burden was on the State to convince the trial court otherwise, in order to rebut the presumption. Thus, under the circumstances, the State was

required to raise this particular issue below if it intended to rely upon it on appeal. Because it did not, we properly declined to address the argument.

Rehearing denied.

Denise SMITH, *Individually*, and as *Natural Mother* and *Guardian* of Jessica Moody, *a Minor*, and Deidre Moody, *a Minor*; Jo Ann Cross, *Individually*, and as *Administratrix* of the Estate of Cauley Shane Coffey, *Deceased*; Jeannie Bright Love, *Individually*, and as *Administratrix* of the Estates of Amy M. Bright, *Deceased*, and Emile Bright, *Deceased*; Stacey Jackson Montgomery, *Individually*, and as *Administratrix* of the Estate of Michael Jackson, *Deceased*, and as *Natural Mother* and *Guardian* of Erica Jackson, *a Minor*; and Tom M. Young, *Administrator* of the Estate of Vira A. Young, *Deceased v.* ROGERS GROUP, INC., John Doe 1 through 5; Hartford Fire Insurance Company; and National Union Fire Insurance Company AND James Evans *v.* Rogers Group, Inc.; John Doe 1 through 5; Marilyn K. Loftin, *Administratrix* of the Estate of Heath Loftin, *Deceased*; Hartford Fire Insurance Company; and National Union Fire Insurance Company

01-1028 72 S.W.3d 450

Supreme Court of Arkansas
Opinion delivered April 18, 2002

Gary Eubanks & Associates, by: *William Gary Holt* and *Robert S. Tschiemer*, for appellants.

Laser Law Firm, by: *Sam Laser* and *Brian A. Brown*, for appellee Hartford Fire Insurance Company.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Bruce Munson* and *Julia L. Busfield*, for appellee National Union Fire Insurance Company.

DONALD L. CORBIN, Justice. The central issue in this case is whether the acquired-immunity doctrine is still a viable defense in this state. The Faulkner County Circuit Court concluded that it is and granted summary judgment to Appellee Rogers Group, Inc., and its insurers, Appellees Hartford Fire Insurance Company and National Union Fire Insurance Company. This case stems from three automobile accidents that occurred on U.S. Highway 65 North, between Conway and Greenbrier. Appellants and their decedents brought suit against Rogers, as the contractor for the Arkansas Highway and Transportation Department (AHTD), alleging that Rogers was negligent in applying Type 3 asphalt to the highway, knowing that it should not be used on such a high-volume highway. The trial court found that Rogers was not negligent because it followed AHTD's specifications exactly. Thus, because AHTD, as a state agency, enjoys sovereign immunity, the trial court found that Rogers acquired immunity from any liability occurring as a result of its performance of the contract with AHTD. Appellants raise four points for reversal. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(b)(4), as it involves issues of substantial public interest. We find no error and affirm the grant of summary judgment.

In the spring of 1996, AHTD took bids on a job project to overlay a 6.28 mile stretch of U.S. Highway 65 North, between Conway and Greenbrier. The job called for the use of Type 3 asphalt. Rogers presented a bid, and it was accepted by AHTD, on the condition that Rogers would first submit a sample of the proposed Type 3 asphalt mixture for approval by AHTD's engineers. Rogers employed the engineering company of Grubbs, Garner, and Hoskyn, Inc., to prepare the asphalt mixture. The sample was prepared by engineer Steven Garrett. Rogers forwarded the sample to AHTD, and its engineers approved the sample for use on the project.

Rogers began work on the project in July 1996. Every day during the project, AHTD had an engineer and other employees on sight, to inspect and oversee the work on the project. AHTD also had personnel at the asphalt plant, who monitored the asphalt and took samples of the mixture to make sure that it continued to meet AHTD's specifications. The job was substantially completed in the middle of September 1996 and was finally inspected by AHTD on September 29. The final inspection revealed that the job had been done according to AHTD's specifications and was thus accepted by AHTD. Rogers had no further contact with the work site after the final inspection.

Approximately two months later, on November 24, 1996, Michael Jackson was driving his car on that stretch of Highway 65 when his vehicle hydroplaned and crossed the center line, striking a car driven by Vira Young. Both Jackson and Young were killed in the accident. Jackson's wife, Stacey, and his infant daughter, Erica, were injured. Although Erica's injuries were relatively minor, Stacey suffered severe injuries requiring weeks of intensive-care hospitalization.

On March 2, 1997, another accident occurred on the same stretch of highway. This time, a car driven by Amy Bright hydroplaned during heavy rain, causing the car to cross the center line and strike a car driven by Denise Smith. Bright and her two passengers, Cauley Coffey and Emile Bright, were fatally injured. Smith and her two minor daughters, Jessica and Deidre Moody, suffered severe injuries.

Finally, on August 2, 1998, James Evans was driving his truck on that same stretch of Highway 65 when he was struck by a truck driven by Heath Loftin. The accident occurred when Loftin's vehicle hydroplaned and crossed the center line, striking Evans's truck. As a result, Loftin was killed and Evans was injured.

Appellants in this case are the victims of the foregoing accidents and their survivors. They sued Rogers, its two insurers, and a number of Rogers's employees, alleging negligence in applying Type 3 asphalt to that 6.28 mile stretch of highway. Appellants assert that Rogers knew that Type 3 asphalt should not have been used on such a high-volume highway, because its use increased the potential for accidents caused by hydroplaning. Additionally, Appellant Evans alleged that Loftin was concurrently negligent with Rogers.[1]

The basis of Appellants' claim against Rogers is an affidavit filed by Steven Garrett, the engineer who prepared the Type 3 mixture used on the project. His affidavit reflects that he spoke with a quality-control employee of Rogers and warned the employee about using Type 3 asphalt on the project. Garrett stated that using Type 3 asphalt on a highway of such high volume was imminently dangerous. He stated that the problems with the mix would cause hydroplaning, due to the sheeting action of water runoff during heavy rains. His affidavit reflects in pertinent part:

> At the time that Rogers Group, Inc., was awarded the high volume overlay project on Highway 65 North, it was aware of each of the above mentioned problems with using the design asphalt mix on a highway application, and that it was using Type 3 design mix improperly in the wrong application. I spoke with a quality control materials employee of Rogers Group, Inc., who told me that he was using Type 3 design asphalt mix for the highway overlay application, and that he was aware that it was never designed for that type of application. I told him that the mix

[1] No judgment has been entered as yet against the individual Rogers's employees, John Does 1 through 5, or Loftin's Estate, Marilyn K. Loftin, Administratrix; hence, they are not parties to this appeal. We review the summary-judgment order pursuant to Ark. R. Civ. P. 54(b), as the trial court certified the immediate appeal of this order.

> design should never be used for an overlay project on this highway.

Appellants alleged that based on Garrett's warning, Rogers was negligent in (1) using the Type 3 asphalt mix on the overlay project, and (2) failing to warn AHTD and the public of the dangers of using such a mix on that particular stretch of highway. As for the latter allegation, Appellants claim that Rogers's failure to warn amounted to a negligent performance of the contract with AHTD.

Rogers filed a motion for summary judgment, claiming that any negligence in the use of Type 3 asphalt was the result of the contract specifications set out by AHTD, and that, accordingly, it was shielded from liability by virtue of the sovereign immunity enjoyed by AHTD. Rogers asserted that all the decisions were made by AHTD, including the specific requirement for the use of Type 3 asphalt. It further asserted that it performed the contract exactly as specified by AHTD, and that, as a result, it was not liable for any injuries caused by the use of Type 3 asphalt on the highway.

In support of its motion, Rogers submitted an affidavit from AHTD's resident engineer, C.W. McMillian, who oversaw the project on this highway. McMillian's affidavit reflected that AHTD specified the type and composition of asphalt to be used in the job, as well as the procedures to be used in applying the asphalt and preparing the surface for the asphalt. McMillian stated that AHTD had selected Type 3 asphalt for use on the project on the basis that it was suitable and appropriate for the project. He stated further that since its application, the asphalt mixture had performed satisfactorily on Highway 65. Most significantly, McMillian's affidavit reflected that AHTD would have used Type 3 asphalt on the project regardless of whether Rogers had notified AHTD that Type 3 was not suitable for the job.

The trial court granted summary judgment to Rogers on the basis of acquired immunity. The trial court based its conclusion on the fact that Rogers merely implemented the plans and specifications laid down by AHTD, and that AHTD had completely approved the work done by Rogers. The trial court also dismissed

the claims against the two insurers, concluding that because Rogers was not negligent in the performance of its contract with AHTD, there was no cause of action against the insurers.

For reversal, Appellants argue that the trial court erred in granting summary judgment on the basis of the doctrine of acquired immunity. They claim that this defense is no longer viable under Arkansas law, following the holding in *Suneson v. Holloway Constr. Co.*, 337 Ark. 571, 992 S.W.2d 79 (1999). Alternatively, they assert that Rogers's conduct falls within an exception to the acquired-immunity doctrine, because Rogers negligently performed the contract with AHTD. Appellants also argue that there was a material issue of fact on the issue of Rogers's duty to warn AHTD. They argue further that if Rogers is immune, they should be allowed to proceed directly against the two insurers. Lastly, they argue that the trial court erred in striking some exhibits and an affidavit filed by Appellants the day before the summary-judgment hearing. None of these arguments has any merit, and we affirm the trial court's judgment.

At the outset, we note our standard of review. Summary judgment is no longer viewed by this court as a drastic remedy; rather, it is viewed simply as one of the tools in a trial court's efficiency arsenal. *Foreman Sch. Dist. No. 25 v. Steele*, 347 Ark. 193, 61 S.W.3d 801 (2001). That being said, summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Id.* All proof must be viewed in the light most favorable to the nonmoving party, and any doubts must be resolved against the moving party. *Short v. Westark Community College*, 347 Ark. 497, 59 S.W.3d 432 (2002). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.*

I. Acquired Immunity

For their first point for reversal, Appellants argue that the acquired-immunity doctrine is no longer a viable defense in Arkansas following this court's decision in *Suneson*, 337 Ark. 571,

992 S.W.2d 79. Rogers argues that *Suneson* only abolished the accepted-work doctrine and did not affect the viability of the acquired-immunity doctrine. To support its argument, Rogers relies on two recent appellate decisions stemming from the same factual allegations involved in this case: *Barker v. Rogers Group, Inc.*, 74 Ark. App. 18, 45 S.W.3d 389 (2001), and *Engelhardt v. Rogers Group, Inc.*, 132 F. Supp. 2d 757 (E.D. Ark. 2001). In *Barker*, the court of appeals specifically rejected the argument that *Suneson* had effectively abolished the acquired-immunity doctrine. Instead, it concluded that there were different rationales and public-policy considerations behind the two doctrines. The *Engelhardt* decision did not actually consider the holding in *Suneson*, but it nonetheless concluded that Arkansas law supported application of the acquired-immunity doctrine in that case. We agree with both of these cases on this point.

The doctrine of acquired immunity provides that a contractor who performs in accordance with the terms of its contract with a governmental agency and under the direct supervision of the governmental agency is not liable for damages resulting from that performance. *See Muskogee Bridge Co. v. Stansell*, 311 Ark. 113, 842 S.W.2d 15 (1992); *Southeast Constr. Co., Inc. v. Ellis*, 233 Ark. 72, 342 S.W.2d 485 (1961); *Barker*, 74 Ark. App. 18, 45 S.W.3d 389; *Jordan v. Jerry D. Sweetser, Inc.*, 64 Ark. App. 58, 977 S.W.2d 244 (1998); *Guerin Contractors, Inc. v. Reaves Food Center*, 270 Ark. 710, 606 S.W.2d 143 (Ark. App. 1980). Under this theory, "a contractor for a public agency shares the sovereign immunity of the public body from liability for incidental damages necessarily involved in the performance of the contract." *Id.* at 713, 606 S.W.2d at 144-45 (citing 64 AM. JUR. 2D *Public Works and Contracts* § 135). However, this doctrine does not protect a contractor who performs the contract in a negligent manner resulting in damages to others. *Id.*

In *Ellis*, this court held that "where a contractor performs his work in accordance with the plans and specifications and is guilty of neither a negligent nor a willful tort, he is not liable for any damages that might result." 233 Ark. at 77, 342 S.W.2d at 488 (citing 40 C.J.S. *Highways* § 212) (quoting *Ference v. Booth & Flinn Co.*, 370 Pa. 400, 403, 88 A.2d 413, 414 (1952)). The clear

purpose of this immunity is to protect the contractor who performs the work as specified from bearing the brunt of liability based on the actions or decisions made solely by the governmental agency, which is immune from suit in tort. There are also practical reasons underlying the doctrine:

> If the contractor was required, at its peril, to check and double check all plans given it and required to keep an engineering force for the purpose of interpreting these plans, and was not permitted to follow the orders of the engineering force of its superior, then the cost of public improvement would be so increased as to make them almost prohibitive.

Id. (quoting *Wood v. Foster & Creighton Co.*, 191 Tenn. 478, 482-83, 235 S.W.2d 1, 3 (1950)).

In contrast, the accepted-work doctrine, which this court abolished in *Suneson*, 337 Ark. 571, 992 S.W.2d 79, provided that after the contractor completed the work and turned it over to, and it was accepted by, the contracting party, the contractor incurred no further liability to third parties by reason of the condition of the work. *Id.* Upon acceptance, the responsibility for any defects in the work shifted to the contracting party. *Id.* Thus, unlike the acquired-immunity doctrine, which is designed to protect innocent contractors from liability based on decisions made and instructions given by the sovereign, the accepted-work doctrine had the effect of shielding *negligent* contractors from liability once they had finished construction and their work had been accepted by the contracting party. This court abolished the doctrine of accepted work for a number of reasons, namely that it was antiquated, it provided harsh results, and the exceptions to the doctrine had virtually swallowed up the rule. *Id.*

This court's decision to abolish the accepted-work doctrine hardly supports the conclusion that it has likewise abandoned the defense of acquired immunity. To the contrary, the reasons and considerations behind acquired immunity are just as valid today as they have ever been. A contractor who performs in accordance with the terms of its contract with a governmental agency and under the direct supervision of the governmental agency should not be held liable for damages resulting from that

performance. The only exception is where the contractor is negligent in the performance of the contract. Unlike the accepted-work doctrine, acquired immunity serves the legitimate purpose of extending the government's immunity to shield an innocent contractor who has completely performed the work to the government's plans and specifications. Moreover, were acquired immunity not available, the costs of public improvements would be greatly increased to the public's detriment. Accordingly, we conclude that the acquired-immunity doctrine is still a viable defense in this state. That being said, we now consider the doctrine's applicability in this case.

The undisputed evidence submitted below demonstrates that Rogers performed its contract with AHTD exactly as specified. According to the affidavits filed by Rogers's employee, Eddie Reidmueller, and AHTD's resident engineer, McMillian, Rogers completed the project in full compliance with the specifications set out by AHTD. There was an AHTD engineer on sight at the project every day, directing and inspecting the contractor's work. There was also an engineer on sight at the asphalt plant every day, checking the asphalt mixture to make sure that it met with AHTD's specifications. Reidmueller stated in his affidavit that Rogers fully complied with the specifications provided by AHTD, and that neither Rogers nor any subcontractors deviated in any way from the instructions and specifications provided by AHTD.

In his affidavit, McMillian stated that it was his responsibility, and that of other on-site AHTD employees, to oversee the project and inspect the type, placement, composition, and application of the surfacing materials to assure compliance with the job's specifications. McMillian stated that if it had been determined that Rogers's work was not in compliance with AHTD's specifications, he would have promptly brought it to the attention of Rogers and would have required the matter to be corrected promptly. McMillian stated that the final inspection of the project was done on September 29, 1996, and that AHTD determined that the work and the asphalt were in compliance with the contract specifications. This proof demonstrates that Rogers performed the contract in full compliance with the specifications mandated by AHTD and under the direct and constant supervi-

sion of AHTD. Accordingly, we affirm the trial court's ruling that Rogers was entitled to rely on the defense of acquired immunity.

II. Negligent Performance of Contract

Appellants next argue that the trial court erred in refusing to find that Rogers's actions fell within an exception to the doctrine of acquired immunity, because it was negligent in the performance of the contract. Specifically, Appellants claim that Rogers was contractually obligated to warn AHTD and the public of any errors in the specifications, and it failed to fulfill this duty. As such, Appellants assert that Rogers negligently performed the contract. We disagree.

Appellants' argument on this point is based entirely on the affidavit of Garrett, the engineer who prepared the particular mix of Type 3 asphalt that was used on this project. According to Garrett's affidavit, which we must view in a light most favorable to Appellants, Garrett spoke with a quality-control employee of Rogers and warned that Type 3 asphalt should never be used on an overlay project on such a high-volume highway. Garrett also stated that the employee indicated to him that he was aware that Type 3 asphalt was never designed for that type of application. Based on this information, Appellants argue that Rogers had a duty to warn AHTD of the danger in using Type 3 asphalt on this project.

Appellants argue further that Rogers's duty to warn arose out of its contract with AHTD. They specifically rely on section 105.05 of the AHTD's 1993 edition of its *Standard Specifications for Highway Construction*, which provides:

> The Contractor shall take no advantage of any apparent error or omission in the plans or specifications, and shall immediately notify the Engineer of any such errors or omissions discovered. The Engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the plans and specifications.

Appellants contend that the information conveyed by Garrett fell within the category of an error or omission in the plans or specifi-

cations for the job. Appellants argue that by failing to convey the information received from Garrett, Rogers was negligent in its contractual duties to AHTD. Appellants argue further that the trial court erred in placing so much emphasis on McMillian's affidavit regarding the effect that any warning would have had on AHTD.

Appellants rely on this court's holding in *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992), to support their argument that had a warning been given by Rogers to AHTD, there is a presumption that such warning would have been heeded. Appellants also argue that *Bushong* supports their claim that an issue of fact remains for the jury as to whether Rogers sufficiently rebutted the presumption. In *Bushong*, this court held:

> Once a plaintiff proves the lack of an adequate warning or instruction, a presumption arises that the user would have read and heeded adequate warnings or instructions. This presumption may be rebutted by evidence "which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances." *Safeco Ins. Co.* [*v. Baker*], 515 So.2d 655, 657 (La. Ct. App. 1987); *See also Johnson v. Niagra*, 666 F.2d 1223 (8th Cir. 1981). In this case, appellant himself admitted that he had never read a label on a cleaning product during the three years he worked at Stewart Electric. Given this, we cannot say the trial court erred in finding appellant's failure to read the label precluded his claim as any warning or instruction would have been futile since appellant would not have read it.

Id. at 234, 843 S.W.2d at 811.

Here, the presumption was rebutted by McMillian's affidavit, which demonstrates that such a warning would have fallen on deaf ears and would not have altered the contract specifications. McMillian's affidavit reflects:

> 8. The Department selected Type III asphalt. The selection of Type III asphalt was made based upon a determination that it was suitable and appropriate for Job R80087. Since its application, Type III asphalt has performed satisfactorily on Highway 65.
>
> 9. *Had Rogers Group employees advised the Department* that they were supposedly informed *that Type III was not suitable for this*

> *job, we would have informed them that Type III was suitable and would have directed that work continue using Type III asphalt.* [Emphasis added.]

Appellants have provided no proof to the contrary. Thus, there is no issue of fact for the jury to decide. Arkansas Rule of Civil Procedure 56(e) requires the nonmoving party to meet proof with proof when summary judgment is sought. That rule provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but *his response, by affidavits or as otherwise provided in this rule, must set forth specific facts* showing that there is a genuine issue for trial. [Emphasis added.]

Appellants have offered no proof, through affidavits or otherwise, to contradict McMillian's affidavit. We disagree with Appellants that this is an issue of credibility for the jury. This is merely an issue of proof, with the undisputed proof showing that AHTD would not have heeded any warning Rogers could have made regarding the use of Type 3 asphalt on the project in question. Accordingly, we affirm the trial court's conclusion that Rogers was not negligent in the performance of its contract with AHTD by failing to warn the agency about using Type 3 asphalt on the overlay project.

We likewise affirm the trial court's conclusion that Rogers was not negligent in failing to warn the public of the dangers of Type 3 asphalt. Appellants' reliance on section 107.01(b) of AHTD's *Standard Specifications* is misplaced. That section merely places a burden on the contractor to take steps to ensure the public's safety while the contract work is being performed. That section provides in pertinent part:

> The Contractor shall comply with applicable Federal, State, and local laws governing safety, health, and sanitation. The Contractor shall provide safeguards, safety devices, and protective equipment and take any other needed action necessary to protect the life and health of employees *on the job* and the safety of the public and to protect property *in connection with the performance of the work* covered by the Contract. [Emphasis added.]

We agree with Rogers that this provision pertains to the contractor's safety obligations while the work is being performed. We do not view this section as creating a generalized duty to warn the public of dangers that may arise out of the sovereign's plans or specifications for the job. Accordingly, the trial court was correct in granting summary judgment to Rogers, as it was not negligent in the performance of its contract with AHTD.

III. Direct Action Against the Insurers

For their third point on appeal, Appellants argue that the trial court erred in dismissing their claims against Rogers's two insurers. They assert that if Rogers is entitled to acquired immunity, they should be allowed to proceed directly against its insurers, pursuant to Ark. Code Ann. § 23-79-210 (Repl. 1999). Subsection (a)(1) provides in pertinent part:

> *When liability insurance is carried by any* cooperative nonprofit corporation, association, or organization, or by any municipality, agency, or subdivision of a municipality or of the state, or by any improvement district or school district, or by any other *organization or association of any kind or character and not subject to suit for tort,* and if any person, firm, or corporation suffers injury or damage to person or property *on account of the negligence or wrongful conduct* of the organization, association, municipality or subdivision, its servants, agents, . . . then the person, firm, or corporation so injured or damaged *shall have a direct cause of action against the insurer* with which the liability insurance is carried to the extent of the amounts provided for in the insurance policy as would ordinarily be paid under the terms of the policy. [Emphasis added.]

This court has heretofore only applied this provision to the insurers of charitable or nonprofit organizations, governmental entities, and county-owned hospitals. *See Cherry v. Tanda, Inc.*, 327 Ark. 600, 940 S.W.2d 457 (1997); *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925 S.W.2d 395 (1996); *Berry v. Saline Memorial Hosp.*, 322 Ark. 182, 907 S.W.2d 736 (1995); *Jarboe v. Shelter Ins. Co.*, 317 Ark. 395, 877 S.W.2d 930 (1994).

Section 23-79-210 is not applicable in this case for two reasons. First, it only provides for direct actions against an

insurer in the event that the organization at fault is immune from suit in tort. Immunity from suit is the entitlement not to stand trial, while immunity from liability is a mere defense to a suit. *See Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987). Acquired immunity is not immunity from suit; rather, it is immunity from liability. This court explained in *Ellis*, 233 Ark. 72, 342 S.W.2d 485:

> It is hornbook law that the *immunity from suit* of the sovereign state does *not* extend to independent contractors doing work for the state. But it is equally true that where a contractor performs his work in accordance with the plans and specifications and is guilty of neither a negligent nor a willful tort, he is not *liable* for any damages that might result.

Id. at 77, 342 S.W.2d at 488 (citation omitted) (emphasis added) (quoting *Ference*, 370 Pa. 400, 403, 88 A.2d 413, 414). Unlike AHTD, Rogers is not an entity that enjoys immunity from suit in tort. This conclusion is clearly illustrated by the fact that Appellants were able to sue the contractor directly in the circuit court. Because Rogers is not immune from suit, the direct-action statute is not applicable.

The second reason that section 23-79-210 is not applicable in this case is because its protections are only triggered where a person is injured "on account of the negligence or wrongful conduct of the organization[.]" We have already concluded in the previous two points that Rogers was entitled to rely on the defense of acquired immunity because it was not negligent in the performance of its contract with AHTD. Because Rogers was not negligent, its insurers may not be held responsible under the direct-action statute. The trial court was thus correct in dismissing the claims against the insurers.

IV. Additional Materials in Opposition to Summary Judgment

For their last point on appeal, Appellants argue that the trial court erred in refusing to allow them to supplement the record with certain materials in opposition to the motion for summary judgment. The materials in question include an affidavit from an expert witness and copies of parts of AHTD's *Standard Specifica-*

tions for Highway Construction. There is no merit to Appellants' argument on this point.

During the hearing below, Rogers asked the court not to admit the materials because their last-minute submission would prejudice it. The trial court granted the motion, finding that the motion for summary judgment had been pending for over a year and one-half and that Appellants had ample time to get these materials filed, instead of waiting until the day before the hearing. Notwithstanding that ruling, the trial court *did* consider the materials in determining that Rogers was entitled to summary judgment. The trial court's order reflects:

> However, the Court did review this material, and heard oral arguments about the content of this material. The Court finds they would not have created a factual dispute in light of the uncontroverted affidavit of C.W. McMillian that Rogers Group performed the contract to the Department's specifications and under the Department's direction.

Thus, because the trial court actually considered the materials in granting summary judgment, Appellants suffered no prejudice from the original ruling striking the materials. We will not reverse a trial court's decision to disallow evidence absent a showing of prejudice. *See Columbia Nat'l Ins. Co. v. Freeman*, 347 Ark. 423, 59 S.W.3d 432 (2002); *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001). We thus affirm the trial court's judgment.

Affirmed.

GLAZE, J., not participating.

John DOE, Jane Doe, and Mary Doe *v.*
Clyde BAUM, Fountain Lake School District,
Arkansas School Boards Association, and
Arkansas Department of Education

01-1159 72 S.W.3d 476

Supreme Court of Arkansas
Opinion delivered April 18, 2002

[redacted]

Bachelor & Newell, by: *Angela R. Echols* and *C. Burt Newell* , for appellants.

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

RAY THORNTON, Justice. Appellants, John Doe, Jane Doe, and Mary Doe appeal the July 17, 2001, order of the Garland County Circuit Court, granting summary judgment to appellee, Arkansas Department of Education, ("ADE"), granting partial summary judgment to appellees, Clyde Baum,[1] and Fountain Lake School District ("FLSD"), and certifying the case for appeal pursuant to Ark. R. Civ. P. 54(b). Appellants raise four points for reversal: (1) the trial court erred in ruling that Ark. Code Ann. § 6-17-1113 (Repl. 1999) did not provide coverage in this case; (2) the trial court erred in ruling that Ark. Code Ann. § 6-19-105 (Repl. 1999) had been repealed by implication; (3) the trial court erred in not allowing appellants to proceed under Ark. Code Ann. § 6-19-118 (Repl. 1999); and (4) the trial court erred in granting summary judgment on the issues of gross negligence and/or reckless indifference and in its failure to submit such issues to the jury. We affirm.

Mary Doe, a third-grade girl, was allegedly raped by an eighth-grade boy named James Roe while returning home from school one day in the fall of 1998 on a school bus owned by FLSD and driven by Baum. As a result of this incident, on April 21, 1999, Mary's grandparents and adoptive parents, Mr. and Mrs. Doe, filed the instant action against Baum, alleging torts of common negligence, gross negligence, reckless indifference, and outrage. FLSD was included as a defendant under the theory of vicarious liability. ADE was also included as a defendant for coverage under its "School Worker Defense Program." Finally, the Arkansas School Boards Association ("ASBA") was included as a defendant for coverage under its school motor vehicle liability program.

Mary testified in her deposition that on the day the rape in question occurred, James had commanded all the other students to move up to the front of the bus. Mary further testified that James

[1] We note that Mr. Baum's last name was misspelled as "Vaum" in the original styling of the case, and we have corrected the mistake to reflect the correct spelling as "Baum."

made her lay down, and he then pulled her pants down. Mary testified that she did not try to call out to or try to run to her brother, did not call out to or try to run to the bus driver, did nothing to try to get away from James, and did nothing to try to bring the incident to the attention to the other students on the bus. Mary also testified that she did not tell anyone about the incident after she got off the bus and that the first person she told about the incident several months later was Sharon Kyle, one of her teachers, who told her to speak about the incident with Linda Woodson, the school's guidance counselor. Mary told Ms. Woodson that she had been raped on the bus and at two other locations, and Ms. Woodson notified the police. Mary related in her deposition that James had put his hand down her pants another time on the bus and then in the woods and the field next to her home.

Mary also related in her deposition that James had instigated another student, Kenny, to put his hand down her pants while she was on the school bus driven by Baum the previous year. Mary testified that she tried to scream so that the bus driver could hear her, but that she was unable to scream because Kenny had put his arm over her mouth so that she could not scream. Mary testified that as she left the bus, she notified Baum of the incident, but that Baum told her that he could not do anything about it because Kenny had already disembarked from the bus. Mary testified that she did not know whether Baum had reported the incident with Kenny to school officials. Mary also testified that she and her grandmother had gone up to the school, where they told Ms. Cox, the K-2 principal about the incident involving Kenny, and Kenny's bus-riding privileges were suspended. Mary stated in her affidavit that she told Ms. Cox that James had been involved in the incident with Kenny. Mary further stated in her affidavit that her grandmother had told Charles Clark, the Superintendent of FLSD, and Ronnie Schroeder, Baum's supervisor, what had happened.

Kory Doe, Mary's brother, who was one of the students on the bus at the time of the incident with James, testified in his deposition that on the day of the incident, he bent down to pick up a pencil he had dropped on the floor of the bus, noticed Mary's foot

down on the floor, and then saw that James had his hand down her pants. Kory testified that no noises were made by either Mary or James during the incident and that no one told him, nor did he hear, that anyone saw the incident. Kory further testified that neither he nor Mary notified the driver about the incident at that time and that Mary told him not to tell anyone. Jane Doe testified in her deposition that she was not made aware of the incident until Mary complained of a problem some days or weeks later.

Baum testified in his deposition that Mary had told him of the incident involving Kenny putting his hands down her pants, but that Kenny had disembarked the bus by the time he learned of the incident. Baum also testified that he immediately told Mary's grandmother, who met Mary at the bus stop that night, of the incident. Baum testified that he did not fill out a pink slip to report the incident because he reported it to Mr. Schroeder, his supervisor, in person as soon as he got finished with his bus route. Baum further testified that he never got any report that James was involved in the incident.

Baum testified that the first he learned of the incident with James was when Mr. Schroeder mentioned to him that he needed to talk to a police officer. Baum testified that neither Mary nor Kory ever reported the incident to him, nor were there any reports from other students. Baum also testified that he never noticed Mary getting off the bus crying, looking disheveled, or looking as though she were hurt in any way in the fall of 1998.

Mr. Schroeder testified in his deposition that James had been a problem student on several prior occasions. Specifically, Schroeder testified that James had been kicked off the bus for using profanity with Baum and Schroeder, had been arrested on at least one occasion while at school, and had been truant, among other things. Schroeder further testified that he did not remember receiving a report involving the incident between Mary and Kenny, but that he would not dispute Baum's memory if Baum said that he had reported such an incident between Mary and Kenny. Schroeder further testified that Baum had been involved in an accident one time where some students were misbehaving in the back of the bus while he was driving on a wet road, and he got

onto the edge of the dirt, slid, and hit a tree. Schroeder testified that he counseled Baum after the accident that he needed to watch the road instead of the kids and that his first responsibility was driving the bus.

On August 8, 1999, appellee ASBA filed a motion for summary judgment, arguing that its liability insurance to FLSD, as is required under Ark. Code Ann. § 21-9-303 (Repl. 1999), did not provide coverage in Mary's case because the incident in question did not arise out of the ownership, maintenance, or use of the vehicle as required under the Motor Vehicle Safety Responsibility Act, which is codified at Ark. Code Ann. § 27-19-713(b)(2) (Supp. 2001). The ASBA argued that its policy only afforded protection in cases where there had been a collision that caused injuries to a third party. The trial court denied ASBA's motion for summary judgment, concluding that the memorandum of intent provided coverage for damages "arising out of the ownership, maintenance, or use of any automobile," that "accident" was defined as an event that resulted in personal injury, and, as such, the facts alleged in the complaint might be covered by insurance provided by the ASBA. That ruling is not at issue in this appeal, but remains the subject of future litigation.

On April 25, 2001, appellees Baum, FLSD, and ADE filed a motion for summary judgment, arguing that (1) they were immune from liability for negligence, gross negligence, and reckless indifference; (2) the coverage afforded by the ADE under Ark. Code Ann. § 6-17-1113 only required coverage for acts that have not traditionally been immune, and school district employees have traditionally been immune from acts of negligence; and (3) ADE was entitled to sovereign immunity and could not be sued.

On July 17, 2001, the Garland County Circuit Court issued an order: (1) granting summary judgment to ADE and dismissing appellants' complaint against it with prejudice; (2) granting partial summary judgment to Baum and FLSD and dismissing appellants' complaint against them as to the civil liability allegations; (3) ordering the complaint as to the motor vehicle liability allegations against Baum and FLSD and as to the allegations of liability protection or coverage under the program provided by ASBA to

remain pending; and (4) certifying the case for appeal pursuant to Ark. R. Civ. P. 54(b). It is from this order that appellants bring this appeal.

We have outlined our standard of review of summary-judgment cases on numerous occasions. In *Short v. Westark Community College*, 347 Ark. 497, 65 S.W.3d 440 (2002), we stated:

> In reviewing a summary-judgment case, we need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Aka v. Jefferson Hosp. Assoc.*, 344 Ark. 627, 42 S.W.3d 508 (2001). Notably, the moving party always bears the burden of sustaining a motion for summary judgment. All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. However, the moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Ark. R. Civ. P. 56; *Robert D. Holloway, Inc. v. Pine Ridge Add'n Resid. Prop. Owners*, 332 Ark. 450, 966 S.W.2d 241 (1998) (citing *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997). Once the moving party makes a prima facie showing that it is entitled to summary judgment, the opponent must meet proof with proof by showing a material issue of fact. *Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 824 S.W.2d 387 (1992).

Short, supra. With this standard of review in mind, we now turn to the points on appeal.

For their first point on appeal, appellants argue that the trial court erred in ruling that Ark. Code Ann. § 6-17-1113 did not provide coverage in this case. Specifically, appellants contend that Ark. Code Ann. § 6-17-1113 provides coverage in this case because, pursuant to Ark. Code Ann. § 6-19-105,[2] school bus drivers have not traditionally been immune for their negligent acts, and the statute provides coverage for acts or omissions from

[2] We note that Ark. Code Ann. § 6-19-105 has been repealed by implication. See our discussion at pp. 12-15 infra.

which employees have not traditionally been immune. Appellees argue, however, that the trial court was correct in ruling that Ark. Code Ann. § 6-17-1113 did not provide coverage in this case because Arkansas recognizes immunity for school districts and their employees from civil liability for negligent torts, except to the extent that they have applicable liability insurance. We agree with appellees and affirm on this point.

We first note that Arkansas has long recognized immunity for school districts and their employees from civil liability for negligent torts. The applicable statute is Ark. Code Ann. § 21-9-301 (Supp. 2001), which provides:

> *It is declared to be the public policy of the State of Arkansas that all* counties, municipal corporations, *school districts*, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies *shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance. No tort action shall lie against any such political subdivision because of the acts of its agents and employees.*

Id. (emphasis added). We have held that the immunity granted to the political subdivisions named in Ark. Code Ann. § 21-9-301 extends to the officials and employees of that governmental entity. *See Cousins v. Dennis*, 298 Ark. 310, 767 S.W.2d 296 (1989) (citing *Matthews v. Martin*, 280 Ark. 345, 658 S.W.2d 374 (1983)).

The statute that appellants contend provides coverage in the present case is Ark. Code Ann. § 6-17-1113, which provides, in pertinent part:

> (a) The Department of Education is authorized and directed to establish a School Worker Defense Program for the protection of:
>
> * * *
>
> (13) Bus drivers and mechanics employed by public schools;
>
> * * *
>
> against civil liability, attorney's fees, and costs of defense for acts or omissions of each employee or volunteer in the performance of his or her duties as a volunteer or his or her official duties as a

> school employee, including civil liability for administering corporal punishment to students, in the amount of two hundred fifty thousand dollars ($250,000) for incidents which occurred prior to July 1, 1999, and one hundred fifty thousand dollars ($150,000) for each incident which occurs after June 30, 1999.
>
> * * *
>
> (d) The investigation of any incident or the defense of any protected person does not waive or forfeit any immunity or authorization to provide for hearing and settling claims extended to educational entities and their personnel by the laws of the State of Arkansas.

Id. Pursuant to the authorization of this statute, ADE opted to establish the School Employee — School Board Protection Program ("Program").[3]

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[3] The language of the Program provides, in pertinent part:

A. PERSONS PROTECTED

2. The following employees of public school districts and public school educational cooperatives:
   g. Bus drivers

B. GOVERNMENTAL IMMUNITY IS NOT WAIVED BY THIS PROGRAM

The investigation of any incident, the defense of any protected person, nor any protection provided by this program, does not waive or forfeit any immunity extended to any protected person as identified in Paragraph A. above by the laws of the State of Arkansas.

C. WHAT WILL THE PROTECTION PROGRAM PAY?

5. SUCH AUTOMOBILE PROTECTION as afforded shall not apply within the state of Arkansas and shall apply to only those persons identified in Paragraph A(2) and A(3) and then only when operating a vehicle owned or leased by, and with the permission of, a public school district or public school educational cooperative. Such automobile protection provided shall be excess to any coverage in force on the involved school vehicle driven by a covered person and shall not waive any immunities that would otherwise apply.

D. EXCLUSIONS — PROTECTION DOES NOT APPLY TO:

7. Any and all claims for damages which are subject to the affirmative defense of governmental immunity under Arkansas law.

School Employee — School Board Protection Program, at 1-4.

We interpreted the scope of Ark. Code Ann. § 6-17-1113 in *Waire v. Joseph*, 308 Ark. 528, 825 S.W.2d 594 (1992), where we stated:

> Given Arkansas' strong adherence to governmental immunity, we think that if the legislature had intended to require ADE to insure against the negligent acts of school district employees, claims from which school districts traditionally have been immune, they would have expressly stated this intent. In the absence of such express intent, we do not think this court should change the longstanding public policy of the State of Arkansas.
>
> This court interprets Ark. Code Ann. § 6-17-1113 to authorize and direct ADE to establish a self-insurance fund or procure insurance policies to insure school district employees against acts or omissions from which they have not traditionally been immune, *i.e.*, civil rights claim under federal legislation and intentional or malicious acts or omissions. In *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989), we stated that Ark. Code Ann. § 21-9-301 does not provide immunity from intentional torts. Similarly, in *Beaulieu v. Gray*, 288 Ark. 395, 705 S.W.2d 880 (1986), we stated that the statute does not protect immune employees from malicious acts. Therefore, we hold that ADE was not statutorily required to insure against the negligent acts of school district employees.

Waire, *supra*; see also *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992), where we stated, "The *Waire* decision also reaffirmed our previous holdings that state employees are not immune from suit for negligence, to the extent the employees are covered by other viable liability insurance." *Id.* (citing *Waire*, *supra*; *Carter v. Bush*, 296 Ark. 261, 753 S.W.2d 534 (1988)).

Applying the holdings in *Waire*, *supra*, and *Deitsch*, *supra*, to the present case, we hold that ADE was not required under Ark. Code Ann. § 6-17-1113 to provide coverage for the alleged negligent acts of Baum because the immunity statute codified at Ark. Code Ann. § 21-9-301 provides governmental agencies, including ADE, as well as school districts and their employees, immunity for negligent acts, and, thus, the trial court did not err in concluding that Ark. Code Ann. § 6-17-1113 does not provide coverage in this case. Moreover, the language included in the Program document itself does not waive the

immunity afforded to either Baum or FLSD by the immunity statute; rather, that language expressly preserves immunity under the Program. Accordingly, we affirm on this point.

[redacted] Because we have held that the trial court did not err in concluding that Ark. Code Ann. § 6-17-1113 does not require ADE to provide coverage in the present case, appellants' sole avenue of redress is by way of the exception that lies within the immunity statute, which provides for a school district and its employees to be immune from liability and from suit for damages, except to the extent that it may be covered by liability insurance. Ark. Code Ann. § 21-9-301; *see also Deitsch, supra*; *Waire, supra*; *Carter, supra*. The trial court in the present case has previously ruled that the motor vehicle liability protection or coverage afforded to Baum and the FLSD by the ASBA may, potentially, apply to the present claim, and this ruling is not at issue on appeal. Accordingly, because appellants's claim regarding the motor vehicle liability issue remains the subject of future litigation, they may still proceed under the exception to the immunity statute.

For their second point on appeal, appellants argue that the trial court erred in ruling that Ark. Code Ann. § 6-19-105 had been repealed by implication upon the enactment of Ark. Code Ann. §§ 21-9-301, 21-9-303, and 6-17-1113. We disagree and affirm.

Ark. Code Ann. § 6-19-105, which was first enacted in 1943 and has not previously been cited by our appellate courts, provides:

> The driver or operator of a bus used for the transportation of school children to and from school or to and from other school activities as declared by the school district board of directors to be school activities shall be liable in damages for the death of or injury to any school child resulting from a failure of the driver or operator to use reasonable care while transporting pupils.

Id.

Ark. Code Ann. § 21-9-301 provides:

> It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special

> improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance. No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

Id. We have held that the immunity granted to the political subdivisions named in Ark. Code Ann. § 21-9-301 extends to the officials and employees of such governmental entities. *Cousins, supra* (holding that school district employees were immune from tort liability under Ark. Code Ann. § 21-9-301 for alleged acts of negligence they committed while performing their official duties for the school district); *see also Autry v. Lawrence*, 286 Ark. 501, 696 S.W.2d 315 (1985); *Matthews, supra.*

We have outlined our statutory construction rules regarding repeal by implication on numerous occasions. When interpreting statutes, the first rule of construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Henson v. Fleet Mortgage Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995). Yet the basic rule of statutory interpretation to which all other interpretive guides must yield is to give effect to the intent of the legislature. *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925 S.W.2d 395 (1996); *Henson, supra.* In ascertaining an act's intent, the appellate court examines the statute historically, as well as the contemporaneous conditions at the time of the enactment, the object to be accomplished, the remedy to be provided, the consequences of interpretation, and matters of common knowledge within the court's jurisdiction. *Rogers, supra*; *Henson, supra*; *City of Little Rock v. AT & T Communications of the S.W., Inc.*, 318 Ark. 616, 888 S.W.2d 290 (1994). A statute of a general nature does not repeal a more specific statute unless there is a plain, irreconcilable conflict between the two. *Winston v. Robinson*, 270 Ark. 996, 606 S.W.2d 757 (1980); *Patrick v. State*, 265 Ark. 334, 576 S.W.2d 191 (1979). Thus, the treatment of a general repealer clause does not differ from the rules applicable to a repeal by implication. The fundamental rule of that doctrine is that a repeal by implication is not

favored and is never allowed except when there is such an invincible repugnancy between the provisions that both cannot stand. *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994); *Uilkie v. State*, 309 Ark. 48, 827 S.W.2d 131 (1992). Repeal by implication is not a favored device in our interpretation of statutes, and we must construe all statutes relating to the same subject matter together. *Waire, supra. "[A] repeal by implication is accomplished where the Legislature takes up the whole subject anew and covers the entire ground of the subject matter of a former statute and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new." Uilkie, supra* (quoting *Berry v. Gordon*, 237 Ark. 547, 376 S.W.2d 279 (1964)); *see also Bryant v. English*, 311 Ark. 187, 843 S.W.2d 308 (1992) (constitutional provision). Hence, the older act will be "repealed" if it is apparent that the latter act was intended to substitute for the prior one. *Uilkie, supra.*

In light of the enactment of Ark. Code Ann. § 21-9-301, which provides immunity from tort actions for school districts and their employees, except to the extent of liability insurance, it appears that Ark. Code Ann. § 6-19-105 has been repealed by implication. The Legislature took up the whole subject of school bus driver liability anew with the enactment of Ark. Code Ann. § 21-9-301 and has covered the entire ground of the subject matter of Ark. Code Ann. § 6-19-105 and clearly intended Ark. Code Ann. § 21-9-301 as a substitute. Ark. Code Ann. § 6-19-105, which was enacted in 1943, imposes liability upon school bus drivers for their negligence in the transportation of students. Ark. Code Ann. § 21-9-301, however, which was enacted in 1969, creates immunity for such school bus drivers for their negligent acts, except to the extent that there is applicable liability insurance coverage. In addition, the adoption of a comprehensive scheme of motor vehicle liability coverage under Ark. Code Ann. § 21-9-303[4] and the Legislature's decision not to amend Ark. Code Ann. § 6-17-1113 to reflect disagreement with our deci-

[4] Ark. Code Ann. § 21-9-303 provides:

(a) All political subdivisions shall carry liability insurance on their motor vehicles or shall become self-insurers, individually or collectively, for their vehicles, or both, in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, § 27-19-101 et seq.

sions in *Waire* and *Deitsch* indicates tacit recognition by the Legislature that school bus drivers are immune from civil liability for negligence, except to the extent that they have applicable liability insurance. The Legislature was aware of our decisions in *Waire* and *Deitsch*, where we held that the Ark. Code Ann. § 6-17-1113 does not waive employees' immunity for negligent acts, but has never taken steps to amend the statute to reflect disagreement with those decisions.

Under Ark. Code Ann. § 21-9-301, school districts and their employees are immune from tort actions except to the extent that they are covered by liability insurance. We conclude that the legislature did not intend to treat school bus drivers, unlike any other governmental entity's employees, as not being immune for their acts of negligence. To reach a contrary conclusion would create a repugnancy that the Legislature surely could not have intended. Accordingly, we affirm the trial court's finding that Ark. Code Ann. § 6-19-105 has been repealed by implication.

For their third argument on appeal, appellants argue that the trial court erred in not allowing appellants to proceed under Ark. Code Ann. § 6-19-118 (Repl. 1999).[5] Specifically,

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(b) The combined maximum liability of local government employees, volunteers, and the local government employer in any action involving the use of a motor vehicle within the scope of their employment shall be the minimum amounts prescribed in the Motor Vehicle Safety Responsiblity Act, § 27-19-101 et seq., unless the political subdivision has purchased insurance coverage or participates in a self-insurance pool providing for an amount of coverage in excess of the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act, § 27-19-101 et seq., in which event the maximum liability of the insurer or pool shall be the limits of the coverage provided for in the policy or agreement.

(c)(1) Any person who suffers injury or damage to person or property caused by a motor vehicle operated by an employee, agent, or volunteer of a local government covered by this section shall have a direct cause of action against the insurer if insured, or the governmental entity if uninsured, or the trustee or chief administrative officer of any self-insured or self-insurance pool.

(2) Any judgment against a trustee or administrator of a self-insurance pool shall be paid from pool assets up to the maximum limit of liability as herein provided.

Id.

[5] We note that Ark. Code Ann. § 6-19-118 (Repl. 1999) has since been repealed by Act 1220 of 2001. *See* Ark. Code Ann. § 6-19-118 (Supp. 2001).

appellants argue that Ark. Code Ann. § 6-19-118 directed ADE to provide additional insurance coverage for injuries that occur on school buses. Appellants further argue that despite the fact that the statute became effective in 1999, after the alleged rape occurred, it should be applied retroactively. Appellees, on the other hand, assert that the trial court was correct in not allowing appellants to proceed under Ark. Code Ann. § 6-19-118 because the alleged incident occurred months prior to the statute's enactment, there is no indication that the Legislature intended it to apply retroactively, and the statute was only funded by the Legislature once, is no longer funded, and the statute's effectiveness is expressly contingent upon the appropriation of necessary funding.

We note that appellants have failed to preserve for appeal their argument regarding the applicability of Ark. Code Ann. § 6-19-118 (Repl. 1999) to the facts of the present case. Appellants in this case failed to obtain a ruling from the trial court on the issue. The trial court did not rule on the issue either at the hearing or in its order, which was drafted by appellees and approved by appellants. Additionally, appellants did not seek to set aside the order in order to seek a ruling on the issue. It is well settled that to preserve arguments for appeal, even constitutional ones, the appellant must obtain a ruling below. *E.g.*, *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001) (citing *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998)). Accordingly, we reject this argument without reaching the merits.

For their final argument on appeal, appellants argue that the trial court erred in granting summary judgment to Baum on the issues of gross negligence and/or reckless indifference and that such issues should have been submitted to the jury. We disagree.

As we previously set out, our standard of review of summary-judgment cases is well settled. In reviewing a summary-judgment case, we need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Short*, *supra* (citing *Aka v. Jefferson Hosp. Assoc.*, 344 Ark. 627, 42 S.W.3d 508 (2001)). The moving party is entitled to summary judgment if the pleadings, depositions, answers to inter-

rogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Short, supra* (citing Ark. R. Civ. P. 56; *Robert D. Holloway, Inc. v. Pine Ridge Add'n Resid. Prop. Owners*, 332 Ark. 450, 966 S.W.2d 241 (1998) (citing *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997)).

We note that the only authority appellants have cited to us regarding the applicable standards of gross negligence and reckless negligence are from *Black's Law Dictionary* (6th ed. 1990). *Black's Law Dictionary* defines "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." *Id.* at 1033. *Black's Law Dictionary* defines "reckless negligence" as being when "the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Id.* at 1034.

Here, viewing the proof in the light most favorable to appellants, we cannot say that Baum's conduct rose to the level of gross negligence or reckless indifference. There is no evidence showing that Baum intentionally failed to perform a manifest duty in reckless disregard of the consequences as affecting the life of Mary, nor that he intentionally performed an act of an unreasonable character in disregard of a risk to Mary that was known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It is not controverted that Mary did not try to call out to or try to run to her brother, did not call out to or try to run to the bus driver, did nothing to try to get away from James, did nothing to try to bring the incident to the attention to the other students on the bus, and did not tell anyone about the incident after she got off the bus.

Appellants asserted that Baum was grossly negligent or recklessly indifferent because Baum knew that James was a problem student that he had to keep his eye on and failed to do so. However, appellants failed to provide any evidence that such a failure was in any way intentional. Rather, appellants' deposition testimony shows that one grandparent conceded that things could

happen on a school bus that a driver could not see, and the other grandparent stated that she could not contend that Baum intentionally tried to harm Mary, but that she thought that he just "wasn't watching those children when he should have been." Additionally, Mary admitted in her deposition testimony that Baum did not know what James was doing to her.

Appellants also asserted that Baum was grossly negligent or recklessly indifferent because of his knowledge of an incident during the prior year when Mary complained to Baum that another student, Kenny, had improperly touched her. Appellants contended that such earlier incident put him on notice that inappropriate sexual conduct had occurred on the bus. However, there was no evidence of an intentional failure to perform a manifest duty or intentional performance of an act with disregard of a known or obvious risk as a result of the earlier incident. Appellant does not cite any authority, and we know of none, that holds that an incident involving another student during the previous year establishes that a failure to observe or respond to an unobserved incident a year later rises to the level of gross negligence or reckless indifference. Appellants have failed to provide evidence to support the allegation that Baum intentionally failed to perform a manifest duty or act with disregard of a known or obvious risk on the day the incident occurred with regard to James. Applying our standard of review of summary-judgment cases to the present case, we hold that there exists no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law on the issues of gross negligence and reckless indifference.

We again note that the trial court certified this case for appeal of the issues resolved by its order pursuant to the provisions of Ark. R. Civ. P. 54(b) and that the allegations presented by the complaint on the basis of insurance coverage under the motor vehicle liability insurance provided to FLSD by ASBA remains pending.

We conclude that the trial court did not commit reversible error in its disposition of the issues brought forward in this appeal.

Affirmed.

GLAZE, IMBER, JJ., not participating.

Terrance ROBINSON and Tamagum Antonio Robinson *v.*
STATE of Arkansas

CR 01-351 72 S.W.3d 827

Supreme Court of Arkansas
Opinion delivered April 18, 2002

[Petition for rehearing denied May 16, 2002]

Lewellen & Associates, by: *Roy C. Lewellen*, for appellant.

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

JIM HANNAH, Justice. Appellants Terrance and Tamagum "Tony" Robinson petition for review of the court of appeals's decision affirming the Robinsons' convictions on unlawful firearm discharge and felon-in-possession charges. This case involves a drive-by shooting. In the late evening of September 21, 1998, Willie and Peggy Gillum pulled into their driveway, when a dark sports car with its lights off stopped on the street by the driveway, and multiple shots were fired from the car at the Gillums. Peggy was uninjured in the shooting, but Willie sustained a gunshot wound to his abdomen. According to the Gillums' testimony at trial, Willie identified the occupants of the car as Ter-

rance and Tony Robinson, who were sitting in the front and back passenger seats, and Marcus Turner, who was driving the car. The Robinson and Gillum families did not get along due to a previous homicide matter in which the Gillums' son, Shawn, was tried and acquitted of the murder of Darrell Robinson in 1997, and to another shooting in which Tony was tried for shooting the Gillums' twenty-year-old son, Broderick, for which Tony was acquitted a week prior to this shooting. There was evidence of great animosity between the families, and evidence that the Robinsons had threatened the Gillums.

Following the shooting and Willie's identification of the shooters, Terrance and Tony were arrested. Terrance was charged with unlawful discharge of a firearm from a motor vehicle and with felon-in-possession of a firearm, and Tony was charged with unlawful discharge of a firearm from a motor vehicle. The case went to trial on April 28 and 29, 1999. Terrance was convicted of both charges and sentenced to twenty-five years for the unlawful discharge of a firearm and six years for the felon-in-possession charge, the terms to run consecutively. Tony was convicted of the unlawful-discharge count and sentenced to eighteen years.

On May 10, 1999, Terrance and Tony filed motions for new trial in which they argued that they deserved a new trial because the State failed to disclose the names and addresses of two witnesses who could provide exculpatory evidence or testimony, because two new witnesses who were previously undiscoverable could provide exculpatory testimony and evidence regarding the shooting, and because the prosecutor engaged in misconduct in introducing a photograph from a rap-music cassette-tape cover with a picture of codefendant, Marcus Turner, whose case was continued, standing in front of a dark sports car.

The trial court entered its judgment and commitment order on May 24, 1999. Following this, it appears that there was some misunderstanding regarding the time frame in which the trial court was required to hear the motion for new trial, and the trial court entered an order on June 10, 1999, extending the time in which it would hold a hearing on the motion for new trial. The trial court held the motion hearing on July 8, 1999, and on that

same day the court orally denied the motion for new trial. The defendants filed their notice of appeal on July 8, 1999, and the trial court entered its written order denying the new trial on July 23, 1999.

When we grant a petition for review pursuant to Ark. Sup. Ct. R. 2-4, we treat the appeal as if it were filed in this court originally. *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 29 S.W.3d 706 (2000); *Fowler v. State*, 339 Ark. 207, 5 S.W.3d 10 (1999); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998).

I. Motion for Directed Verdict

First, the Robinsons argue that the testimony elicited from Mr. and Mrs. Gillum, with Mr. Gillum identifying the Robinsons as the shooters, was inconsistent and, thus, not credible. In addition, the police investigator testified that the description of the car given at the scene was inconsistent with the car ultimately targeted as the one used in the shooting. The Robinsons argue that these discrepancies, therefore, rendered the jury verdict unreliable, indicating that no reasonable person could find that the State proved its case. The trial court ruled that these were issues of credibility for the jury to determine, and that the jury could find substantial evidence based on the victims' testimony alone.

We cannot reach the merits of the Robinsons' argument because this issue is not preserved for appeal. The Robinsons' renewed motion for directed verdict was not made by defense counsel until after the trial court read the jury instructions. Our rule provides that when there has been a trial by jury, a renewal of a previous motion for a directed verdict at the close of all the evidence preserves the issue of insufficient evidence for appeal. Ark. R. Crim. P. 33.1; *see also, Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998); *Hayes v. State*, 312 Ark. 349, 849 S.W.2d 501 (1993). We have previously stated that this renewal is more than a matter of mere form: it goes to the substance of the evidence arrayed against the criminal defendant. *Thomas v. State*, 315 Ark. 504, 868 S.W.2d 483, (1994). However, after the jury has been charged, it is too late to consider a motion to direct a verdict. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

We have held that a trial court's decision to consider and then deny a motion for a directed verdict made after the jury had been instructed, but before closing arguments, did not comply with the rule requiring that the motion be renewed at the close of the case and was therefore "too late." *Claiborne v. State*, 319 Ark. 602, 603, 892 S.W.2d 511, 512 (1995). Here, the record and abstract clearly show that defense counsel did not renew the motion for directed verdict until after the trial court read the jury instructions. Therefore, according to our case law and court rules, the motion was untimely, and we cannot consider the issue here.

II. Admission of Photograph

In their next point on appeal, the Robinsons argue that the trial court erred in admitting the picture from a music group's cassette-tape cover depicting Marcus Turner and others standing next to a black sports car. The defense objected to its admission, arguing that a picture of Turner standing next to a dark sports car was irrelevant in this case against the Robinsons. The prosecution argued that it was highly relevant because Mr. Gillum testified that Turner was the driver of the dark car, and that the picture depicts Turner standing next to a dark sports car. The trial judge allowed the picture to be admitted into evidence. On appeal, the Robinsons continue to argue that the trial court erred in admitting the evidence because a picture of Turner standing next to a dark sports car was irrelevant in this case against them. As they argued below, the Robinsons continue to argue that other than the picture, there is no evidence that Turner owned that car, and that even if he did, it is of no consequence in this case.

The court of appeals refused to address this issue on appeal because the Robinsons did not include a photocopy of the picture in the abstract, although a description of the picture was abstracted. We agree with the court of appeals and also refuse to reach the issue because our court rules require a photocopy of pictures and other similar exhibits to be included in the abstract.

Arkansas Supreme Court Rule 4-2(a)(6) discusses the abstracting rules, including those for photographs, stating in pertinent part:

> Whenever a map, plat, photograph, or other similar exhibit, *which* cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract filed in the Court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the Court upon motion.

Ark. Sup. Ct. R. 4-2(a)(6). (Emphasis added.) Whether photographs and such exhibits must be reproduced for each copy of the brief filed with the court rests on the word "which" in the above sentence. This rule is a classic example of the importance of using the exact word to describe the meaning to be conveyed and highlights the subtle difference between "which" and "that" in our language usage. Both "which" and "that" are relative pronouns, whose function is to introduce subordinate clauses. *See generally* William Strunk, Jr., and E.B. White, *The Elements of Style* 4-5 (New York: Macmillan Publishing Company, 1979). The difference between the two is based on whether the modified clause is restrictive or nonrestrictive — that is, whether the added information is necessary to describe the modified object (restrictive) or unnecessary and added merely for additional information (nonrestrictive). *Id.* In Rule 4-2(a)(6), "which" introduces a nonrestrictive subordinate clause adding additional information about photographs and other similar exhibits, and indicates that these types of exhibits cannot be abstracted in words. This explains why a waiver by the court is required when a party wants to abstract the exhibit in words rather than by photocopy. In contrast, had the rule used "that" for "which" and stated, "Whenever a map, plat, photograph, or other similar exhibit that cannot be abstracted in words. . .," the subordinate clause introduced by "that" would instead add necessary information describing a particular picture that could be abstracted in words, rather than generally describing all such exhibits, which cannot be described in words. However, by using the word "which" in the rule instead indicates that these exhibits are incapable of being abstracted in words and, therefore, must be reproduced unless the court specifically waives this requirement. Here, there was no waiver; therefore, failure to "abstract" the photograph by reproducing it "by photocopy or other process" precludes this court from reviewing this issue.

We have three fairly recent cases which deal with the abstracting of photographs and other similar exhibits. *See Donihoo v. State*, 325 Ark. 483, 931 S.W.2d 69 (1996); *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995); *Coney v. State*, 319 Ark. 709; 894 S.W.2d 583 (1995). In these cases, this court was faced with the failure of the defendant to reproduce copies of the photographs, and in all three cases, the court found the abstract flagrantly deficient and refused to reach the issue. The court in *Bunn*, for example, stated:

> We cannot consider the merits of Bunn's argument, as he failed to abstract the photograph as a part of his appeal. As we have stated many times, "[t]he appellant in a felony criminal appeal has 'the duty . . . to abstract such parts of the record . . . as are material to the points to be argued in the appellant's brief.'" *Wynn v. State*, 316 Ark. 414, 871 S.W.2d 593 (1994); *See also* Ark. Sup. Ct. R. 4-3(g). . . .
>
> * * *
>
> Bunn did not present such a motion asking that we waive the requirements of Rule 4-2(a)(6); therefore, his failure to abstract the "mug shot" precludes our review of his argument on this point. As we have stated many times, the reason for this rule is basic - there is only one transcript, there are seven judges on this court, and it is impossible for each of the seven judges to examine the one transcript. *Franklin v. State*, 318 Ark. 99, 884 S.W.2d 246 (1994); *Dixon v. State*, 314 Ark. 378, 863 S.W.2d 282 (1993).

Bunn, 320 Ark. at 524-525. *Bunn* is particularly important because the issue there was the abstracting of a "mug shot," which necessarily only includes a person's face. It could have been argued there, as it was here, that a written description of the photograph was sufficient to instruct the court about what was in that picture. However, this court in *Bunn* determined that the photograph should have been reproduced. Such is the case here; therefore, because the Robinsons did not abstract the photograph at issue, the abstract is flagrantly deficient, and we cannot reach the merits.

III. Doyle *Violation*

In their third point on appeal, the Robinsons argue that the trial court erred in refusing to instruct the jury that the defendants had no obligation to give a statement to the police, thus resulting in a *Doyle* violation. The Robinsons argue that the prosecutor improperly questioned Terrance about whether he had given a statement prior to testifying at trial, and that upon objection to such inquiry, defense counsel asked the court to instruct the jury that a defendant's silence cannot be used against him, which the court refused to do. The Robinsons point out that the trial court did not allow the prosecutor during the State's case to ask Detective Dwight Stewart about Terrance's refusal to give a statement, determining that such testimony would be in error. The State responds that the Robinsons not only failed to timely object to preserve the issue for appeal, but also invited this error in the defense's own cross-examination of Detective Stewart. As such, the Robinsons cannot claim error now.

A *Doyle* violation arises from *Doyle v. Ohio*, 426 U.S. 610 (1976), in which the defendants were cross-examined by the prosecutors about their post-*Miranda* silence and asked why they told an exculpatory story for the first time at trial. The Supreme Court held that this was reversible error, stating:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, 426 U.S. at 618. In *Burnett v. State*, 310 Ark. 202, 832 S.W.2d 848 (1992), this court reviewed a Rule 37 petition including an issue regarding the defense attorney's failure to object to the prosecution's questioning the defendant about his silence during interrogation. While we noted the language from *Doyle* regarding fundamental fairness, we also determined that trial counsel was not ineffective for failing to object to the line of questioning in that underlying trial due to trial strategy. We also noted that "such questioning may be harmless error in some instances

where there is no prosecutorial focus or repetitive questioning or arguing centered on a defendant's silence and where the evidence of guilt is overwhelming. . . ." *Burnett*, 310 Ark. at 205.

Despite *Doyle's* fairly broad limitation on questioning, there are some exceptions. Where, for example, a comment on the defendant's post-arrest silence is not an attempt to impeach the defendant, it is not the type of comment prohibited by the court in *Doyle*. *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998); *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). In *Greer v. Miller*, 483 U.S. 756 (1987), the Court held that there was no *Doyle* violation where a question was asked by the prosecutor that touched upon the defendant's post-arrest silence, but was followed by an immediate objection sustained by the trial court and an admonishment to the jury that it should disregard any questions to which objections were sustained. In further defining *Doyle*, the Court stated that the prosecutor was not allowed to impeach the defendant with the silence, nor was the prosecutor otherwise permitted to call attention to the defendant's silence. In *Ferrell*, we found no error where a federal agent indicated that the defendant "refused to make a statement" during questioning. At trial, the defendant asked for a mistrial. We stated:

> Even if Cook's comment is construed as a reference to Ferrell's post-arrest silence, the reference was inadvertently elicited while Cook was attempting to explain Ferrell's demeanor, and the prosecution did not dwell on the reference. Under such circumstances, we will not reverse a trial court's decision to deny a mistrial. *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995); *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993).

Ferrell, 325 Ark. at 464. In *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993), we held that there was no *Doyle* violation when there was no comment or question by the prosecutor about appellant's post-arrest silence but instead there was an inadvertent reference to the defendant's silence by a witness.

In this case, there were three instances where the defendants' post-arrest silence was raised. First, following the defense's cross-examination of Detective Dwight Stewart in the State's case, the prosecutor asked to approach the bench to determine whether he

could ask Detective Stewart on redirect whether Terrance refused to give a statement to the police when he turned himself in. The prosecutor argued to the judge out of the jury's hearing that the defense attorney had opened the door to this line of questioning, and he wanted to follow-up with this inquiry. The trial judge stated, "No. She didn't open it up that much. I'm not gonna allow you to do that." Thereafter, the prosecutor indicated that he had no further questions for Detective Stewart at that time.

The second instance arose when defense counsel was questioning Detective Stewart during the defense's case. During the questioning, the following exchange occurred:

DEFENSE ATTORNEY:	Okay. And during the course of your being in charge of this file, did you even become aware of the fact that I represented Tony and Terrance?
DET. STEWART:	Uh, after Terrance was arrested, I was aware of that.
DEFENSE ATTORNEY:	Okay. And did you ever contact me to see if my clients would make any statement?
DET. STEWART:	No, ma'am, because when he came in, I read 'em his rights, and he told me he didn't want to make any statement.
DEFENSE ATTORNEY:	Okay. Okay. That's fair. Did you — but you never contacted me to see if that posture had changed?
DET. STEWART:	No, ma'am.

Finally, the third instance occurred when the prosecutor cross-examined Terrance. The following exchange occurred:

PROSECUTOR:	Now, this is the first time you've told this story, right? You haven't given a statement before now, have you?
TERRANCE:	No, sir.

DEFENSE ATTORNEY: Your Honor, I'm gonna object. May we approach?

(*The following conference was held at the bench out of the hearing of the jury.*)

DEFENSE ATTORNEY: I think we need an instruction if he's gonna ask these questions. He doesn't have an obligation to give a statement to anybody at any time, even today.

THE COURT: That's true.

PROSECUTOR: She put him on the stand. She also asked Officer Stewart, did you ever come by and ask my client — I just asked him if this is the first time he's told the story. I can do that, Judge.

DEFENSE ATTORNEY: That insinuates he has an obligation to do something.

PROSECUTOR: It isn't.

DEFENSE ATTORNEY: It does, too.

THE COURT: Well, you don't want to do anything that would suggest that — that he failed to give a statement at the time of his arrest because he's not obligated to.

PROSECUTOR: Judge, she opened the door when — let me say this: It can be prejudicial. I'll go on from here. But she asked Officer Stewart and he said, no, he didn't even want to give a statement at that time. I remember him saying that.

DEFENSE ATTORNEY: But that sounds like he's being uncooperative, and I think there needs to be a limiting instruction that tells the jury he has no obligation to testify even today.

THE COURT: Well now he does have an obligation when you put him on.

DEFENSE ATTORNEY:	Only until I put him on, but —
THE COURT:	He's required — well, I know, you waived that when you put him up there.
PROSECUTOR:	You waive it when you put him on.
DEFENSE ATTORNEY:	Right. But I haven't waived it as to — he had no obligation until he took the stand. And I think there ought to be an instruction to that effect.
THE COURT:	No, I'm not going — I'm not going to give one on that.
DEFENSE ATTORNEY:	Okay. Thank you, Your Honor.
PROSECUTOR:	Thank you.

In reviewing these three exchanges, it is clear that the first two cannot raise any *Doyle* issue because the first one took place out of the hearing of the jury and the second was brought forth by the defense itself, and no objection was raised by the defense attorney when Detective Stewart gave his testimony. As such, there is no issue for appeal.

Regarding the third exchange, the trial court's failure to give a limiting admonition to the jury does not rise to reversible error in this case. First and foremost, the jury already heard that Terrance and Tony both refused to give a statement to the police when defense counsel questioned Detective Stewart. Second, as the State points out, the Robinsons cannot show prejudice because the defense was the first to open the door to this revelation by bringing it to the jury's attention during Detective Stewart's cross-examination. *See Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998). In *Willis*, we held that there was no *Doyle* violation where the appellant opened the door to this line of questioning by his own testimony on direct examination concerning what he had and had not told the officers investigating the crime. *See also, Stephens v. State*, 290 Ark. 440, 720 S.W.2d 301 (1986). Third, the prosecutor did not dwell on this line of questioning in the third exchange noted above, and he, in fact, ceased all ques-

tioning after the trial court sustained the defense's objection. *See Burnett, supra.* Appellant suffered no prejudicial error because he opened the door to this line of questioning and because the same or similar evidence was introduced at trial without objection. *Willis, supra.* Therefore, we do not find reversible error here.

IV. Instruction on Alibi Defense

In their fourth point of appeal, the Robinsons argue that the trial court erred in failing to instruct the jury on their alibi defense. According to testimony at trial for the defense, Rose Robinson, Tony's mother and Terrance's grandmother, claimed that Terrance and Tony were with her on the night of the shooting and, therefore, they could not have been involved. On cross-examination, the prosecutor asked Rose about her son Darrell, who had been charged with murder in a separate matter years earlier, regarding whether Darrell's defense in that case was an alibi defense as well. She indicated that it was not, and that she had not testified in that case. There was no objection from the defense as to this line of questioning. However, at the close of the defense's case, defense counsel asked the court to instruct the jury that the case against Darrell was dismissed prior to trial by the prosecutor so that the jury would not mistakenly believe that Rose used the alibi defense for Darrell in his case. The trial court ultimately instructed the jury that there was no trial in Darrell's case. On appeal, however, the Robinsons argue that the trial court did not go far enough in instructing the jury that Rose never gave an alibi defense in that case because there was no trial. The State responds by arguing that this issue is not preserved for appeal because the defense's objection was not timely, the argument is not supported by legal authority or convincing argument, the requested instruction was not abstracted by the defense, and the judge gave an instruction to the jury that a trial was not held in Darrell's case, thus implying that no alibi defense could have been given anyway.

[redacted] This is an issue on which the contemporaneous-objection rule applies. This court will not consider arguments on appeal in the absence of a specific, contemporaneous objection at trial. *See Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000). The purpose of the contemporaneous-objection rule is to give the

trial court a fair opportunity to consider an allegation of error and to correct it, if the allegation is meritorious. *See Brooks v. State*, 256 Ark. 1059, 511 S.W.2d 654 (1974); *Western Union Tel. Co. v. Freeman*, 121 Ark. 124, 180 S.W. 743 (1915); *Jones v. Seymour*, 95 Ark. 593, 130 S.W. 560 (1910). In *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999), for example, we held that the appellant's failure to make contemporaneous objections to the testimony of witnesses regarding his physically abusive conduct towards them prevented him from asserting error on appeal. Such is the case here in that while Rose's testimony is arguably objectionable due to the prosecutor's questions and implications, the defense failed to object to any of the questions or implications during Rose's testimony. In fact, the defense's request for a clarifying instruction did not arise until the close of the defense's case, after another seven witnesses testified.

Furthermore, the trial court did give an instruction to the jury even without a contemporaneous objection, and this instruction cured any possible prejudice. However, even if it had not, it was incumbent upon the defense to proffer an instruction for this court's review. We have been constant in our requirement that counsel object and proffer an instruction in order to later appeal, and we have been hesitant to allow exceptions to this requirement. *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998); *Brown v. State*, 320 Ark. 201, 895 S.W.2d 909 (1995). Therefore, although the defense appears to argue that the trial court's admonishing instruction was not sufficient to cure any error, the defense proffered no alternative at trial for the trial court to consider then or for this court to consider on review.

V. Motions for New Trial

In their next point on appeal, the Robinsons argue that trial court erred in denying their identical motions for a new trial after a hearing. In their motions for new trial, the Robinsons argued that the State failed to disclose the names and addresses of two witnesses, that this information was new evidence not previously discoverable by the defense, and that there was misconduct by the prosecutor in introducing the picture of Marcus Turner standing in front of the black car. The State responds that the Robinsons'

motions for new trial were untimely or, in the alternative, that the trial court did not abuse its discretion in denying the motion on the claim of newly discovered evidence.

We cannot consider the merits of the motions for new trial because the defense did not timely file these motions, as we determined in a previous decision in this case in *Robinson v. State*, 342 Ark. 384, 39 S.W.3d 432 (2000) ("*Robinson I*"). In *Robinson I*, this court addressed whether the Robinsons' notice of appeal was timely filed, as it was filed more than thirty days beyond the entry of the judgment and commitment order, and could not have been timely based on the trial court's ruling on the motions for new trial because those motions were void. The court explained, stating:

> The issue before us is whether these posttrial motions were effective. Stated differently, are posttrial motions following a criminal trial void and ineffective if filed before entry of the judgments?
>
> In *Brown v. State, supra*, a motion for new trial and motion for judgment notwithstanding the verdict were filed after the jury verdict but before entry of the judgment and commitment order. The appellant in that case had been found guilty of capital murder and the jury's sentence was life in prison without the possibility of parole. The posttrial motions were premised on the fact that the jury only deliberated for ten minutes on the appellant's guilt. We held that the issue raised in both posttrial motions was not preserved for our review. We said:
>
>> As an initial matter, both the posttrial motions in this matter were ineffective because they were filed before the judgment was entered in this case. *See Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996) (per curiam); *Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995) (per curiam). Because the motions are void, we treat them as if they had never been made.
>
> *Brown*, 333 Ark. at 700, 970 S.W.2d at 288.
>
> Similarly, in the case at hand the posttrial motions for a new trial were void and of no effect because they were filed before the judgments were entered. The notice of appeal in this case was filed forty-five days after the entry of the judgments. Since the

> posttrial motions did not extend the period of time in which to appeal due to their ineffectiveness, the appeal is untimely.
>
> The Robinsons contend that under one appellate rule for civil matters, and specifically under Ark. R. Civ. P. 59(b), new trial motions filed prematurely are deemed filed the day after judgment. However, that is not the case in criminal appeals as has been clearly set forth in *Brown v. State, supra.*
>
> The Robinsons also maintain that they were misled by the trial court, which held the hearing on the motions for new trial after the thirty-day period for filing a notice of appeal had passed. Placing the responsibility on the trial court is not enough to excuse the absence of subject-matter jurisdiction in this court. *Daniels v. State*, 338 Ark. 328, 5 S.W.3d 1 (1999) (per curiam); *Cook v. State*, 327 Ark. 125, 937 S.W.2d 641 (1997) (per curiam); *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996) (per curiam).

Robinson I, 342 Ark. at 386-387. Despite the first dismissal of the appeal in *Robinson I*, this court subsequently granted a motion for a belated appeal filed by defense counsel, thus allowing this current appeal.

Clearly, in *Robinson I* we determined that the motions for new trial were not timely filed, and that ruling is now law of the case. It is well settled that the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal. *Ghegan & Ghegan, Inc., v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001); *Morris v. Garmon*, 291 Ark. 67, 722 S.W.2d 571 (1987). In *Robinson I*, we not only decided that the motions for new trial were untimely pursuant to our holding in *Brown v. State*, 333 Ark. 698, 970 S.W.2d 287 (1998), but we also determined that Ark. R. Civ. P. 59(b) did not apply to this situation. As such, the Robinsons' attempt to reargue that issue on appeal here and in their petition for review is improper because it has already been addressed by this court.

Furthermore, Ark. R. Crim. P. 33.3, dealing with posttrial motions, is the parallel criminal rule to Ark. R. Civ. P. 59. However, where Rule 59(b) was amended in January 1999 to allow motions for new trial filed prior to entry of the judgment to be considered timely filed, the equivalent was not included in

Rule 33.3 until February 15, 2001. The prior version of Rule 33.3 did not contain within the rule a time requirement for filing, but this requirement was provided by case law in cases such as *Brown, supra*, Hicks v. State, 324 Ark. 450, 921 S.W.2d 604 (1996) (per curiam), and *Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995) (*per curiam*). Therefore, at the time the motions for new trial were filed, the trial court considered the motions and denied them, and this court addressed the matter in *Robinson I*, the motions for new trial were untimely under the Arkansas Rules of Criminal Procedure pursuant to our decisions in *Brown, Hicks*, and *Webster*. Therefore, this issue is barred from our review by law of the case.

VI. Testimony Regarding Police Involvement

For their sixth argument on appeal, the Robinsons argue that the trial court erred in allowing testimony that a police officer, Lacey Robertson, had informed the Robinsons that the Gillums had left the police station on the night of the shooting and were going home. The Robinsons argue that reference to Robertson's presence at the police station, the fact that Tony turned himself in to Robertson, and that Robertson was Rose Robinson's business accountant was "prejudicial and highly speculative" under Ark. R. Evid. 403, thus making the references at trial reversible error. The State responds that it does not understand the Robinsons' argument and, regardless, there was no objection below, and the argument is not supported by any legal authority or relevant argument.

[redacted] We will not consider this argument because there was no objection raised by the defense at trial to any of this evidence, and because the defense has failed on appeal to cite any legal authority, other than a statement that this evidence was highly prejudicial under Ark. R. Evid. 403, to warrant reversal. The law is well settled that to preserve an issue for appeal a defendant must object at the first opportunity. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000); *Vaughn v. State*, 338 Ark. 220, 992 S.W.2d 785 (1999); *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996); *Hill v. State*, 285 Ark. 77, 685 S.W.2d 495 (1985). Furthermore, failure to cite authority or make a convincing argument is sufficient reason for affirmance. *Ayers v. State*, 334 Ark.

258, 975 S.W.2d 88 (1998); *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). It is certainly not apparent without further research that appellant's argument is well-taken. *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996).

VII. Prosecutorial Misconduct

Finally, the Robinsons argue that the case should be reversed due to cumulative prosecutorial misconduct. They argue that the prosecutor's reference to a police conspiracy, reference to unrelated, inadmissible crimes committed by the Robinsons, improper questioning of Terrance about his refusal to give a statement to the police, and improper questioning of Rose Robinson about the photograph of Marcus Turner all support reversal of this case. The State responds that in order to preserve a cumulative-error argument, the defense must raise the argument below and demonstrate the alleged accumulation of error. *See Willis, supra*. Furthermore, the State notes that some of these issues were raised in the other six points on appeal, and that this argument is not supported by any legal authority nor is there any showing of prejudice.

Once again, we do not reach the merits of this argument due to the Robinsons' failure to cite any authority whatsoever, or failure to show that any prejudice has occurred. While the defense quoted *Timmons v. State*, 286 Ark. 42, 688 S.W.2d 944 (1985), for language about prosecutorial misconduct, it completely failed to explain how this case applies to these facts here. Basically, we are left guessing about its application to these specific facts. Furthermore, this court has repeatedly held that for a cumulative-error argument to be upheld on appeal, the appellant must show that there were objections to the alleged errors individually and that a cumulative-error objection was made to the trial court and a ruling obtained. *See, e.g., Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999). This court does not recognize the doctrine of cumulative error where there is no error to accumulate. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995); *Dillon v. State*, 317 Ark. 384, 877 S.W.2d 915 (1994).

Affirmed.

BROWN and IMBER, JJ., concur.

ROBERT L. BROWN, Justice, concurring. My disagreement with the majority opinion concerns its conclusion that photographs could not have been abstracted in words under Ark. Sup. Ct. R. 4-2(a)(6), as it read on May 17, 2001, when the appellants' brief was filed, but had to be reproduced as part of the abstract absent a court waiver.[1] Under the majority's interpretation, maps, plats, photographs and similar exhibits could not have been abstracted in words at that time but had to have been reproduced in their entirety as part of the abstract.

I disagree with the majority because the clear language of Rule 4-2(a)(6), as it read on May 17, 2001, contradicts that construction. It provides in pertinent part:

> Whenever a map, plat, photograph, or other similar exhibit, *which cannot be abstracted in words*, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract filed in the Court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the Court upon motion. (Emphasis added).

The clause, "which cannot be abstracted in words," is unquestionably a condition that had to have been met before reproduction of the photograph was required. There is, too, the fact that we removed this clause in our May 31, 2001 *per curiam*. *See In re: Modification of the Abstracting System—Amendments to Supreme Court Rules 2-3, 4-2, 4-3, and 4-4*, 345 Ark. Appendix 626 (2001). The clause had to have had some meaning or we would not have removed it.

The majority deals with this clause by making a highly technical grammatical distinction between the pronouns "that" and "which." The result of this analysis is to deny the appellants appellate review on a grammatical point. I object to that. This court has taken pains to remove procedural pitfalls that have plagued parties in the past. The creation of this "trap" is unnecessary in my judgment.

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[1] By *per curiam* dated May 31, 2001, we amended our Supreme Court Rules to eliminate the clause "which cannot be abstracted in words." Rule 4-2(a)(6) is now Rule 4-2(a)(5).

Having said that, I too would affirm this case, but I would do so on the merits. The photograph in question was adequately described in the abstract through the testimony of the prosecuting attorney. In describing the photograph on the cassette which is at issue, the prosecutor said: "This is the CD of Marcus Turner standing on the outside of the vehicle. The sports car looks dark." That description is repeated in the abstract by the appellants and adequately describes the front cover of the cassette that was admitted into evidence. We, thus, have a sufficiently described photograph in the abstract to allow us to decide this issue on the merits.

The appellants argue that the cassette photograph was "of no consequence" as to whether Marcus Turner was driving a black car with appellants as passengers. Apparently, the appellants are arguing irrelevancy as they cite Arkansas Rule of Evidence 401, which defines "relevant evidence," but they cite no other authority. When an appellant's arguments are obviously lacking in merit and are unsupported by any citation of authority, this court has declined to research the issue on the appellant's behalf or consider the point. *See Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988). Furthermore, the cassette photograph is clearly relevant as it showed Marcus Turner, a co-defendant to be tried in a separate trial, standing in front of a car similar to the one described by prosecution witness as the dark-colored sports car in which the appellants were riding when the crime was committed. A ruling on the relevancy of evidence is discretionary with the trial court and will not be disturbed absent an abuse of discretion. *See Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996). There was no abuse of discretion in this case. For that reason, I would affirm.

IMBER, J., joins.

Brian GOODEN *v.* STATE of Arkansas

CR 00-845 72 S.W.3d 488

Supreme Court of Arkansas
Opinion delivered April 18, 2002

Gene McKissic, for appellant.

PER CURIAM. On March 21, 2002, we issued an order for Gene McKissic to appear before this court at 9:00 a.m., Thursday, April 4, 2002. *See Gooden v. State*, 2002 WL 442102 (March 21, 2002) (*per curiam*). The date of appearance was later changed to April 11, 2002. The purpose of our order was for Mr. McKissic to show cause why he should not be held in contempt of court for not filing appellant's brief by the deadline given as a final extension which was February 27, 2002.

Mr. McKissic appeared before this court on April 11, 2002. At that time, he entered a plea of not guilty and requested that a master be appointed to determine the facts. We appoint the Honorable John Lineberger as a master to conduct a hearing. After the hearing, we direct the master to make findings of fact and file them with this court. Upon reviewing the master's findings, we will decide whether Mr. McKissic should be held in contempt.

Warren LOONEY *v.* STATE of Arkansas

CR 01-1308 72 S.W.3d 488

Supreme Court of Arkansas
Opinion delivered April 18, 2002

Kenneth G. Fuchs, for appellant.

No response.

PER CURIAM. Appellant Warren Looney previously filed a motion for belated appeal *pro se*, which we treated as a motion for rule on clerk. *See Looney v. State*, 2002 WL 130679 (Jan. 31, 2002) (*per curiam*) (*Looney I*). In *Looney I*, we noted that Mr. Looney's trial counsel, Kenneth G. Fuchs, had filed a notice of appeal on behalf of Mr. Looney, and we directed Mr. Fuchs to admit fault for not perfecting this appeal by filing the full record. Also in *Looney I*, we appointed Mr. Fuchs to represent Mr. Looney because he is indigent. In response to *Looney I*, Mr. Fuchs has now filed an affidavit with this court stating that the fact that the record was never filed was due to a mistake on his part. We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to permit the filing of the full record, when prepared. *See In Re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

Mr. Looney further petitions for a writ of *certiorari* to bring up the balance of the record for his appeal. We grant the

petition and order that the balance of the record be filed within sixty days of the date of this order.

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

[redacted]

Timothy RAY *v.* STATE of Arkansas

CR 02-317 73 S.W.3d 594

Supreme Court of Arkansas
Opinion delivered April 18, 2002

[redacted]

Wright & Vannoy, by: *Herbert T. Wright*, for appellant.

No response.

PER CURIAM. [redacted] Appellant, Timothy Ray, by and through his attorney, Herbert T. Wright, has filed a motion for belated appeal, which will be treated as a motion for rule on the clerk. *See Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000) (citing *Muhammed v. State*, 330 Ark. 759, 957 S.W.2d 692 (1997)). Mr. Wright admits in the instant motion that the record was tendered late due to a mistake on his part. We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See In Re Belated Appeals in Criminal Cases,* 265 Ark. 964 (1979) (per curiam).

Accordingly, we grant the motion for rule on the clerk. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Ricky L. SCOTT *v.* STATE of Arkansas

CR 01-1052 72 S.W.3d 840

Supreme Court of Arkansas
Opinion delivered April 18, 2002

Jeanne E. Richards, for appellant.

No response.

PER CURIAM. Attorney Jeanne E. Richards petitions to withdraw as counsel for Ricky L. Scott in this Rule 37 appeal. Ms. Richards shows this court that on April 5, 2001, she terminated the attorney-client relationship with Scott when they "reached radically different conclusions on how to proceed with his Rule 37 petition." She states that these disagreements were "fundamental and devisive." Since that time, she closed her criminal law practice in the fall 2001, and now works as a staff attorney for the State of Arkansas.

On May 10, 2001, Scott filed a timely *pro se* notice of appeal. On May 21, 2001, an order was entered by the trial court removing Ms. Richards as counsel. On September 10, 2001, Scott completed an affidavit of indigence. On September 20, 2001, a record

was tendered to this court 133 days after the notice of appeal was filed. A motion for rule on clerk and for appointment of counsel was subsequently filed in this court.

On February 21, 2002, we handed down a *per curiam* opinion where we stated that Ms. Richards had not been relieved as counsel by this court at the time the notice of appeal was filed, as required under Ark. R. App. P.—Crim. 16, and that in order for the record tendered on September 20, 2001, to be filed late, Ms. Richards must admit fault in not having the record timely filed. *Scott v. State*, 2002 WL 253906 (Feb. 21, 2002) (*per curiam*). By affidavit, Ms. Richards admitted fault for the late filing of the record. On March 11, 2002, the Criminal Justice Coordinator for this court accepted the tendered record and set the briefing schedule, with Scott's brief due on April 20, 2002.

[redacted] We grant Ms. Richard's motion to withdraw owing to her changed circumstances. We hereby appoint Didi Moak to assist Scott in this Rule 37 appeal and request the Criminal Justice Coordinator to reset the briefing schedule. *See Hammon v. State*, 347 Ark. 267, 65 S.W.3d 853 (Substituted opinion Jan. 24, 2002).

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

Stephen B. WILLIAMSON, M.D. *v.* Steven Craig ELROD, as *Personal Representative* of the Estate of Floy Elrod, *Deceased*

01-828 72 S.W.3d 489

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Mitchell, Blackstock, Barnes, Wagoner & Ivers, by: *Clayton Blackstock* and *Mark Burnette*, for appellant.

Everett Law Firm, by: *John C. Everett* and *Elizabeth E. Storey*; and *Milligan Law Firm*, by: *Phillip J. Milligan*, for appellee.

W. H. "DUB" ARNOLD, Chief Justice. This is a medical-malpractice action brought by the Estate of Floy Elrod, deceased, against general surgeon Stephen B. Williamson, M.D. Floy Elrod, age sixty-six at death, was survived by her husband of forty-seven years, Tullis Elrod, and two adult sons, Steven Craig Elrod and John Stanley Elrod. At trial, the jury found that Dr. Williamson was negligent. The jury awarded Tullis Elrod $500,000 for loss of consortium; Tullis, John, and Steven Elrod $250,000 for mental anguish; and the Estate of Floy Elrod $100,000 for pain and suffering. Dr. Williamson moved for a

directed verdict at the end of Elrod's case and again at the end of all the evidence; both motions were denied. Dr. Williamson moved for judgment notwithstanding the verdict, remittitur, or a new trial by timely posttrial motions. The motions were denied, and this appeal was filed. We hold that appellant's motion for directed verdict should have been granted as appellee did not meet his burden of proof regarding the standard of care in Arkansas; as such, we reverse and dismiss the case.

Floy Elrod died on April 25, 1996. Appellee brought this cause of action pursuant to the Medical Malpractice Act and the Wrongful Death Act, seeking damages caused by the alleged negligence of the appellant. At the time of her death, Floy Elrod was a patient at Baptist Medical Center, suffering from free air in the abdomen. Floy Elrod had been a patient at Baptist Rehabilitation Center prior to that time, where she was receiving rehabilitation and care for cancer.

On April 25, 1996, Floy Elrod was immediately transferred to Baptist Medical Center (hereafter "Baptist") when a test revealed free air in the abdomen. She was admitted to Baptist by Dr. Brad Baltz, her oncologist. Upon Floy Elrod's admission to Baptist, Dr. Baltz ordered a surgical consult with the defendant. Nurse Garcia, a nurse on duty at the time, testified at trial that she notified the appellant of the consult at 2:15 a.m. on April 25, 1996. While Dr. Baltz contends that Floy Elrod may have elected not to have the surgery, Floy Elrod's entire family testified that she lay on her hospital bed from the time she arrived at Baptist, until her death at 3:27 p.m., waiting for the appellant to arrive to perform the surgery. The family members further testified that she knew she would die without the surgery. The appellant arrived at Floy Elrod's hospital room for the surgical consult twenty-one minutes prior to her death.

At trial, Dr. Samuel Landrum, the appellee's expert witness, testified that if notified of the surgical consult of a patient with free air in the abdomen, a majority of or "most" physicians would have consulted within an hour or less, and therefore, the appellant's failure to arrive for the surgical consult within an hour or less violated the standard of care. Dr. Landrum further testified that

Floy Elrod would have had a 70 percent chance of survival had the defendant arrived for the surgical consult within the hour after being notified, and had the surgery been performed; however, he further testified that he would not have faulted appellant, or any surgeon, if he had consulted with and told Mrs. Elrod that he did *not* recommend the surgery.

Appellant argues that the trial court erred in denying his directed-verdict motion and post-trial motions wherein he argued that Elrod's expert, Dr. Samuel Landrum, based his opinions on a standard of care not recognized under Arkansas law. We agree. Dr. Landrum used a standard of care comparing what the majority of doctors in a given area do in a given situation as opposed to using the standard of care dictated by the General Assembly in Ark. Code Ann. § 16-114-206(a)(1) (1987). As such, Elrod did not satisfy the elements of proving a medical malpractice claim. More specifically, Elrod never established what the standard of care was as required by Ark. Code Ann. § 16-114-206(a)(1) through (3), which states:

> *16-114-206. Burden of proof.*
>
> (a) In any action for medical injury, the plaintiff shall have the burden of proving:
>
> (1) The degree of skill and learning *ordinarily* possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality;
>
> (2) That the medical care provider failed to act in accordance with that standard; and
>
> (3) That as a proximate result thereof, the injured person suffered injuries which would not otherwise have occurred.

[Emphasis added.]

Black's Law Dictionary defines "ordinary" as "[o]ccurring in the regular course of events; normal; usual." *Black's Law Dictionary* 1125 (7th ed. 1999). What a "majority" of or "most" physicians in a community would consider to be reasonable medical care in that community is different in meaning from "ordinary" and does not rise to the level of proof of "stan-

dard of care" required by the statutory language in § 16-114-206(a)(1). If "majority" was the standard, it would require a poll of physicians practicing in a community. *Compare Hopper v. Tabor*, Tenn. Ct. App. No. 03A01-9801-CV-00049 (Aug. 19, 1998); *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977). In interpreting Ark. Code Ann. § 16-114-206, this Court has held that in any action for medical injury, the plaintiff must prove the applicable standard of care; that the medical provider failed to act in accordance with that standard; and that such failure was a proximate cause of the plaintiff's injuries. *See Blankenship v. Burnett*, 304 Ark. 469, 472, 803 S.W.2d 539 (1991). In such cases, it is not enough for an expert to opine that there was negligence that was the proximate cause of the alleged damages. *Aetna Casualty & Sur. Co. v. Pilcher*, 244 Ark. 11, 424 S.W.2d 181 (1968). The opinion must be stated within a reasonable degree of medical certainty or probability. *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992).

The burden of proof for a plaintiff in a medical malpractice case is fixed by statute. The statute requires that in any action for a medical injury, expert testimony is necessary regarding the skill and learning possessed and used by medical care providers engaged in that speciality in the same or similar locality. *Dodson v. Charter Behavioral Health Sys., Inc.*, 335 Ark. 96, 983 S.W.2d 98 (1998). The importance of having an expert detail the standard of care and the facts pointing to a breach is evidenced in *Reagan v. City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991), wherein we affirmed a summary judgment when the trial court found that there was no material issue of fact remaining where the expert physician never provided the proper proof to meet the plaintiff's burden of proof under the statute. We stated therein:

> [A]ppellant presented neither expert nor lay testimony as to the appropriate standard of care to be used. Likewise, appellant did not present any evidence that Dr. Ash failed to act in accordance with the standard of care. The only evidence appellant did offer relating to a standard of care or breach thereof was the testimony of Dr. Duckworth, appellant's family physician who ordered the appendectomy. Without stating exactly what the appropriate standard of care was, Dr. Duckworth testified that Dr. Ash acted in accordance with the standard of care. The only other evidence

> offered by appellant consisted of the depositions of appellant and his parents; these depositions contained broad statements about the incident but related nothing about a standard of care or breach thereof.
>
> In short, appellant presented no evidence indicating the existence of an issue of fact. To the contrary, the expert testimony presented does not meet the statutory burden of proof.

Reagan, 305 Ark. at 80. The record in this case does not reflect that Dr. Landrum ever testified as to what the degree of skill and learning ordinarily possessed by doctors in good standing in Little Rock or similar locales was. By failing to establish this standard, any testimony he gave as to appellant's failure to meet the standard is of no merit because Elrod never initially established the applicable standard of care under which appellant allegedly fell.

[redacted] Elrod argues that this argument is not preserved for appeal because appellant never objected during Dr. Landrum's testimony, direct or cross, that the standard of care was not established. We disagree. This is not a factual substantial-evidence issue; rather, it is a question of law regarding whether the elements of a cause of action were met. As such, the appropriate time to challenge the failure to meet the standard of proof was during the directed-verdict motion. To require a party to object that the opposing party did not meet its burden of proof during a witness's testimony would allow the opposing party to then resume questioning to meet that burden. In other words, had appellant objected during Dr. Landrum's testimony that the burden of proof was never established or met, then Elrod would have immediately cured the lack of proof by asking more questions, thus, in essence, shifting the burden of proof to appellant to show that the standard was not met rather than keeping it with Elrod to establish that it was met. Having found that appellee did not meet his burden of proof regarding the standard of care in Arkansas, we reverse and dismiss the case.

Reversed and dismissed.

FARM BUREAU MUTUAL INSURANCE COMPANY
of Arkansas, Inc. *v.* RUNNING M FARMS, INC.;
S&K Company, Inc.; and Sumner Mitchell

01-251 72 S.W.3d 502

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Wright, Chaney, Berry, Daniel, Hughes & Moore, P.A., by: *Rodney P. Moore*, for appellant.

Crisp, Boyd & Poff, L.L.P., by: *Mark C. Burgess*, for appellees.

DONALD L. CORBIN, Justice. Appellant Farm Bureau Mutual Insurance Company of Arkansas, Inc., appeals from the order of the Lafayette County Circuit Court denying its motion for judgment notwithstanding the verdict and motion to deny a new trial. Appellees Running M Farms, Inc., S&K Company, Inc., and Sumner Mitchell cross-appeal the trial court's order allowing Appellant to withdraw a confession of judgment filed prior to trial. This case was certified to us from the Arkansas Court of Appeals as involving an issue of first impression; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We dismiss both the appeal and cross-appeal.

This action stems from a dispute over liability under insurance policies for damage to crops caused by hail. Mitchell, a farmer, is president of Running M Farms and S&K Company, two farms located in Hempstead and Lafayette Counties. On March 18, 1997, Mitchell purchased crop-hail insurance from Appellant for wheat crops that he had planted on each farm. One policy covered 520 acres of the 590 acres of wheat planted on Running M Farms, and a second policy covered the entire 350 acres of wheat planted at S&K Company.

According to eyewitnesses, a storm moved through the area where the farms were located on the morning of April 22, 1997, producing heavy rains, high winds, and marble-sized hail. Mitchell testified that at the time of the storms he was at a nearby airstrip where he maintained a crop-dusting business. After the storm passed, Mitchell drove to his farms to determine if his crops had sustained any damage. Mitchell visited S&K Company first, where he discovered some wheat plants with split flag leaves, bruised stems, and a few broken-over plants. He then went to Running M Farms and again noticed some plants with split flag leaves and bruised stems. According to Mitchell, of the wheat planted at Running M Farms, all but a twenty-acre circular patch, was hit by hail.

Mitchell contacted William Tipton, a staff adjuster for Appellant, to report the damage to his wheat crops. After inspecting the crops, Tipton sent Mitchell a letter stating, "[t]here is no coverage under your crop hail policy for damage to the flag leaf of your wheat. If you see some direct damage in the future to the head or stalk, I will be happy to reinspect the wheat again with you." While harvesting the wheat on S&K Company, Mitchell noticed some damage to the stalks and heads. He contacted Tipton and requested a reinspection. Following this reinspection, Appellant offered Mitchell $6,900 in settlement of his claim.

After declining the offer, Appellees filed suit, alleging that Appellant had breached its contract resulting in damages of $70,000 to Running M Farms and $54,000 to S&K Company. Appellees filed several amended complaints during the course of this litigation, adding various claims for extra-contractual damages, fraud, bad faith, and tortious interference with a business expectancy. The case was originally scheduled to go to trial on August 23, 1999, but after Appellant filed a pleading entitled "Confession of Judgment," admitting liability under the insurance policy in the amount of $76,000, the matter was continued, and a new trial was scheduled for June, 2000.

Appellant subsequently filed a motion to withdraw its confession of judgment on the basis that the parties were in dispute regarding the effect of the confession and that it was not possible

to avoid a trial. The trial court granted Appellant's request, and the case proceeded to trial on June 22, 2000. At the close of Appellees' case, Appellant moved for a directed verdict, but the motion was denied. Appellant then rested without presenting any further evidence. The case was submitted to the jury, which was unable to agree on a verdict. The jury was then dismissed and a mistrial declared.

Following the mistrial, Appellant filed "A Motion For Judgment Notwithstanding The Verdict And Motion To Deny New Trial," alleging that Appellees failed to present sufficient proof to create a jury question on the breach of contract issue and also failed to offer proof as to the amount of damages incurred. The trial court denied Appellant's motion and this appeal followed.

On appeal, Appellant contends that the trial court erred in failing to grant its motion for judgment notwithstanding the verdict (JNOV) and motion to deny a new trial. Appellant argues that it was entitled to a directed verdict, because Appellees failed to submit sufficient proof in support of their claim for breach of contract and also failed to establish the amount of damages they were entitled to as a result of any breach. As an initial issue, however, this court must determine whether an appeal from an order denying a motion for JNOV is a final order for purposes of appeal.

This court has held that although neither party raises the issue, the question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise *sua sponte*. *Reed v. Arkansas State Hwy. Comm'n*, 341 Ark. 470, 17 S.W.3d 488 (2000); *Union Pac. R.R. Co. v. State Ex Rel. Faulkner Cty.*, 316 Ark. 609, 873 S.W.2d 805 (1994). It is not only the power but the duty of a court to determine whether it has subject-matter jurisdiction. *Haase v. Starnes*, 337 Ark. 193, 987 S.W.2d 704 (1999). The parties to an action may not confer subject-matter jurisdiction on this court. *Vanderpool v. Fidelity Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997). Thus, even though the parties to this action do not challenge our jurisdiction, we are obligated to determine if the present order is final and appealable, thereby conferring jurisdiction on this court.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. The requirement of finality limits our appellate review to final orders in an effort to avoid piecemeal litigation. *Larscheid v. Arkansas Dep't. of Human Servs*, 343 Ark. 580, 36 S.W.3d 308 (2001). For an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Beverly Enters.-Ark., Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000); *Mueller v. Killam*, 295 Ark. 270, 748 S.W.2d 141 (1988). This court has held that the test of finality and appealability of an order is whether the order puts the court's directive into execution, ending the litigation or a separable branch of it. *Reed*, 341 Ark. 470, 17 S.W.3d 488. In the present action, Appellant admits that there is no Arkansas case providing for a direct appeal from an order denying a motion for JNOV. Appellant argues, however, that this is a final order, appealable pursuant to Ark. R. App. P.—Civ. 2(a)(3), because it is an appeal from the grant of a new trial. We disagree.

A review of Ark. R. Civ. P. 59, governing new trials, reveals that the new trial at issue here is not of the type provided for in that rule. Rule 59(a) sets forth eight specific grounds giving rise to the grant of a new trial. The requirement of a new trial following a mistrial is not one of those announced grounds. The rule further provides that "A motion for a new trial shall be filed not later than 10 days *after the entry of judgment.* A motion made *before entry of judgment* shall become effective and be treated as filed on the day *after the judgment is entered.*" *See* Rule 59(b) (emphasis added). Thus, Rule 59 encompasses those situations where a new trial is requested following the entry of a judgment, not situations where a new trial is required following a mistrial.

A review of our case law establishes that this court has drawn a distinction between a new trial following the entry of judgment and one following a mistrial. Where a mistrial has occurred, it is equivalent to no trial having occurred at all, as there has been no final determination regarding a claimant's cause of action. *Gregory v. Colvin*, 235 Ark. 1007, 363 S.W.2d 539 (1963). Stated otherwise, a mistrial is a proceeding that has miscarried,

and the consequence is not a trial. *Midwest Lime Co. v. Independence Cty. Chancery Court*, 261 Ark. 695, 551 S.W.2d 537 (1977). A new trial, on the other hand, 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.* Distinguishing a new trial from a retrial, this court stated:

> There is a marked difference between a court's granting a motion for a new trial and declaring a mistrial; the former contemplates that a case has been tried, a judgment rendered, and on motion therefor said judgment set aside and a new trial granted, while the latter results where, before a trial is completed and judgment rendered, the trial court concludes that there is some error or irregularity that prevents a proper judgment being rendered in which event a mistrial may be declared.

Id. at 702, 551 S.W.2d at 540 (citing 66 C.J.S. 65, § 1c, *New Trial*). In sum, the critical distinction between a retrial following a mistrial and a new trial is whether a judgment was entered.

Another important distinction is that where a mistrial has occurred due to a jury's inability to reach a verdict, a party may not be denied its right to a new trial. *See, e.g., Tipps v. Mullis*, 257 Ark. 622, 519 S.W.2d 67 (1975); *Gregory*, 235 Ark. 1007, 363 S.W.2d 539. In *Tipps*, this court held that once a jury is properly discharged because it is unable to agree on a verdict, a "new trial on all issues and subject to the same motions and procedures as if no trial had ever been had" is required. 257 Ark. at 625, 519 S.W.2d at 69. There is no similar requirement for a new trial once a judgment has been entered. In fact, a motion for a new trial filed pursuant to Rule 59 is a matter left to the discretion of the trial court. *See, e.g., Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 976 S.W.2d 382 (1998).

Clearly, in view of this court's case law on this point, it is evident that once the jury deadlocked and was subsequently discharged here, the resulting mistrial caused a situation where the present action would proceed to a new trial on all issues and subject to the same motions as before, because there has been no determination of the merits in this case. This is not a case where the trial court could grant or deny a new trial at its discretion.

Moreover, Appellant, prior to the time the jury deadlocked, had no right to appeal from the trial court's denial of its directed-verdict motion, where no final judgment had been rendered. Appellant does not now have the right to a review of that denial, simply because a verdict was not entered. In sum, the instant order is not one granting a new trial and, thus, is not appealable under Ark. R. App. P.—Civ. 2(a)(3).

We are mindful that Ark. R. Civ. P. 50, governing directed verdicts and motions for JNOV, contemplates the filing of a JNOV motion where no verdict has been returned. In discussing the time allowed to file a motion for JNOV, Rule 50(b)(2) states in relevant part: "[i]f a verdict was not returned, such party within 10 days after the jury has been discharged may move for judgment in accordance with his motion for directed verdict." Rule 50(b)(3) further provides in relevant part: "If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." Nowhere in this rule, nor in any rule of appellate procedure, is a party permitted to appeal the denial of a motion for JNOV where there has been no final determination of the merits. If, however, this were a situation where the trial court had granted Appellant's motion for JNOV, thereby depriving Appellees of a new trial, then such an order would be appealable, because the effect of the trial court's order would be to dismiss the cause of action and discharge the parties. Such an order would be analogous to an order denying summary judgment when it is combined with a dismissal on the merits, thereby terminating the proceedings below. *See e.g.*, Ark. R. App. P.—Civ. 2(a)(2); *Gammill v. Provident Life & Accident Ins. Co.*, 346 Ark. 161, 55 S.W.3d 763 (2001); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

Finally, we are unpersuaded by Appellant's contention that this court should review the denial of a motion for JNOV because other jurisdictions do so. Specifically, Appellant points to Nebraska, where the courts have reviewed a trial court's denial of a motion for directed verdict or JNOV following a mistrial. *See Synder v. Contemporary Obstetrics & Gynecology, P.C.*, 258 Neb. 643, 605 N.W.2d 782 (2000); *Bailey v. Williams*, 189 Neb. 484, 203 N.W.2d 454 (1973). These cases are distinguishable, how-

ever, because Nebraska statutory law specifically provides that such orders are appealable. Arkansas does not have a similar statutory provision excluding orders denying motions for directed verdict or JNOV from the finality requirement.

Moreover, we agree with the reasoning announced by the North Carolina Court of Appeals in *Samia v. Ballard*, 25 N.C. App. 601, 214 S.E.2d 222 (1975), that the provision of a procedural rule allowing for the filing of a motion for JNOV where no judgment has been entered does not have the effect of broadening the scope of appellate jurisdiction. There, the court held that the denial of a defendant's motion for directed verdict following a mistrial was not an appealable order, because there was no judgment from which to appeal.

Similarly, the Supreme Court of Maine held that where a mistrial was declared due to a hung jury, the case had not reached its final judgment stage, as no judgment had been rendered, and thus the denial of a motion for directed verdict was not appealable. *Bernat v. Handy Boat Service, Inc.*, 239 A.2d 651 (1968). "Historically it has been recognized that the granting of a mistrial automatically produced a new trial and the case was not ripe for appellate review at that stage." *Id.* at 652.

Finally, in *Gold v. Newman*, 211 Conn. 631, 560 A.2d 960 (1989), the Connecticut Supreme Court held that the denial of a defendant's motion for directed verdict did not constitute a final judgment for purposes of appeal. In so holding, the court pointed out that there was no statutory authority excepting such motions from the general requirement that an appeal must be from a final order. The court reasoned that the denial of a motion for JNOV following a mistrial "does not terminate a separate and distinct proceeding or so conclude the rights of the parties that further proceedings cannot effect them." *Id.* at 635, 560 A.2d at 962. The Connecticut court further stated that allowing such appeals could create the opportunity for an interlocutory appeal in every case where a mistrial is declared, thereby delaying such cases for considerable periods of time. *Id.*

[redacted] In sum, we agree with those jurisdictions that have held that the denial of a motion for directed verdict or JNOV is

not a final appealable order. Thus, we are precluded from reaching the merits of Appellant's argument on appeal. Likewise, we are precluded from reaching the merits of Appellees' cross-appeal.

Appeal dismissed; cross-appeal dismissed.

Lea Ann LINDER, Carolyn Greene, and Cleta Johnson *v.* Bill LINDER and Mildred Sims

01-380 72 S.W.3d 841

Supreme Court of Arkansas
Opinion delivered April 25, 2002

[redacted]

[redacted]

[redacted]

[redacted]

Joel W. Price, for appellants.

Ronald W. Metcalf, P.A., by: *Ronald W. Metcalf*, for appellees.

Mark Pryor, Att'y Gen., by: *Melanie Winslow*, Ass't Att'y Gen., for intervenor.

ROBERT L. BROWN, Justice. This is a grandparent visitation-rights case. At issue is the constitutionality of the Arkansas Grandparental Visitation Act, codified at Ark. Code Ann. § 9-13-103 (Repl. 2002) (GPVA). There are three appellants in this matter: Lea Ann Linder, mother of Brandon Linder, the minor child around whom this litigation revolves; Cleta Johnson, Lea Ann's mother; and Carolyn Greene, Lea Ann's sister.[1] The appellees are Bill Linder, Brandon's paternal grandfather, and Mildred Sims, Brandon's paternal grandmother. Bill Linder and Mildred Sims were granted visitation with Brandon by the trial court. Lea Ann now appeals this grant of visitation. The State of Arkansas has intervened to defend the constitutionality of the GPVA.

On April 24, 1992, Lea Ann Linder married Steven Linder. They had one child, Brandon, who was born on November 17, 1995. Steven, Lea Ann, and Brandon lived near Alma and close to Bill Linder, Steven's father. Bill and Steven's mother, Mildred Sims, had divorced some years earlier. Bill was remarried to Donna Linder. Bill and Donna had two children, Nikki and Stacey. Steven worked with Bill on a daily basis, and Bill saw Brandon on a regular basis.

On November 11, 1997, just before Brandon's second birthday, Steven Linder was killed in a four-wheel all-terrain vehicle accident while he was hunting. In the immediate aftermath of Steven's death, Lea Ann and Brandon spent Brandon's birthday, part of Thanksgiving, and part of the Christmas Eve holiday with Bill and Donna Linder. During this time, Bill saw Brandon on a fairly regular basis, though less than when Steven was alive.

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[1] The three appellants will be referred to collectively in this opinion as Lea Ann.

For about four months after Steven's death, Lea Ann and Brandon remained in the house in which they had all lived, which was in close proximity to Bill's home. According to Lea Ann, she did not feel comfortable living in the house, and she and Brandon moved into a duplex in nearby Van Buren. Lea Ann got a job and put Brandon in day care. While they lived in Van Buren, Lea Ann told Bill that he could see Brandon if he came to their home. He did not do so. In 1998, Lea Ann and Bill had arrangements to spend part of the Easter holiday together, but those plans fell through when Lea Ann called Bill and canceled due to a conflict.

In the late spring of 1998, relations between Bill and Lea Ann became more strained. At the end of May, Lea Ann moved to a house in Fort Smith. Soon thereafter, on June 11, 1998, Bill contacted Lea Ann and specifically requested to see Brandon. The two were unable to work out a mutually convenient time for the visit. On June 24, 1998, Bill Linder filed a petition for visitation in the Sebastian County Chancery Court.

In the visitation petition, Bill alleged that he had a close and loving relationship with Brandon, and that Lea Ann was unreasonably denying him access to his grandson. He proceeded in his petition under Ark. Code Ann. § 9-13-101 (Repl. 2002), Arkansas's general custody statute and asserted that that statute, which provided for grandparental *custody*, gave the chancery court the implied power to grant grandparental *visitation*. The petition did not invoke rights under the GPVA. Nor did the petition assert that Brandon would suffer harm if he did not see his grandfather, or that Lea Ann Linder was an unfit mother.

The parties began the discovery process. Lea Ann was deposed, and in her deposition, she asserted that she did not want Bill to have as much visitation as he wanted, but that she would agree to limited visitation. She stated, as her reason for limiting the visitation, that Bill and Steven's mother, Mildred Sims, were locked in a power struggle over family members' loyalties. She further stated that Steven, during his life, had always had problems with his father, and that she did not want Brandon to have the same problems. She also stated that Steven had confided in her that

he did not enjoy working with his father, and that his father was a source of emotional anguish to him.

After the deposition, Bill moved for temporary visitation, alleging that discovery could take some time and that he should be allowed to see Brandon during the interim period. On August 5, 1998, the trial court entered a temporary visitation order pending a hearing on the petition. The order, entered on August 10, 1998, granted Bill temporary visitation. In its order, the trial court required Lea Ann to allow Bill to see Brandon according to the Twelfth Judicial District's standard visitation order and allowed limited weekend visitation with Brandon.

On August 13, 1998, Lea Ann filed a motion to set aside the temporary order and requested an emergency hearing. She attached several letters from medical professionals and friends expressing the opinion that Brandon should not be separated from his mother during his time of loss and confusion about his father's death. During the pendency of her motion to set aside, Lea Ann did not allow Bill to see Brandon, contrary to the trial court's temporary order. Bill filed a motion to show cause on why she should not be held in contempt of court.

On August 27, 1998, the chancellor held a hearing on the temporary order and on Bill's motion for contempt. After hearing the testimony of several witnesses for both sides, including Lea Ann and Bill, the trial court ruled from the bench that it was in Brandon's best interests to grant Bill's petition for visitation. In its order, the trial court allowed Bill visitation every other weekend. The court also found Lea Ann to be in contempt of court but did not impose a sanction. The trial court's order was not filed until September 2, 1998.

On August 31, 1998, Bill filed another motion for contempt due to Lea Ann's failure to comply with the trial court's August 27 bench ruling. On September 2, 1998, another contempt hearing was held. Again, the chancellor found Lea Ann to be in contempt of court but did not sanction her. After this hearing, Lea Ann allowed Bill two visits with Brandon as ordered by the court. This was the first time Bill had seen Brandon since February 1998. Lea Ann, however, did not allow a third visit, because she stated

that Brandon had a fever and was too ill to visit. In response, Bill filed his third motion for contempt on September 22, 1998.

On September 25, 1998, Lea Ann filed a Notice of Appeal from the September 2, 1998 order but did not pursue this appeal and never lodged a record in the matter.

On October 6, 1998, Bill's counsel wrote a letter to the trial court in which he averred that on October 3, 1998, Bill picked up Brandon from Lea Ann's house for an overnight visit. According to the letter, there were several irregularities with this visit. First, Lea Ann's sister, Carolyn, was present at the pick-up and, as was apparently her custom, she videotaped the pick-up. Second, Lea Ann called to check on Brandon nine times during the visit. Third, Lea Ann appeared uninvited and unannounced twice during the visit: first in the parking lot of the county fair, and then at Bill's home at midnight. Subsequent to this overnight visit, the trial court warned the parties to cooperate.

Contrary to the trial court's letter and prior orders, Lea Ann did not make Brandon available for his next visitation. On October 12, 1998, Bill filed a fourth motion for contempt. On October 15, 1998, the trial court held an emergency hearing on this motion. Lea Ann did not appear at the hearing and had fled the jurisdiction, taking Brandon with her. On October 22, 1998, the trial court found Lea Ann in contempt of court and issued a warrant for her arrest. On October 26, 1998, Bill moved for temporary custody of Brandon. The same day, the court granted Bill's motion *ex parte* and awarded Bill temporary custody of Brandon.

Lea Ann's and Brandon's whereabouts remained unknown for a year, despite the efforts of local, state, and federal law enforcement officers. After months of attempting to locate the two, Bill joined Cleta Johnson (Lea Ann's mother) and Carolyn Greene (Lea Ann's sister) in his visitation action. He then deposed them regarding Lea Ann's and Brandon's location. Both women refused to disclose the information and invoked their Fifth Amendment protection against self-incrimination on the advice of counsel.

On October 14, 1999, Bill moved to hold Cleta and Carolyn in contempt of court for their refusal to disclose Lea Ann's location. On October 18, 1999, the trial court ordered them jailed for contempt and conditioned their release on Lea Ann's surrendering herself to the court. That same day, Cleta and Carolyn told the court that Lea Ann and Brandon were living in Columbus, Ohio.

While living in Ohio, Lea Ann had married a man named Wes Carlisle. Ohio law enforcement authorities located Lea Ann and Brandon in Columbus, and Lea Ann surrendered herself to the court that evening. Cleta and Carolyn were released from jail the next day, and Lea Ann was placed in jail until the trial court released her on October 25, 1999. Brandon was delivered to Bill under the trial court's custody order. On October 28, 1999, Lea Ann moved to have custody of Brandon restored to her because she was now back in the jurisdiction of the trial court. The motion further alleged that while in Bill's custody, Brandon was attacked by a dog and suffered lacerations on his face. There is nothing in the record before us to indicate that the trial court took any action on her motion.

On November 4, 1999, Bill moved that all parties to the litigation undergo psychological evaluations. He specifically requested that Dr. Mary "Guen" Wright, a forensic psychologist, be appointed by the trial court for this task. Lea Ann objected to Dr. Wright's performing the requested evaluations because Bill had already hired her to counsel Brandon. On November 8, 1999, the court granted Bill's motion over Lea Ann's objections. Psychological evaluations of all involved parties commenced.

On the weekend of December 10, 1999, Lea Ann had visitation with Brandon, who was still in Bill's custody. As part of her visitation, she took Brandon to Ohio to see her husband and Brandon's step-father. This out-of-state trip violated the terms of the trial court's visitation order, according to Bill's December 20, 1999 Motion for Performance Bond. The motion sought to require Lea Ann to post a bond to fund Bill's efforts to find Brandon and her if she again fled the jurisdiction.

On December 16, 1999, Lea Ann again moved the trial court to return Brandon to her custody, but the court took no action on

this motion. During the months of December 1999, and January and February 2000, a volley of correspondence to the trial court ensued in which Bill and Lea Ann, through counsel, disputed the details of Bill's custody and Lea Ann's visitation. The trial court did not respond to this correspondence. During this time, the psychological evaluations were ongoing.

On February 16, 2000, Mildred Sims intervened in the action in an attempt to obtain the right to visit Brandon under the GPVA. She had seen Brandon sporadically during Bill's custody in the latter months of 1999 and early 2000. In her motion, she alleged that Lea Ann had not made contact with her about Brandon, and that it would be in Brandon's best interest to have a relationship with his paternal grandmother.

On February 22 and 24, 2000, Lea Ann's counsel submitted two extensive motions and memoranda of law requesting that the GPVA be declared unconstitutional and that custody of Brandon be restored to her. She also moved to exclude the reports and testimony of Dr. Wright because she had been hired by Bill before the trial court ever appointed her. She noted that it was Bill who recommended Dr. Wright to the court. The trial court denied the motion to exclude.

On March 6, 2000, the trial court began a lengthy final hearing in this matter. This hearing continued on March 8, 2000, and on March 27-30, 2000. Dr. Guen Wright testified extensively at this hearing over Lea Ann's objections. Dr. Wright prepared and submitted to the court a sixty-page report detailing her psychological evaluations of Lea Ann, Brandon, Wes Carlisle, Bill, Donna, Cleta, and Carolyn.

The crux of Dr. Wright's testimony was that Lea Ann suffered from two psychological disorders. First, Dr. Wright opined that Lea Ann suffered from a psychological disorder known as shared psychotic disorder, or *folie à deux*.[2] *Folie à deux* is a disorder which occurs when a diagnosed person is so closely connected with and bonded to another person (called the inducer) that the psychosis of the inducer is adopted by the diagnosed person. In

[2] *Folie à deux* literally is translated from French to mean "a shared madness of two."

this case, Dr. Wright opined that Lea Ann had adopted the persecutory-delusional psychosis of her mother, Cleta Johnson, whom Dr. Wright identified as the inducer. This was Dr. Wright's first diagnosis of *folie à deux* in her career. On cross-examination, Dr. Wright opined that Cleta and Lea Ann were able to maintain the extraordinarily close relationship required for *folie à deux* through telephone calls.

Dr. Wright also diagnosed Lea Ann with narcissistic personality disorder, which is characterized primarily by an inflated and unrealistic sense of one's own self-worth. Dr. Wright did not diagnose any other adult as having psychological disorders, although she did diagnose Brandon with three disorders.

In addition to Dr. Wright's testimony, Bill testified. He also presented the testimony of Cleta regarding her relationship with her daughter, and Sebastian County Sheriff's Department warrant officer John Mendenhall, who was involved in the year-long effort to locate Lea Ann in 1998-1999. Lea Ann presented the testimony of Wes Carlisle's mother, Beverly Carlisle, as well as the testimony of Drs. Donald Chambers, Patricia Walz, and Richard Aclin. Dr. Chambers vigorously disputed Dr. Wright's diagnosis of *folie à deux*.

After the conclusion of the testimony, the trial court made a partial bench ruling. The court declined to hold the GPVA unconstitutional. At the beginning of the final hearing held on March 6, 2000, the trial court first stated that position when it said from the bench that this trial court did not rule acts of the legislature unconstitutional. At the conclusion of the testimony the trial court reiterated its prior statement when it made the following ruling:

> I am going to overrule Mr. Price's motion to declare the Arkansas statute unconstitutional. I'll let some other forum address that, but I'm not. I find it to be without merit, and I'm overruling it.

The court gave Lea Ann custody of Brandon and allowed Bill and Mildred the standard visitation associated with noncustodial parents. He required that Lea Ann post a $20,000 bond as assurance that she would permit the visitation.

There were several post-hearing pleadings filed by the parties involved. Specifically, on March 24, 2000, Lea Ann moved to strike Dr. Wright's testimony. On June 8, 2000, Lea Ann renewed her motion to have the GPVA declared unconstitutional in light of the United States Supreme Court's opinion in *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), which was handed down on June 5, 2000 and which declared Washington state's GPVA unconstitutional as applied.

On June 26, 2000, the State of Arkansas intervened in this matter and filed a brief in the trial court. The State urged the court to find Arkansas's GPVA constitutional under *Troxel v. Granville, supra.*

In mid-July, 2000, Lea Ann was offered a job transfer to New York within her company, Renaissance Imports, which is a shoe-import outfit operating in New York state. The transfer offered salary and benefits comparable to her job in Arkansas. She requested that the trial court allow her to accept the transfer and move, with Brandon, to New York.

On August 9, 2000, the trial court entered an order formally deciding the outcome of the custody/visitation hearing as well as the other post-hearing matters pending before it. The order declared the Arkansas GPVA to be constitutional as applied and on its face. The order awarded custody of Brandon to Lea Ann and found her to be a fit mother. However, the trial court denied Lea Ann's request to move to New York and required the posting of a $20,000 bond assuring the court that she would not flee the jurisdiction and that she would allow the visitation that Bill was awarded in conformity with the court's standard order. Bill was permitted weekend visitation and Wednesday night visitation. Mildred Sims was assigned Bill's visitation on the first weekend of each month.

Lea Ann now appeals from this order, as do Cleta Johnson and Carolyn Greene. She urges this court to declare GPVA unconstitutional. She also challenges a number of other rulings made by the trial court, which we do not reach as we reverse and dismiss on her first issue raised.

I. Motion to dismiss and strike

As an initial point, appellees Bill Linder and Mildred Sims move to dismiss the 1998 appeal in this case. This prior appeal consisted solely of a Notice of Appeal filed by Lea Ann on September 25, 1998, and was not pursued, as Lea Ann fled the jurisdiction some twenty days later. As a result, the appellees argue that the constitutionality of the GPVA and Bill's visitation have become law of the case or, alternatively, that the doctrine of *res judicata* applies. The appellees ask this court to dismiss the 1998 notice of appeal and to strike those portions of Lea Ann's brief which challenge the constitutionality of the GPVA and the trial court's visitation order.

With respect to law of the case, we note that there was no previous opinion by an appellate court in this state. This court recently observed that the doctrine applied when there had been a previous appellate opinion in the case. *See Cadillac Cowboy v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002). In *Cadillac Cowboy*, we said:

> The venerable doctrine of law of the case prohibits a court from reconsidering issues of law and fact that have already been decided on appeal. The doctrine serves to effectuate efficiency and finality in the judicial process. *Frazier v. Fortenberry*, 5 Ark. 200 (1843); *see also*, 5 AM.JUR.2d *Appellate Review* § 605 (1995). We have said the following with regard to the law-of-the-case doctrine:
>
>> The doctrine provides that a decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998). On the second appeal, the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *Griffin v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994).
>
> *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 346, 47 S.W.3d 227, 237 (2001).

Cadillac Cowboy v. Jackson, 347 Ark. at 970, 69 S.W.3d at 388.

It is true that under our doctrine of law of the case, we do not address in a second appeal issues that could have been raised in the first appeal, but were not. *Chambers v. Stern*, 347 Ark. 395, 64 S.W.3d 737 (2002) (citing *McDonalds Corp. v. Hawkins*, 319 Ark. 1, 888 S.W.2d 649 (1994); *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989)). As we said in *Morris v. Garmon*, 291 Ark. 67, 68-69, 722 S.W.2d 571, 573 (1987): "On second appeal, as in this case, the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented." However, it is equally clear from our cases that it is this court's *opinion* in a prior appeal which becomes law of the case, not the mere filing of a notice of appeal. *See, e.g., Ghehan v. Ghehan v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001) ("[T]he decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal."); *Morris v. Garmon, supra* ("[T]he decision on the first appeal becomes the law of the case[.]") There was no decision in a previous appeal in the case before us. We conclude that a motion to dismiss this matter due to law of the case has no merit.

With respect to *res judicata*, it is true that the doctrine bars the relitigation of claims that were actually litigated in the first suit as well as those that could have been litigated. *Office of Child Support Enforcement v. Willis*, 347 Ark. 6, 59 S.W.3d 438 (2001); *Well v. Arkansas Pub. Serv. Comm'n*, 272 Ark. 481, 616 S.W.2d 718 (1981). Thus, where a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Willis, supra*; *Swofford v. Swofford*, 295 Ark. 433, 748 S.W2d 660 (1988). The policy of the doctrine is to prevent parties from relitigating issues or raising new issues when they have already been given a fair trial. *Willis, supra*; *McCormac v. McCormac*, 304 Ark. 89, 799 S.W.2d 806 (1990).

Custody matters, however, are different when the doctrine of *res judicata* is called into play. When the matter is a custody issue, our court takes a more flexible approach to *res judicata*. We recognize, for example, that custody orders are subject to modifi-

cation in order to respond to changed circumstances and the best interest of the child. *Mood v. Marquez*, 338 Ark. 636, 999 S.W.2d 678 (1999); *Thurston v. Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987). For example, in *Tucker v. Tucker*, 195 Ark. 632, 636, 113 S.W.2d 508, 508 (1938), we said;

> The judgment of a chancery court in this state, awarding the custody of an infant child to one of the parents, or to any other person, is a final judgment, from which an appeal lies, but it is not res judicata in the same or another court of this state involving the custody of the same child, where it is shown that the conditions under which the former decree was made have changed and that the best interest of said child demand a reconsideration of said order or decree.

In the case at hand, what has been involved since 1998 has been Bill Linder's petition for visitation and, since 1999, the custody of Brandon. Secondly, the constitutionality of the GPVA was not an issue in the litigation that preceded the September 2, 1998 order. Indeed, it was not raised until Mildred Sim's petition in 1999. *Troxel v. Granville, supra*, which has become the seminal case, was not handed down by the United States Supreme Court until 2000. *Res judicata* simply does not govern this situation.

We deny the appellees' motion to dismiss and strike.

II. Constitutionality of the GPVA

For her first point on appeal, Lea Ann contends that the GPVA, under which Bill was awarded visitation, is unconstitutional, both facially and as applied. She bases her argument on her Fourteenth Amendment liberty interest in parenting her child without undue interference from the state, as recently addressed by the United States Supreme Court in *Troxel v. Granville, supra*.

Arkansas's GPVA provides:

> (a)(1) Upon petition by a person properly before it, a circuit court of this state may grant grandparents and great-grandparents reasonable visitation rights with respect to their grandchild or grandchildren or great-grandchild or great-grandchildren at any time if:

(A) The marital relationship between the parents of the child has been severed by death, divorce, or legal separation; or

(B) The child is in the custody or under the guardianship of a person other than one (1) or both of his or her natural or adoptive parents; or

(C) The child is illegitimate, and the person is a maternal grandparent of the illegitimate child; or

(D) The child is illegitimate, and the person is a paternal grandparent of the illegitimate child, and paternity has been established by a court of competent jurisdiction.

(2) The visitation rights may only be granted when the court determines that such an order would be in the best interest and welfare of the minor.

(3)(A) An order denying visitation rights to grandparents and great- grandparents shall be in writing and shall state the reasons for denial.

(B) An order denying visitation rights is a final order for purposes of appeal.

(b) If the court denies the petition requesting grandparent visitation rights and determines that the petition for grandparent visitation rights is not well-founded, was filed with malicious intent or purpose, or is not in the best interest and welfare of the child, the court may, upon motion of the respondent, order the petitioner to pay reasonable attorney's fees and court costs to the attorney of the respondent, after taking into consideration the financial ability of the petitioner and the circumstances involved.

(c) The provisions of subsections (a) and (b) of this section shall only be applicable in situations:

(1) In which there is a severed marital relationship between the parents of the natural or adoptive children by either death, divorce, or legal separation; or

(2) In which the child is in the custody or under the guardianship of a person other than one (1) or both of his or her natural or adoptive parents; or

(3) If the child is illegitimate.

Ark. Code Ann. § 9-13-103 (Repl. 2002).

a. Fundamental right to parent.

[redacted] The Fourteenth Amendment provides in relevant part that "[No state shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14 § 1. This language has been interpreted over the years to have both a procedural and substantive component. The substantive component of the due process clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

[redacted] [redacted] One of the substantive components that has emerged from the Fourteenth Amendment's guarantee of due process of law is the liberty right of a parent to have and raise children. Several cases from the United States Supreme Court have dealt with the contours of this right as it has emerged over recent decades. In *Troxel v. Granville*, *supra*, Justice O'Connor, speaking for four Justices in a plurality decision, summarized the Court's approach to governmental intrusions on the parent-child relationship:

> [T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.,* at 535, 45 S. Ct. 571. We returned to the subject in *Prince v. Massachusetts,* 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of

> parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166, 64 S. Ct. 438.
>
> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Troxel, 530 U.S. at 65-66.

Thus, a parent has a liberty interest, for example, in shaping a child's education. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating Wisconsin statute purporting to require Amish children to attend public school, against the wishes of the parents). A parent also has a right to direct the care and upbringing of a child. *Prince v. Massachusetts*, *supra* (affirming application of a child-labor law to the parent of a child distributing religious tracts). Accordingly, a fit parent is given a presumption that he or she is acting in a child's best interests. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children."). The parental rights protected by the Fourteenth Amendment do not spring from a bare biological connection to a child, but rather must be born of a relationship to a child demonstrated over time. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

b. *Troxel v. Granville*

In *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), the United States Supreme Court wrestled with the balance between state statutes granting grandparents the right to petition for visitation rights against a parent's Fourteenth-Amendment due-process liberty interest in parenting a child without undue state interference. The Washington State statute involved in *Troxel* was considerably broader than the Arkansas statute at issue in the instant case, as it allowed *any person* the right to petition for visita-

tion *at any time*. In *Troxel*, the two children at issue were born to unwed parents, and the father later committed suicide. Before the father's death, the paternal grandparents saw the two children frequently. However, after the father's death, the visits became less regular. The grandparents petitioned for additional visitation time. The mother agreed to some visitation but balked at giving as much visitation as the grandparents wanted.

The Washington Supreme Court declared the Washington statute to be facially invalid due to its breadth. *See In re Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998). The Washington Supreme Court first determined that strict scrutiny should apply to any intrusion on the parent's Fourteenth Amendment, fundamental interest in parenting the child without state intrusion. The court then identified possible compelling state interests that might offset the parent's fundamental interest, each of which was predicated on harm or threat of harm to a child. Only in the event of harm, the court reasoned, would the State be justified in intruding upon a parent-child relationship by ordering nonparental visitation against the parent's will. The Washington court concluded that a statute that allowed *any* person to petition for visitation under *any* circumstances was not justified by a compelling interest.

The United States Supreme Court granted *certiorari* and affirmed, but took a different tack in the case. In the resulting opinions, all but one justice agreed that the Fourteenth Amendment provided a liberty interest for parents to be free from intrusion by government when making decisions regarding the rearing of children. Instead of addressing the facial challenge to the statute, as the Washington court had done, Justice O'Connor, writing for four justices, addressed only the application of the statute and held that the Washington statute was unconstitutional as applied.

Justice O'Connor's analysis began by characterizing the Washington statute as "breathtakingly broad." *Troxel*, 530 U.S. at 67. She then focused on the central problem with the statute: It fails to accord a fit parent's wishes any weight whatsoever. The statute, in employing only the best-interest-of-the-child standard, failed to recognize the fit parent's interest in deciding what is in a child's best interest. The only guidance offered by Justice

O'Connor as to the scope of the "fitness" determination is her statement that "so long as a parent *adequately cares for his or her children* (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69 (emphasis added). She then observed:

> [The statute] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest [of the child] determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.
>
> . . .
>
> The Superior Court's order was not founded on any *special factors* that might *justify* the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters.

Troxel, 530 U.S. at 67-68 (emphasis added).

Justice O'Connor went on to note that impingement on a parent's fundamental liberty right to raise children requires heightened review and that one "special factor" that might warrant state interference was if the parent were declared unfit. *Troxel*, 530 U.S. at 68. She summarized:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court *must* accord at least some special weight to the parent's own determination.

Troxel, 530 U.S. at 70 (emphasis added). Thus, if a parent is unfit, then clearly under this approach, the state intrusion into the relationship is warranted. Justice O'Connor concluded:

> As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Troxel, 530 U.S. at 72-73. She declined to issue a *per se* ruling on the constitutionality of grandparental visitation statutes, preferring instead to allow state courts to resolve the issue as well as the disposition.

Justice O'Connor's opinion in the case was joined by Chief Justice Rehnquist and Justices Breyer and Ginsburg. Justices Souter and Thomas concurred in separate opinions. Justice Souter's reasoning departed from Justice O'Connor's opinion in that he would have facially invalidated the Washington statute in the same manner as the Washington Supreme Court did. Justice Thomas also concurred. He initially noted his reservations about substantive-due-process jurisprudence generally but concurred in the judgment because the parties did not ask the court to overrule its precedent holding that parents have a fundamental rights to raise their children. He also noted that none of the opinions set out a standard of scrutiny to which courts should hold nonparental visitation statutes. He urged state courts to apply strict scrutiny to these statutes in the same manner that the Washington Supreme Court did.

Justice Stevens, Scalia, and Kennedy each dissented. Justice Stevens would have reversed and remanded for the Washington Supreme Court to judicially narrow the terms of the statute. Justice Stevens's dissent also noted that Justice O'Connor's opinion focused solely on the parent's liberty interest in raising the child. However, he noted that there are many interests at stake, including

the child's interest in forming a relationship with a grandparent. Justice Stevens specifically rejected the notion that there must be a threshold showing of unfitness on the part of the parent before nonparental visitation is permissible. He would instead invoke a balancing approach, weighing all of the interests at stake in any given case.

Justice Scalia would have reversed and dismissed the case. In his opinion, it is the state legislatures that have the power to enact family-law legislation, and he questioned the validity of any substantive due process right to parent a child. He would decline to "federalize" family law, reasoning that state legislatures are better equipped to make law in the family-law area. Justice Kennedy also dissented and would have reversed and remanded the case. He agreed that parents have a Fourteenth Amendment right to parent their children without undue state interference, but he asserted that with today's changing family structure a best-interests balancing test was the most appropriate standard of review.

To summarize, six Justices agreed that the case should be affirmed (O'Connor, Rehnquist, Ginsburg, Breyer, Souter, and Thomas). Eight Justices agreed that the Fourteenth Amendment protects a parent's right to raise his or her child without undue interference from government (all but Scalia; Thomas with reservations). Five Justices agreed that a fit parent is accorded a presumption that the parent acts in the child's best interests (O'Connor, Rehnquist, Ginsburg, Breyer, and Stevens). Four Justices (O'Connor, Rehnquist, Ginsburg, and Breyer) agreed that "special factors" must "justify" the state's intrusion, and that one of those factors is a finding of parental unfitness.

c. Standard of Review.

We begin our analysis of the instant case by concluding that Lea Ann, as a single parent, has a fundamental right under the Fourteenth Amendment in prohibiting state intrusion on her parenting of Brandon. The next question, then, is what level of scrutiny this court should apply when examining the constitutionality of the state's intrusion upon her right. Most courts that have addressed this issue have used the analysis of the strict-

scrutiny review. *See, e.g.*, *Roth v. Weston*, 259 Conn. 202, 789 A.2d 431 (2002); *Santi v. Santi*, 633 N.W.2d 312 (Iowa 2001); *In re Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998). The United States Supreme Court, however, did not directly address whether strict scrutiny is appropriate in *Troxel*. Only Justice Thomas in his concurring opinion advanced the idea that strict scrutiny should be the standard of review for any impingement on this fundamental right.

Nevertheless, assessment of intrusions on other fundamental rights have traditionally been reviewed by the Court under the strict scrutiny standard. *See, e.g.*, *Washington v. Glucksberg*, *supra*; *Reno v. Flores*, 507 U.S. 292 (1993). The notable exceptions are the cases in which the Court has balanced two equally compelling interests or fundamental rights. In these cases, the Court has rejected strict scrutiny and instead adopted a balancing test. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion) (balancing the state's compelling interest in protecting life of the unborn against the burden on a woman's privacy right to terminate a pregnancy); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990) (balancing a patient's right to refuse medical treatment against the state's equally compelling interest in safeguarding an individual's personal choice between life and death).

We hold that strict scrutiny is the standard that should apply to this case. Here, we have only one fundamental right at issue—Lea Ann's right to raise her child—and one statutorily created procedure for a judicial award of grandparental visitation. As Justice O'Connor noted in *Troxel*, grandparental visitation has no historic roots in the common law but rather is a legislated creature of the late twentieth century. *Troxel*, 530 U.S. at 96-97 (plurality opinion); *see also Brooks v. Parkerson*, 454 S.E.2d 769, 770 n.2 (Ga. 1995) ("At common law grandparents had no legal right of visitation with their grandchildren over the objections of the parents."); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

The State argues that we should review the constitutionality of the GPVA under a rational-basis standard, but cites no authority

in support of this contention. We disagree and will apply the strict scrutiny standard to our analysis of this case.

d. Facial Unconstitutionality

We turn then to Lea Ann's challenge that the GPVA is unconstitutional on its face. A facial invalidation of a statute is appropriate if it can be shown that under *no* circumstances can the statute be constitutionally applied. *United States v. Salerno*, 481 U.S. 739 (1987). Here, we conclude that the GPVA could be constitutionally applied in a narrow category of cases. As a prerequisite to filing a petition, the statute requires the following:

> (c) The provisions of subsections (a) and (b) of this section shall only be applicable in situations:
>
> (1) In which there is a severed marital relationship between the parents of the natural or adoptive children by either death, divorce, or legal separation; or
>
> (2) In which the child is in the custody or under the guardianship of a person other than one (1) or both of his or her natural or adoptive parents; . . .

Ark. Code Ann. § 9-13-103 (Repl. 2002). Thus, § 9-13-103(c)(2) would allow a grandparental visitation petition to be filed against a person or entity that had no Fourteenth Amendment parental rights and, thus, no fundamental interest at stake. For example, if a child was in the custody of the State Division of Youth Services, section (c)(2) would allow the grandparents to petition for visitation. In that situation, there would be no fundamental parental right at stake, and a trial court would be perfectly within its legal bounds to decide what is in the best interest of the child and apply the statute accordingly.

Facial invalidation of the GPVA is, therefore, inappropriate. We hold as we do, even though we note that the trial court implored any reviewing court to find that its order either complied with *Troxel* or that the GPVA is unconstitutional on its face. We decline to declare that the statute is facially invalid for the reasons given.

e. Unconstitutional As Applied.

We next address whether the GPVA is unconstitutional as applied. Stated differently, under a strict-scrutiny analysis, we must resolve whether this State has a compelling interest in judicially interfering with Lea Ann's fundamental parenting rights. In assessing our GPVA in light of *Troxel*, we immediately discern a major deficiency. Rather than giving the parent's decision presumptive or special weight in deciding whether grandparental visitation is in the best interest of the child, as *Troxel* requires, the GPVA makes no provision for that but leaves the decision solely to the discretion of the trial court. Ark. Code Ann. § 9-13-103(a)(2) (Repl. 2002). Furthermore, when denying grandparental visitation, the GPVA requires that the trial court state the reasons for the denial in writing. Ark. Code Ann. § 9-13-103(a)(3)(A) (Repl. 2002). No concomitant requirement that the reasons be stated in writing is required when a trial court grants grandparental visitation. The net result is that the trial court may grant grandparental visitation without the burden of stating its reasons, but denial by the trial court requires justification and implicitly places the burden of proof on the parent. By this requirement, the General Assembly has incorporated a procedural preference for granting such rights as opposed to denying them. This preference is directly at odds with the presumptive effect given to the parent's wishes under *Troxel* and, in effect, shifts the burden of proof to the parent.

We next address the fitness issue and the trial court's August 9, 2000 order. According to that order, Lea Ann is found to be a fit mother. That order reads: "The natural mother of the child is suitable to provide day-to-day care of the child" and "she adequately cares for her child and there is an obvious loving parental bond between mother and child." The order concludes "that the custody of the child is to be with Lea Ann as she adequately provides for this [sic] daily needs."

Despite the explicit finding of fitness and the related award of custody to Lea Ann, the trial court's order then discusses grandparental visitation. It describes Lea Ann and her behavior as "irrational concerning the grandfather and not in touch with reality," "not fit to make the decision on behalf of the child as regards

contact with the paternal grandfather," "delusional on the point of the court ordered visitation," and "totally unfit to make the decision concerning grand parental visitation." The trial court concludes:

> For a person to react as has the defendant in this case is not an exercise in rationality. For a person to react as has the defendant overcomes the presumption of a parent acting in the best interest of a child. This is not just the court disagreeing with a decision made by a parent[.] [I]t is much more and satisfies the *Troxel* criteria. If it does not then no case ever will and the trial court implores any appellate court that may review this decision to declare the grandparent visitation law unconstitutional in toto. For a person to react as the defendant has in this case exhibits total irrationality and lack of judgment concerning the welfare of a child on the part of the mother. The behavior of the defendant has reached the level that justifies the court interfering in the parents liberties to make all decisions for the minor child.

The trial court concluded that the GPVA was constitutional.

[redacted] It appears that the trial court found Lea Ann to be a fit parent for all purposes save one: making the decision about Brandon's relationship with his paternal grandparents. This finding of fitness is corroborated by the court's grant of custody to her and his remarks about her suitability as a parent and her loving bond with Brandon. It is only with respect to making visitation decisions that Lea Ann was found to be wanting and unfit. The question then becomes whether unfitness solely to decide visitation matters is a compelling interest on the part of the State that warrants intrusion on a parent's fundamental parenting right and overcomes the presumption in the parent's favor. We conclude that it is not. So long as Lea Ann is fit to care for Brandon on a day-to-day basis, the Fourteenth Amendment right attaches, and the State may not interfere without a compelling interest to do so. As Justice O'Connor wrote in *Troxel*, the State must accord "special weight" to the mother's decision so long as she is a fit mother. *See Troxel* at 68-69.

One other jurisdiction has addressed an analogous question regarding unfitness to make a visitation decision. *See In re Custody of Nunn*, 103 Wash. App. 871, 14 P.3d 175 (2000). In *Nunn*, the

appellate court considered a paternal aunt's argument that the mere fact that the natural mother of the child was rejecting contact with the paternal relatives made her unfit. The court framed the issue as follows:

> And so the question boils down to this: Can an otherwise fit parent be found unfit because she chooses to fight a nonparental custody petition, because she openly expresses her dislike of the side of the family that brought the custody petition, because she avoids old family friends who are supporting the other side in the custody litigation, because she doesn't trust the custody evaluators who have been brought into the litigation, and because she doesn't foster a good relationship between her child and all of those people? The answer is no.

Nunn, 103 Wash. App. at 887-88, 14 P.3d at 184. The court went on to say: "It would be an anomaly to consider an otherwise fit parent unfit simply for exercising her fundamental right as a parent to limit visitation of her children with third persons—even if, as in *Smith*, those third persons are loving family members and close friends of family." *Id.* at 888, 14 P.3d at 184.

In short, we decline to hold that unfitness to decide visitation matters objectively equates to unfitness to parent sufficient to warrant state intrusion on the parent's fundamental right. Were we to decide otherwise, any custodial parent refusing visitation would be subject to a trial court's nonparental visitation order on grounds that the parent was unfit to decide the matter. Such a conclusion would be at odds with the Supreme Court's decision in *Troxel*. There must be some other special factor such as harm to the child or custodial unfitness that justifies state interference.

[redacted] The appellees further contend that the instant case differs from *Troxel* in that here Lea Ann refused all grandparental visitation whereas in *Troxel* the parent was agreeable to some visitation. The trial court also mentioned that distinction. We disagree that this factual distinction represents a basis for rendering *Troxel* inapposite. The Supreme Court has addressed grandparental visitation in one case since its decision in *Troxel*. *See Dodge v. Graville*, 121 S. Ct. 2584 (2001) (memorandum decision). In *Dodge*, the court summarily vacated a decision of the Arizona Court of Appeals, which had limited a parent's right to cut off *all*

grandparental visitation and cited *Troxel* as authority for doing so. While this court can only speculate on the Court's reasons for vacating the Arizona Court of Appeal's decision in *Dodge*, it is apparent that, in the Court's view, cutting off some or all parental visitation, in and of itself, was not the critical point on which the *Troxel* decision turned.

As a final point, the appellees contend that this court held that the GPVA is constitutional in the case of *Reed v. Glover*, 319 Ark. 16, 889 A.W.2d 729 (1994). We disagree with the appellees' conclusion. At issue in *Reed*, which was handed down pre-*Troxel*, was whether the GPVA discriminated against illegitimate children in violation of the equal protection clause of the Fourteenth Amendment. The other issue in *Reed* was whether a grandparent's due process rights were violated because visitation was taken from her without a hearing. We decided both issues against the grandparent, primarily because no convincing authority was cited by her in support of her contentions. Those issues are a far cry from what confronts us in the present case. We hold that the GPVA was unconstitutional as applied in this case and, as a result, violated Lea Ann's fundamental liberty interest under the due process clause.

f. Disposition

We are next confronted with how to dispose of this case in light of the GPVA's unconstitutionality, as applied to this case. The options are either reversal and dismissal for the General Assembly to correct the GPVA's constitutional lapses, or a remand to the trial court accompanied by an attempt by this court to correct those lapses by judicially narrowing the statute.

State courts, since *Troxel*, appear to be equally divided on whether to construe their particular statutes so as to render them constitutional. *See, e.g.*, *In re Paternity of Roger D.H.*, 2002 WL 59233 (Wis. App. Jan. 17, 2002) (publication decision pending) (reversing with instructions to give mother's wishes "presumptive weight" on remand); *Zeman v. Stanford*, 789 So. 2d 798, (Miss. 2001) (using ten pre-*Troxel* factors to determine best interest of child); *Crafton v. Gibson*, 752 N.E.2d 78 (Ind. App. 2001) (revers-

ing with instructions to give "special weight" to parent's wishes on remand). *But See, e.g.*, *DeRose v. DeRose*, 634 N.W.2d 859 (Mich. App. 2002); *Punsly v. Ho*, 87 Cal. App. 4th 1099, 105 Cal. Rptr. 2d 139 (2001) (reversing, stating that "where it is apparent that a visitation order violated the Constitution, the court should not force the parties into additional litigation"); *Kyle O. v. Donald R.*, 85 Cal. App. 4th 848, 102 Cal. Rptr. 2d 476 (2000) (same). *See also Troxel* at 101 (Kennedy, J., dissenting) (noting the harmful effects of protracted visitation litigation).

We note that the states reading factors into their grandparent-visitation statutes for determining the best interest of the child have statutes that differ from our GPVA. For example, the Mississippi statute provides that the trial court must find that (1) the grandparent has established a viable relationship with the grandchild, and (2) that denial of visitation was unreasonable, as well as a finding that such visitation would be in the best interest of the child. *See Stacy v. Ross*, 798 So. 2d 1275 (Miss. 2001). In West Virginia, the statute includes a burden-of-proof standard requiring the grandparents to prove by a preponderance of the evidence that the requested visitation is in the best interest of the child. *Brandon L. v. Moats*, 209 W. Va. 752, 551 S.E.2d 674 (2001).

This court's jurisprudence has recognized a reluctance to read language into a statute to render it constitutional. In *Shoemaker v. State*, 343 Ark. 727, 736, 38 S.W.3d 350, 355 (2001), we declined to salvage a facially unconstitutional statute by narrowing its scope. We said:

> Were this court to read into the statute a limitation to "fighting words," we would clearly be legislating in order to save the statute. This we will not do.

At issue in *Shoemaker* was a teacher-harassment statute which we declared unconstitutional as facially offensive to the First Amendment because it criminalized valid free speech.

On the other hand, in *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999), this court remanded a case involving a child's name change for the trial court to consider certain factors in reaching its decision regarding the best interest of the child. The

pivotal difference between our opinions in *Shoemaker* and *Huffman* is that in *Shoemaker* the constitutionality of a vague statute was at issue, and we declined to construe the statute to eliminate the vagueness as that would be legislating. In *Huffman*, the constitutionality of the statute was not involved. We merely employed factors for the trial court to consider in determining the best interest of the child when a name change was the issue under Ark. Code Ann. § 20-18-401 (Repl. 2000).

For this court to completely overhaul our GPVA would be a significant task. Our GPVA gives no presumption to the parent's wishes. But, equally as important, it procedurally favors the granting of grandparental visitation, and, thus, implicitly shifts the burden of proof to the parent. Finally, it fails to spell out under what circumstances would parental unfitness or harm to the child would warrant state intrusion. While it may appear better on the surface not to dismiss this case altogether, the alternative is to completely rewrite the GPVA, contrary to express legislative intent. This is best left to the General Assembly to do, should it be so inclined at its 2003 session.

The Michigan Court of Appeals, considered its own grandparent-visitation statute in light of *Troxel*, and is convincing in its analysis:

> This leads us to the question whether we could and should endeavor to interpret Michigan's statute in a manner consistent with the constitution. However, such an effort would require a significant, substantive rewriting of the statute. To render the statute constitutional, we would have to read into it requirements that go beyond the text of the statute and do more than simply define the term "best interests of the child" more clearly. We would have to go from the judicial robing room to the legislative cloak room and we decline to do so. In short, the rewriting of the grandparent visitation statute is a task best left for the Legislature.

DeRose v. DeRose, 643 N.W.2d 259 (Mich. App. 2002). Our decision not to legislate is also consistent with the path taken in other jurisdictions when the issue is whether to depart from legislative intent. *See, e.g.*, *Florida v. Cronin*, 774 So. 2d 871, 874 (Fla. App. 2000), *Quoting Meyer v. Caruso*, 731 So. 2d 118, 126 (Fla.

App. 1999) ("It is fundamental that judges do not have the power to edit statutes so as to add requirements that the legislature did not include.")); *Salem College & Academy, Inc. v. Employment Div.*, 298 Or. 471, 695 P.2d 25 (1985).

There is one final point. Justice Kennedy observed in *Troxel* that "a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes complicated." *Troxel* at 101 (Kennedy, J., dissenting). *See also Punsly v. Ho*, *supra*. Justice Kennedy's observation is instructive. The Linders have been engaged in this struggle over grandparental visitation for four years—more than half of Brandon's life. Until the General Assembly fashions a statute that meets the requirements of *Troxel*, this matter should be laid to rest.

Reversed and dismissed.

HANNAH, J., concurring in part and dissenting in part.

JIM HANNAH, Justice, concurring in part; dissenting in part. I agree that the grandparents-visitation statute may apply to guardians and other nonparental custodians, and on that basis it is not facially unconstitutional. However, I disagree that this statute is unconstitutional as applied.

I do agree that the language of the statute needs revision. If the legislature were to redraft the statute in light of the long history of decisions of this court concerning the right of a parent to raise their child, and the presumption that a parent is acting in the best interests of their child in making decisions concerning the child, as well as the United States Supreme Court decision in *Troxel v. Granville*, 530 U.S. 57 (2000), the confusion would be resolved, and the task assigned to the trial courts would be much easier and would produce more predictable results. It is also troublesome that our present statute requires the trial court to state in writing why grandparent visitation is being denied, but requires no statement in writing when grandparent visitation is granted. Inclusion of factors the trial court must consider in its analysis required under the statute would also be helpful. *See*, *Martin v.*

Coop, 693 So.2d 912 (Miss. 1997). Nonetheless, under the facts of this case, I would affirm the trial court's decision holding the statute was not unconstitutional as applied but I would reverse and remand this case for reconsideration of visitation granted to the grandparent.

As the United States Supreme Court held in *United States v. Salerno*, 481 U.S. 739 (1986), "the mere fact that [a legislative] Act might operate unconstitutionally under some conceivable circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745. More specifically, a statute may sometimes be preserved by the courts by simply restricting its application. *Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 350 (2001). This could be done by requiring application of the preexisting presumption in favor of parents, as was done by the trial court in this case.

The trial court specifically noted *Troxel, supra*, and specifically stated its analysis was intended to comply with the requirements set out therein. When the trial court's nine-page decision is read in total, it is apparent the trial court was considering the grandparent-visitation rights under the statute in light of the mother's parental rights and interests. In fact, on page seven, the trial court states, "The behavior of the defendant has reached the level that justifies the court interfering in the parent's liberties to make all decisions for the minor child." The trial court further found that the presumption in Lea Ann's favor was overcome.

A brief review of the record reveals a parent who behaved irrationally in a number of ways, in directly disobeying orders of the court, and in fleeing the jurisdiction. It is apparent that the trial court was considering both Lea Ann's parental rights and the best interest of Brandon. I do not believe that the trial court's decision to leave Brandon in the custody of Lea Ann may be read so broadly as the majority does. Clearly, the trial court is concerned about Lea Ann's care of Brandon in a much more general sense even if the order might have been worded more clearly.

I also write to emphasize that this decision is narrow in scope and applies only to visitation issues arising from application of Ark. Code Ann. § 9-13-103 (Repl. 2002). In other words, this decision is limited to an attempt by grandparents to obtain visitation under

the subject statute. The analysis should not be confused and applied in a case where the State is determining custody, and visitation on other basis, including other statutory schemes, or under the State's exercise of its sovereign *parens patriae* power in protection of the children of this State.

The issue of grandparent visitation did not originate with the subject statute investing grandparents with a statutory right to commence an action to obtain visitation. Mention of visitation granted grandparents may be found in our case law stretching back to the 1950s at the least. *Parks v. Crowley*, 221 Ark. 340, 253 S.W.2d 561 (1952); *Servaes v. Bryant*, 220 Ark. 769, 250 S.W.2d 134 (1952). However, as this court stated in *Glover v. Reed*, 319 Ark. 16, 889 S.W.2d 729 (1994), grandparent rights are derived from statutes or may be conferred by a court of competent jurisdiction. *See also, Cox v. Stayton*, 273 Ark. 298, 619, 619 S.W.2d 617 (1981). It is not clear that the action pending in the chancery court is simply an action for grandparents-visitation rights under Ark. Code Ann. § 9-13-103. Bill Linder did not even bring his petition under that statute, but rather under Ark. Code Ann. § 9-13-101 (Repl. 2002) "Award of Custody", and it should be noted that the trial court has considered custody, which is not even mentioned in the grandparents-visitation statute. Nothing in this decision prohibits the grandparents from pursuing any other avenues that might be open to them.

The trial court granted the paternal grandfather the same visitation as a noncustodial parent. Unless this visitation was granted in the context of a custody proceeding, it appears to be granted in error. Even then, absent a finding of an extremely close paternal type relationship, which was absent in the facts of this case, this amount of visitation could not have been in the best interests of this child. I would reverse and remand this case for the trial court to reconsider the paternal grandfather's visitation.

James Eric FOUNTAIN *v.* STATE of Arkansas

CR 01-890 72 S.W.3d 511

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Hatfield & Lassiter, by: *Jack T. Lassiter*, for appellant.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. James Eric Fountain was convicted at a bench trial in the Pulaski County Circuit Court on four drug-related felonies: simultaneous possession of drugs and firearms; possession of marijuana with intent to deliver; maintaining a drug premises; and possession of drug paraphernalia. On the offense of simultaneous possession of drugs and firearms, a class Y felony, Mr. Fountain was sentenced to a term of ten years with four years suspended. On each of the other offenses, he was sentenced to a term of ten years with four years suspended. Those sentences were to run concurrently with his sentence on the class Y felony offense. Both the State and Mr. Fountain filed notices of appeal. On October 8, 2001, Mr. Fountain filed a motion to dismiss appeal or for alternative relief. We ordered that the motion be submitted as a case with the clerk to set a briefing schedule. Important to the outcome of this motion is a timeline of the events following trial:

May 18, 2001:	Notice of appeal filed on behalf of State
May 22, 2001:	Judgment and commitment order filed
May 25, 2001:	Notice of appeal filed by Mr. Fountain
June 1, 2001:	Notice of cross-appeal filed on behalf of State
June 5, 2001:	Motion to correct judgment and commitment order filed by Mr. Fountain
June 11, 2001:	Motion to correct order is granted
June 18, 2001:	Amended notice of cross-appeal filed on behalf of State
June 21, 2001:	Amended judgment and commitment order filed
June 29, 2001:	Amended notice of appeal filed by Mr. Fountain
August 16, 2001:	Record lodged with this court by Mr. Fountain

Mr. Fountain contends that he is the appellee in this matter and is now proceeding under the heading of appellant only because that designation appears in our order directing the clerk to set a briefing schedule. He asks this court to dismiss both his appeal and the State's appeal and remand the case to the trial court for execution of sentence. Mr. Fountain maintains that he never would have appealed had the State not appealed, and asserts that he proceeded at all relevant times under a belief that he was the appellee in this matter. He emphasizes the fact that he filed his notice of appeal following the notice of appeal filed by the State. The State requests the opportunity to pursue its appeal and argues that Mr. Fountain's motion to dismiss should be denied as to its appeal.

Where an appeal, other than an interlocutory appeal, is desired on behalf of the State following a misdemeanor or felony prosecution, the State must file a notice of appeal within thirty days after entry of a final order by the trial judge. Ark. R. App. P.—Crim. 3(b) (2001). Similarly, Arkansas Rule of Appellate Procedure—Criminal 2(a) (2001) provides that a notice of appeal

must be filed within thirty days from the date of entry of a judgment.[1] The State filed its notice of appeal in this matter on May 18, 2001. Citing Arkansas Rule of Appellate Procedure—Criminal 2(b)(1), Mr. Fountain argues that, although the State's May 18, 2001 notice predated the May 22 filing of the judgment, the notice was nevertheless effective and should be treated as having been filed on May 23, 2001. We agree.

Criminal Appellate Rule 2(b)(1) (2001) provides, in relevant part: "A notice of appeal filed after the trial court announces a decision but before the entry of the judgment or order shall be treated as filed on the day after the judgment or order is entered." Ark. R. App. P.—Crim. 2(b)(1). The filing benefit granted by Criminal Appellate Rule 2(b)(1) was not something this court intended to provide only to criminal defendants. A similar provision appearing in our civil appellate rules entitles all parties appealing judgments in civil actions to the same premature filing benefit. Ark. R. App. P.—Civ. 4(a) (2001). Arkansas Rule of Appellate Procedure—Civil 4(a) was amended on January 28, 1999, to provide that a premature notice of appeal is to be treated as if it had been filed after entry of the judgment, decree, or order. *See* Addition to Reporter's Notes to Ark. R. App. P.—Civ. 4, 1999 Amendment. Accordingly, Criminal Appellate Rule 2(b)(1) was revised on June 24, 1999, to reconcile it with recent changes in the comparable Civil Appellate Rule 4. *See* Reporter's Notes to Ark. R. App. P.—Crim. 2, June 1999 Amendment. Subsection (b)(1) of Criminal Appellate Rule 2 now provides that a premature notice of appeal is to be treated as if it had been filed after entry of the judgment, decree, or order. Ark. R. App. P.—Crim. 2(b)(1). A consistent interpretation of our rules demands that the premature filing benefit be afforded to the State.[2] Otherwise, the benefit would be granted to all parties except the State. Such an

[1] Criminal Appellate Rule 2(a)(3) also allows for a notice of appeal to be filed within thirty days from the date a posttrial motion under Ark. R. Crim. P. 33.3 is deemed denied. Ark. R. App. P.—Crim. 2(a)(3) (2001).

[2] The dissenting opinion suggests an interpretation of our rules that can only be characterized as internally inconsistent: The State is not entitled to the filing benefit granted by Rule of Appellate Procedure—Criminal 2(b)(1), and yet, it is subject to the filing deadline for cross-appeals set out in Rule of Appellate Procedure—Civil 4(a).

interpretation of our appellate rules would lead to an absurd result, and this court has often said that we will not adopt an interpretation of the law that leads to an absurd result. *See Yarbrough v. Witty*, 336 Ark. 479, 987 S.W.2d 257 (1999); *Citizens To Establish A Reform Party v. Priest*, 325 Ark. 257, 926 S.W.2d 432 (1996). Justice must be served in an evenhanded manner: fair to the State, yet fair to the defendant. *Clements v. State*, 306 Ark. 596, 817 S.W.2d 194 (1991).

Applying Criminal Appellate Rule 2(b)(1), the State's first notice of appeal was timely filed, and the State was the original appellant. Two days after the State filed its notice of appeal, Mr. Fountain filed his notice of appeal on May 25, 2001. His notice was also timely. The State then filed its notice of "cross-appeal" on June 1, 2001, appealing the same May 22 Order. We note that the document was titled a notice of *cross*-appeal. This court should not be blinded by titles. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997). The State was actually the first party to appeal from the trial court's original order. In any event, both notices filed by the State were well within the State's thirty-day limit for filing a notice of appeal under Criminal Appellate Rule 3(b).

Following these notices of appeal, Mr. Fountain filed a post-trial motion for correction of the trial court's May 22 Order. Pursuant to Criminal Appellate Rule 2(b)(1), that motion extended the time for filing notices of appeal until thirty days from entry of the order disposing of the last motion outstanding. The extension applied to all parties. Ark. R. App. P.—Crim. 2(b)(1). The trial court granted Mr. Fountain's posttrial motion, and, as a result, entered an amended judgment and commitment order on June 21.

The State filed its amended notice of "cross-appeal" on June 18, 2001, appealing the trial court's original and amended orders. As previously noted, this court should not be blinded by titles. Once again, the State was the first party to appeal from the trial court's amended order, albeit prematurely. When a notice of appeal is filed prior to the disposition of any post-trial motions, or prematurely, Ark. R. App. P.—Crim. 2(b)(2) (2001) provides

relief. That rule also states that a notice of appeal made after the disposition of any post-trial motions is effective to appeal the underlying judgment as well. Criminal Appellate Rule 2(b) reads, in relevant part:

> (1) . . . Upon timely filing in the trial court of a post-trial motion, the time for filing a notice of appeal shall be extended for all parties. The notice of appeal shall be filed within thirty (30) days from entry of the order disposing of the last motion outstanding. . . .
>
> (2) A notice of appeal filed before disposition of any post-trial motions shall be treated as filed on the day after the entry of an order disposing of the last motion outstanding or the day after the motion is deemed denied by operation of law. Such a notice is effective to appeal the underlying judgment or order. A party who also seeks to appeal from the grant or denial of the motion shall within thirty (30) days amend the previously filed notice, complying with subsection (a) of this rule.

Ark. R. App. P.—Crim. 2(b). Applying Ark. R. App. P.—Crim. 2(b)(2), the State's amended notice of appeal must be treated as filed one day after entry of the amended judgment, or June 22, 2001. Thus, the State clearly filed its appeal within thirty days after entry of the June 21 amended order by the trial court. Furthermore, pursuant to Criminal Appellate Rule 2(b)(2), the State's amended notice of appeal is effective to appeal both the original judgment and the amended judgment.

Under Ark. R. App. P.—Crim. 3(c) (2001), the State was entitled to sixty days from the filing of its notice of appeal within which to file the transcript of the trial record. Mr. Fountain lodged the transcript with this court's clerk on August 16, 2001. Therefore, the transcript was filed fifty-five days after the State's June 22 notice of appeal. The filing of the transcript by the defendant alleviated the State's need to file another copy of the transcript.[3] As such, the State's appeal is properly before this

[3] Such filing does not, however, affect the requirement under Ark. R. App. P.–Crim. 3(c) that the Attorney General may only take an appeal after inspecting the trial record and becoming satisfied that error has been committed to the prejudice of the State and, further, that the correct and uniform administration of the criminal law requires review by the Supreme Court.

court.[4] Mr. Fountain's motion to dismiss is hereby denied such that the State will be allowed to pursue its appeal of both the trial court's May 22 and June 21 orders.

In his motion, Mr. Fountain requests to pursue his appeal if the State is allowed to pursue its appeal. As Mr. Fountain's June 29, 2001 amended notice of appeal was timely and as the transcript was filed in compliance with Ark. R. App. P.—Civ. 5(a) (2001), Mr. Fountain will also be allowed to pursue his appeal of the trial court's original and amended orders. We direct the clerk to set an appropriate briefing schedule.

Motion to dismiss appeal denied.

ARNOLD, C.J., THORNTON and HANNAH, JJ., dissent.

W. H. "DUB" ARNOLD, Chief Justice, dissenting. I disagree with the majority and would grant Mr. Fountain's motion to dismiss both the appeal and cross-appeal.

The majority holds that in applying Criminal Appellate Rule 2(b)(1), the State's first notice of appeal was timely filed, and that State was the original appellant. I disagree. Arkansas Rule of Appellate Procedure—Criminal 3(b) addresses appeals by the State and plainly states that where an appeal from a final judgment is

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[4] Mr. Fountain points out that the State did not file a transcript of the June 11 hearing, even though its June 18 "Amended Notice of Cross-Appeal and Designation of Record" requested a transcript of that hearing as part of the record on appeal. The State counters that Mr. Fountain's suggestion that the State's appeal should be dismissed because it has not lodged the record of the June 11 hearing is, at best, premature.

The State correctly contends that lodging a transcript of that hearing is not a prerequisite to this court acquiring jurisdiction of its appeal. If the transcript needs to be made a part of the record, either party can ask that the record be supplemented with it under Ark. R. App. P.—Crim. 4(a), which states that matters pertaining to the modification of the record on appeal are to be governed by the Rules of Appellate Procedure–Civil. Civil Appellate Rule 6 states:

> If anything material to either party is omitted from the record by error or accident . . . , the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court . . . may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted.

Ark. R. App. P.—Civ. 6(e) (2001).

desired "on behalf of the State," notice of appeal shall be filed within thirty days "*after* entry of a final order." [Emphasis added.] As a separate rule was drawn to address appeals by the State, I believe that it is evident that such appeals are to be treated differently than those contemplated by Rule 2. Further, in the case of *Bowden v. State*, 326 Ark. 266, 931 S.W.2d 104 (1996) this Court explained the need for a separate rule for appeals by the State. In *Bowden*, we held that there is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the State: the former is a matter of right, and to cut off a defendant's right to appeal because of his attorney's failure to follow rules would violate the Sixth Amendment right to effective assistance of counsel; the latter is not derived from the Constitution, nor is it a matter of right, but is granted pursuant to this rule. *Id.*

As such, I would hold that Ark. R. App. P.—Crim. 2(b)(1) does not apply to appeals by the State and that the State's first notice of appeal, which predated the entry of the judgment and commitment order was premature and, therefore, invalid under Ark. R. App. P.—Crim. 3(b), which *does* apply to appeals by the State. As Mr. Fountain did file a timely notice of appeal after entry of the judgment and commitment order, I believe he is clearly the appellant, and the State, having filed a notice of cross-appeal subsequently, is the cross-appellant. Moreover, as Mr. Fountain is the one who actually filed the transcript, if this Court allows the State to appeal as the *appellant*, Mr. Fountain becomes, in effect, trapped by his filing of the transcript; in other words, if he had not filed it, then the State would not even *have* a transcript.

Mr. Fountain then argues that, if *he* is the one characterized as the appellant, the State's cross-appeal should be dismissed because the rules of appellate procedure do not provide for cross-appeals by the State. While it is true that the rules of appellate procedure do not expressly provide for cross-appeals, we have, however, entertained cross-appeals by the State in previous cases, including *Moore v. State*, 321 Ark. 249, 903 S.W.2d 145 (1995), *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001), and *Smith*

v. State, 347 Ark. 277, 61 S.W.3d 168 (2001). In *Byndom*, we held that the State's right to file a criminal appeal arises under Ark. R. App. P.—Crim. 3, which specifically states as follows:

> (b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either a misdemeanor or felony prosecution, the prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge.

This rule does not state "Where a *direct* appeal. . ." but instead states "Where an appeal. . . ." Although Mr. Fountain attempts to argue that Rule 3 does not apply to *cross*-appeals, there is no other authority under which the State could cross-appeal in a criminal case.[1] This Court, in a concurring opinion in *Osborne v. State*, 340 Ark. 444, 11 S.W.3d 528 (2000), said:

> [W]hile our Rule of Appellate Procedure—Criminal do not specifically mention cross-appeal, as such, our Rules of Appellate Procedure—Civil clearly do (see Ark. R. App. P.—Civ. 3(d)), and these civil appellate rules have commonly been referred to and applied when necessary in criminal appeals.

Further, while it is true that the rules do not specifically set out a *time* for the State to file a *cross*-appeal, this Court has referred to and applied the Rules of Appellate Procedure—Civil when necessary in criminal appeals. Under Ark. R. App. P.—Civ. 4(a), a party cross-appealing must file within ten days after receipt of the other party's direct appeal. While the State did file its initial notice of cross-appeal well within ten days of Fountain's notice of appeal, the State failed to file an amended or subsequent notice of cross-appeal after Mr. Fountain filed his amended notice of appeal following the amended judgment and commitment order entered by the trial court. Therefore, while I do believe that the State's cross-appeal is allowable, I believe that it must be dismissed as untimely.

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[1] The issue of whether the State can file a cross-appeal pursuant to the Arkansas Rules of Appellant Procedure—Civil is not before the Court; therefore, I will not address that issue.

I believe that the filing of an amended judgment clearly affects a previously-filed notice of appeal. *See Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997) (dismissing an appeal wherein a notice of appeal of an order denying a motion for new trial was not timely filed, although a notice of appeal had been timely filed following the entry of the judgment and commitment and a second notice of appeal had been timely filed following the entry of an amended judgment and commitment); *Burks v. State*, 328 Ark. 678, 945 S.W.2d 367 (1997) (holding that the failure to file a notice of appeal after the entry of an amended judgment and commitment order, although a notice of appeal had been filed after the original judgment and commitment order, constituted a denial of effective assistance of counsel). Clearly, each time an amended judgment and commitment is filed, or a post-trial motion is entertained by the trial court, a new notice of appeal must be filed. In this case, following the filing of the amended judgment and commitment, Mr. Fountain filed a timely amended notice of appeal; however, the State did not then file another notice of cross-appeal; therefore, I would hold that the State's cross-appeal must be dismissed.

For all of the foregoing reasons, I believe that Mr. Fountain's motion to dismiss his appeal, as well as the cross-appeal filed by the State, should be granted; as such, I must respectfully dissent.

THORNTON AND HANNAH, JJ., join this dissent.

Russell Eugene LOGHRY, *Individually* and as *Husband* and *Administrator* of the Estate of Ann Marie Loghry, *Deceased v.* ROGERS GROUP, INC.; Ben L. Rechter; National Union Fire Insurance Company; and Hartford Fire Insurance Company

01-1309 72 S.W.3d 499

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Gary Eubanks & Associates, by: *William Gary Holt* and *Robert S. Tschiemer*, for appellant.

Laser Law Firm, by: *Sam Laser*, for appellee Hartford Insurance Company.

Huckabay, Munson, Rowlett & Moore, P.A., by: *Bruce Munson* and *Julia L. Busfield*, for appellee National Union Fire Insurance Company.

ANNABELLE CLINTON IMBER, Justice. This case arises from a fatal accident. Appellant Russell Eugene Loghry contends that the type of asphalt used on the highway caused the accident. Mr. Loghry, individually and as husband and administrator of the estate of Ann Marie Loghry, deceased, filed a negligence action against the Rogers Group, Inc., Ben L. Rechter, Hartford Fire Insurance Company, and National Union Fire Insurance Company.[1] The trial court granted the Rogers Group and Mr. Rechter's motions for summary judgment and the insurance companies' motions to dismiss. We affirm the trial court's rulings.

The facts in this case are largely undisputed. On December 21, 1998, Ann Marie Loghry was traveling on Highway 65 just north of Conway. It was raining slightly. The car driven by Mrs. Loghry crossed the center line and collided with a car driven by

[1] The original action also alleged claims against John Does 1 to 5, but the claims against the unknown tortfeasors were later dismissed.

Deborah Engelhardt, killing both Mrs. Loghry and Ms. Engelhardt. The parties disagree as to the cause of the accident. Mr. Loghry alleges that the car suddenly and without warning hydroplaned, while the defendants allege that the accident was caused by Mrs. Loghry's own negligence.

The accident occurred on a 6.28 mile section of highway that had been resurfaced with Type 3 asphalt. The engineer who designed the Type 3 asphalt, Steven Garrett, stated in an affidavit that the Type 3 mix asphalt was primarily designed for use on parking lots, overlays, potholes, and low volume highways and that it could sometimes cause hydroplaning during heavy rains. The Arkansas State Highway and Transportation Department requested bids to resurface the 6.28 miles of Highway 65 using Type 3 asphalt. The Rogers Group was the successful bidder. In accordance with the bid requirements, the contract between the Rogers Group and the Highway Department specified Type 3 asphalt. The Highway Department approved the Type 3 asphalt mix; supervised the resurfacing daily; tested the asphalt mix periodically; and, upon completion of the resurfacing and final inspection, certified that the Rogers Group had completed the job according to the contract specifications.

The trial court granted the motions for summary judgment filed by the Rogers Group and Mr. Rechter. In so ruling, the trial court concluded that because the Rogers Group had repaved the highway according to the plans and specifications of the Highway Department and under the close supervision of the Highway Department, the Rogers Group was immune from liability under the acquired-immunity doctrine. Furthermore, the trial court concluded that the decision to use Type 3 asphalt was made by the Highway Department, and not by the Rogers Group. Because Mr. Loghry failed to present evidence that Mr. Rechter, vice-president of the Rogers Group, engaged in any independent act of negligence, the trial court also ruled that he was entitled to summary judgment. As to Mr. Loghry's claim of negligent performance of the contract, an exception to the doctrine of acquired

immunity, the trial court granted summary judgment in favor of the Rogers Group and Mr. Rechter. The claims against the two insurance companies were dismissed because the insurance carriers could not be liable if the Rogers Group was not liable. In a final order and settlement of the record, the trial court dismissed claims against five unknown tortfeasors, added two documents to the record that were erroneously omitted from the original record, and denied Mr. Loghry's request for permission to undertake additional discovery.

On appeal, Mr. Loghry raises one point on appeal with four subpoints. Mr. Loghry's overall contention on appeal is that the trial court erred in granting summary judgment based on the acquired-immunity doctrine. The substance of Mr. Loghry's argument on appeal is set forth in the following four subpoints: (1) that the acquired-immunity defense is no longer viable or should be abrogated; (2) that even under the acquired-immunity doctrine, genuine issues of fact remain as to whether the Rogers Group negligently performed the contract;[2] (3) if the acquired-immunity doctrine protects the Rogers Group and Mr. Rechter, a direct carrier action is proper under Ark. Code Ann. § 23-79-210; and (4) the trial court erred in denying Mr. Loghry additional time to complete discovery.

The first three subpoints are identical to those raised and rejected by this court in the companion case of *Smith v. Rogers Group, Inc.*, 348 Ark. 241, 72 S.W.3d 450 (2002). The trial court in this case reviewed and considered the same affidavits, depositions, and exhibits that were before the trial court in the *Smith* case.[3] Accordingly, we deem it unnecessary to reiterate in the instant case what was said in the companion case bearing upon these points, and we adopt and incorporate herein by reference

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[2] This subpoint includes no argument concerning any alleged independent act of negligence on the part of Mr. Rechter.

[3] Although two of the exhibits were belatedly filed in the *Smith* case, they were nonetheless considered by the trial court in that case. *Smith v. Rogers Group, Inc., supra.*

the reasoning set forth in *Smith v. Rogers Group, Inc., supra.* Thus, we affirm the trial court on the first three subpoints.

Mr. Loghry's last subpoint on appeal is that the trial court erred in granting the motions for summary judgment and dismissal before he had time to complete his discovery. In his response to the motion for summary judgment, Mr. Loghry stated:

> Plaintiff further notes that discovery is continuing in this case with Highway Department depositions being scheduled, as well as that of Defendant Rechter, and it would be improper for the Court to consider summary judgment until completion of discovery. Plaintiff requests that the Court grant a reasonable time to complete discovery.[4]

While it is appropriate to present a request for additional time in the response to summary judgment, that request must comply with Ark. R. Civ. P. 56(f). *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994). Rule 56(f) provides as follows:

> (f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Ark. R. Civ. P. 56(f) (2000, 2001). A trial court has broad discretion in matters pertaining to discovery, and the exercise of that discretion will not be reversed by this court absent abuse of discretion that is prejudicial to the appealing party. *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995); *Rankin v. Farmers Tractor & Equipment Co., Inc.*, 319 Ark. 26, 32, 888 S.W.2d 657, 660

[4] Subsequent to the grant of summary judgment, Mr. Loghry proffered Mr. Rechter's deposition taken on March 14, 2001, and advised the court that he wanted to depose two Highway Department employees: Jim Gee, who approved the Type 3 asphalt mix, and C.W. McMillian, the resident engineer.

(1994); *Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994).

Here, Mr. Loghry did not comply with Rule 56(f). He merely requested "a reasonable time to complete discovery" and did not state that he was unable to present evidence in opposition to the motion for summary judgment. Furthermore, Mr. Loghry fails to demonstrate how the additional discovery would have changed the outcome of the case. He filed an extensive brief in support of his response to the motion for summary judgment and attached six exhibits: the affidavits of two engineers, Steven Garrett and James A. Scherocman; the contract between the Rogers Group and the Highway Department; the 1993 Standards for Highway Construction; the answers to interrogatories and responses to requests for documents filed by the Rogers Group in the *Smith* case; and deposition testimony given in the *Smith* case by a quality control supervisor for the Rogers Group, Eddie Riedmueller. The latter two exhibits reflect that the *Smith* case had been pending since 1998. Under these circumstances, we cannot say that the trial court abused its discretion in denying additional time for discovery.[5]

Because Mr. Loghry requested a hearing and did not receive a hearing, he asserts a due process violation. However, the decision to hold a hearing on a motion for summary judgment is discretionary, not mandatory. Ark. R. Civ. P. 56(c) (2001); *Campbell v. Bard*, 315 Ark. 366, 868 S.W.2d 62 (1993). Because Mr. Loghry offers no argument as to how the trial court abused its discretion in failing to conduct a hearing, his contention is without merit.

Affirmed.

GLAZE, J., not participating.

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[5] We note that effective February 1, 2001, Ark. R. Civ. P. 56(c) was amended to establish a time frame for the parties to follow in connection with motions and proceedings under the rule. *See* Addition to Reporter's Notes, 2001 Amendments, Ark. R. Civ. P. 56 (2001). Mr. Loghry failed to comply with Rule 56(c), as amended.

D'ARBONNE CONSTRUCTION CO. *v.*
Sylvia Leann FOSTER, *et al.*

01-661 72 S.W.3d 862

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Bruce Munson* and *Julia L. Busfield*, for appellants.

Hamilton & Hamilton, by: *James A. Hamilton*, for appellee Sylvia Leann Foster.

Richard Byrd and *Holiman & Kennedy*, by: *Richard E. Holiman*, for appellees Sherri, Gus and Randy Culbreath.

RAY THORNTON, Justice. The court of appeals certified this case to us for an interpretation of Rule 54(b) of the Arkansas Rules of Civil Procedure. The issue presented is whether the appeal must be dismissed because the names "John Doe 1" and "John Doe 2" remain included in the caption of the case. No specific order was entered by the trial court disposing of any claim that might have been made against the two John Doe defendants, but the matter was completely tried and a verdict was entered which allocated 100 percent of the liability to two named defendants, while dismissing the other named defendant. The jury verdict and order of the trial court resolved all issues relating to all allegations of claims for damages, and no unresolved or unknown claims remain for further disposition. Under these circumstances, we conclude that any claims that might have been asserted against the two unidentified John Does were abandoned, and no issues remain to be decided. We conclude that the trial court entered a final order disposing of each and every claim against each and every party to the litigation, and that Ark. R. Civ. P. 54(b) does not require that the appeal be dismissed. Accordingly, we reassign the case to the court of appeals for decision on the merits of the appeal.

To be appealable, an order must be final. Ark. R. App. P.—Civ. 2. The finality of a trial court's judgment is governed by Ark. R. Civ. P. 54(b) and states in pertinent part:

> (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, *or when multiple parties are involved*, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute the following certificate . . . [certificate omitted].
>
> (2) Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order or other form of decision is subject to revision at

> any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id. (emphasis added).

The purpose of Rule 54(b) is to prevent piecemeal litigation, and we have refused to engage in a review of an appellant's claim against some defendants when claims against remaining defendants could possibly be asserted in the future. *Shackelford v. Arkansas Power and Light*, 334 Ark. 634, 976 S.W.2d 950 (1998); *See also, Cortese v. Atlantic Richfield*, 317 Ark. 207, 876 S.W.2d 581 (1994). However, this case does not present an order that disposes of less than all of the claims against all of the parties, and therefore there are no remaining issues to be litigated and there is no possibility of piecemeal litigation.

We recently held that John Doe defendants must be formally dismissed from a case when the plaintiff decides not to involve them in the litigation. *Shackelford, supra.* The plaintiff in that case amended the original complaint to exclude two John Doe defendants identified as a boat hoist manufacturer and an electrician. *Id.* This court held that simply amending the complaint, though an indication that the plaintiff meant for them to be dismissed, was not sufficient to dismiss them from the case, and any order that included those defendants in the caption would be invalid until the defendants were formally dismissed. *Id.*

The instant case presents a unique set of facts distinguishing it from *Shackelford*. *Shackelford* involved the finality of an order of summary judgment. Following the remand of an earlier case, Ms. Shackelford filed an amended complaint naming only AP&L as the defendant. AP&L moved for summary judgment, and Ms. Shackelford verbally assured the court that AP&L was the only defendant. The trial court entered a summary judgement order in favor of AP&L, but the caption to the order listed AP&L, Pat and Carrick Patterson, John Doe 1 and John Doe 2 as the defendants. The body of the summary judgment order referred only to AP&L. Specifically, the last sentence of the order named AP&L as a defendant and dismissed plaintiff's cause of action against that defendant with prejudice. She appealed the order of summary judgment to this court, and we dismissed her appeal

without prejudice due to a violation of Ark. R. Civ. P. 54(b) because the rights and liabilities or claims of fewer than all the parties were resolved. *Id.*

Shackelford was decided on the basis of an order granting summary judgment that did not formally dispose of all possible claims against all other defendants, rather than as in this case where there was a complete trial, jury verdict, and an order allotting 100 percent of the liability between two defendants and deciding all issues relating to damages. In the instant case, the jury filled out a verdict form where the defendant parties were specifically identified. The form read as follows:

> INTERROGATORY NO. 1
>
> Do you find from a preponderance of the evidence that defendant, Lee Earnest Johnson was negligent and that his negligence was a proximate cause of the occurrence?
> Answer yes or no:
>
> *YES* /s/ Jerry Hudson
> FOREPERSON
>
> INTERROGATORY NO. 2
>
> Do you find from a preponderance of the evidence that defendant D'Arbonne Construction Company was negligent and that its negligence was a proximate cause of the occurrence?
> Answer yes or no:
>
> *YES* /s/ Jerry Hudson
> FOREPERSON
>
> INTERROGATORY NO. 3
>
> Do you find from a preponderance of the evidence that defendant, Warner Canley was negligent and that his negligence was a proximate cause of the occurrence?
> Answer yes or no:
>
> *NO* /s/ Jerry Hudson
> FOREPERSON
>
> [Jurors' names omitted.]

INTERROGATORY NO. 4

If you answered "yes" to more than one of the first three interrogatories, then answer the following interrogatory: Using 100% as a whole, what percent of negligence which was a proximate cause of the occurrence, do you place on the defendants that you found in the first four interrogatories to have negligently caused this occurrence? Answer in percentages. Your answer must total 100%.

50% LEE EARNEST JOHNSON

50% D'ARBONNE CONSTRUCTION

0% WARNER CANLEY

100% TOTAL /s/ Jerry Hudson
FOREPERSON

[Jurors' names omitted.]

INTERROGATORY NO. 5

Do you find that Lee Earnest Johnson was acting as an agent of the defendant, Caskey Terral, D/B/A Terral Logging at the time of the occurrence?
Answer yes or no:

NO /s/Jerry Hudson
FOREPERSON

[Jurors' names omitted.]

INTERROGATORY NO. 6

Do you find that D'Arbonne Construction Company, Inc., was acting as an agent of the defendant, Caskey Terral, D/B/A Terral Logging at the time of the occurrence?
Answer yes or no:

NO /s/Jerry Hudson
FOREPERSON

[Jurors' names omitted.]

As is clear from the verdict form, all claims were decided, and all issues relating to the parties were disposed of. In addition to naming the defendant parties, the verdict form apportioned damages to each of the defendants in the case, settling the issue of damages. Unlike *Shackelford*, this case was completely tried, the verdict

apportioned 100 percent of the liability and damages, and no unresolved claims remained. The plaintiffs never identified the John Doe defendants, the amended complaint eliminated all references to any claims against them, and the case proceeded to trial with no claims asserted against the John Does. All claims against the John Doe defendants were abandoned before the commencement of the trial, and extinguished by the verdict allotting 100 percent of the liability to named defendants. That conclusion resolves the issue before us, and is entirely consistent with a strict interpretation of Rule 54(b). We conclude there is no need for dismissal based upon these facts.

Furthermore, there is the issue of the status of the two John Doe defendants. The language of Ark. R. Civ. P 54(b) addresses party litigants only. The two John Doe defendants were never identified or served in accordance with Ark. R. Civ. P. 4(f), and were never made parties to this action. The record reflects that appellees successfully served the named defendants D'Arbonne Construction, Caskey Terral, and Earnest Lee Johnson. Nothing in the record reflects even attempted service upon the John Does by warning order or otherwise. While there is no required time for service of an unknown John Doe, certainly such service must be obtained before the conclusion of the litigation for the John Does to become parties to the litigation. Without having ever made the John Does parties to this litigation, appellee was under no obligation to file a nonsuit requesting voluntary dismissal pursuant to Ark. R. Civ. P. 41(a).

Because of the total abandonment of any claims against the John Doe defendants, because of the specific allotment of 100 percent of the liability to the named defendants on the verdict forms, and because the John Doe defendants were never made parties to this litigation, we conclude that the trial court's order appealed from was a final order disposing of every claim against any and all parties to the litigation. To rule otherwise would contravene the judicial economy that Rule 54(b) was intended to encourage. Under these circumstances, we hold that Ark. R. Civ. P. 54(b) does not require that the appeal be dismissed. Accordingly, we reassign the case to the court of appeals for decision on the merits of the appeal.

IMBER, J., dissents.

ANNABELLE CLINTON IMBER, Justice, dissenting. This appeal should be dismissed under Ark. R. Civ. P. 54(b). The majority mistakenly concludes that the amended complaint eliminated all references to the John Doe defendants and the case proceeded to trial with no claims asserted against the John Does. The amended complaint was not designated an "amended and substituted" complaint, and it retained the two John Doe defendants in the style of the complaint. Therefore, it is not clear whether the claims asserted in the original complaint, including the claims asserted against the John Doe defendants, were still pending at the time of trial. Likewise, the pleadings do not support the majority's conclusion that all claims against the John Doe defendants were abandoned before the commencement of the trial.

Recently, in *Shackelford v. Arkansas Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998), we concluded that claims against two John Doe defendants were still pending, and that there was no final order as to the two unknown defendants or a Rule 54(b) certification. We therefore held that this court did not have jurisdiction to hear the case, and we dismissed the appeal without prejudice so that the trial court could enter a final order as to the remaining defendants, John Doe 1 and 2. *Id.* Similarly, this case still has pending claims against John Doe 1 and 2, and there is no final order as to the two John Doe defendants or a Rule 54(b) certification. The majority's opinion ignores the plain language of Rule 54(b) that provides:

> Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

Ark. R. Civ. P. 54(b)(2) (2001). The majority's opinion also, *sub silentio*, overrules *Shackelford v. Arkansas Power & Light Co., supra.* Furthermore, the majority incorrectly holds that service on John Doe defendants must be obtained before the conclusion of the litigation under Ark. R. Civ. P. 4(f) (2001). Rule 4(f) provides for service by warning order upon a defendant whose identity or whereabouts remains unknown. However, the last sentence in Rule 4(f)(1) expressly states: "This subsection shall not apply to actions against unknown tort-feasors." Ark. R. Civ. P. 4(f)(1) (2001). Thus, Rule 4(f) does not require service by warning order upon the unknown tortfeasors in the instant case. As the majority points out, there is no time limit for service on John Doe defendants. After Rule 4(i) establishes the 120-day time limit in which defendants must be served after the filing of the complaint, the last sentence of that subsection states: "This paragraph shall not apply . . . to complaints filed against unknown tortfeasors." Ark. R. Civ. P. 4(i) (2001). Rule 4 of the Arkansas Rules of Civil Procedure simply sets no deadline for serving an unknown tortfeasor.

Based upon the plain language of our rules of civil procedure and our decision in *Shackelford v. Arkansas Power & Light Co., supra*, we do not have jurisdiction to hear this case and should dismiss this appeal without prejudice so that the trial court may enter a final order as to the remaining defendants, John Doe 1 and 2.

I respectfully dissent.

Kenneth HAWKINS *v.* STATE of Arkansas

CR 01-1065 72 S.W.3d 493

Supreme Court of Arkansas
Opinion delivered April 25, 2002

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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

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

RAY THORNTON, Justice. Appellant, Kenneth Hawkins, was convicted of rape, and sentenced to life imprisonment as a habitual offender pursuant to Ark. Code Ann. § 5-4-501 (Supp. 2001). This conviction stems from the rape of appellant's stepdaughter, R.T., who was under the age of fourteen at the time the offense occurred.

During appellant's trial, the physician who treated R.T. after the rape, was permitted to testify that R.T. identified appellant as her attacker. Appellant objected to this testimony arguing that it was hearsay and that it should have been excluded. The trial court overruled appellant's objection.

On appeal, appellant challenges the trial court's evidentiary ruling. We affirm the trial court.

In his only point on appeal, appellant contends that the trial court erroneously permitted R.T.'s doctor to testify that R.T. identified appellant as her attacker. Appellant argues that this testimony is impermissible hearsay. A trial court is accorded wide discretion in evidentiary rulings. *Flores v. State*, 348 Ark. 28, 69 S.W.3d 864 (2002). We will not reverse a trial court's ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Id.*

[redacted] Pursuant to Rule 801(c) of the Rules of Evidence, "'hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Such testimony is generally inadmissible evidence. *See* Rule 802 of the Arkansas Rules of Evidence.

In the case now before us, appellant objected to Dr. May Hawawini testifying as to statements made to her by R.T., during her examination of R.T. The trial court denied appellant's hearsay objection without explanation. On appeal, the State argues that Dr. Hawawini's testimony was admissible pursuant to Rule 803(4) of the Arkansas Rules of Evidence. This rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id.

We have recently reviewed our court's interpretation and application of Rule 803(4) in *Flores supra.* In *Flores,* we were asked to determine whether hearsay evidence was properly admitted pursuant to Rule 803(4). Specifically, we were asked to determine whether the trial court erred when it allowed a treating physician to testify that his patient's mother identified her boyfriend as the individual who had inflicted injuries on her child by throwing him up against a wall. *Flores, supra.* We discussed previous cases in which this court addressed appropriate use of Rule 803(4). Additionally, we reviewed cases in which our court of appeals and the Eighth Circuit Court of Appeals has applied or refused to apply the medical-treatment exception to the hearsay rule. *Flores, supra.*

[redacted] In *Flores,* we stated "the basis for this hearsay exception is the patient's strong motivation to be truthful in giving state-

ments for diagnosis and treatment." *Id.* (*citing* Cotchett and Elkind, *Federal Courtroom Evidence* 144 (1986)). We further acknowledged that statements describing medical history regarding the cause of the condition are also admissible under the rule, if pertinent to the diagnosis or treatment. However, where such information is not relevant for diagnosis, but rather attempts to fix blame, it must be excluded. *Flores, supra.*

After providing the background for the exception, we applied a test that was articulated by the Eighth Circuit in *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) to assist us in determining whether hearsay evidence fits within the medical-treatment exception. *Flores, supra.* The two-prong test asks: first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment. *Flores, supra.* In *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985), the Court of Appeals explained:

> The test reflects the twin policy justifications advanced to support the rule. First, it is assumed that a patient has a strong motive to speak truthfully and accurately because the treatment or diagnosis will depend in part upon the information conveyed. The declarant's motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule. Second, we have recognized that a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription.

Id. (Internal citations omitted).

After applying this test to the facts in *Flores*, we determined that the trial court properly admitted the mother's statement to the doctor concerning the fact that the child was physically abused based on the medical-treatment exception, but had improperly admitted the portion of the testimony that identified Flores as the child's attacker. *Id.* We determined that the identification of the perpetrator was not used by the physician in the diagnosis or treatment of the child's injuries. Accordingly, we concluded that the statement that identified the perpetrator was improperly admitted pursuant to Rule 803(4). *Flores, supra.*

The facts in this case are readily distinguishable from the facts in *Flores*. Specifically, in the case *sub judice*, the declarant was a child victim who was responding to questions from the physician seeking to determine the cause of the injury and the treatment to be provided. By contrast, the hearsay statements in *Flores* were not made in response to questioning of a victim by a physician in her process of ascertaining circumstances reasonably pertinent to diagnosis or treatment. Another critical distinction between the case now before us and *Flores* is that the hearsay statements in *Flores* were made in an effort to shift blame from one child abuser to a second child abuser. Here, the statements were made by an abused child in response to an effort by the doctor to treat and diagnosis the child's injuries.

In *Flores*, we also noted a modification of the principles of Rule 803(4) that is relevant to the case *sub judice*. Specifically, we stated:

> Only in the special situation of sexual or physical abuse of a child has the rule of excluding the identification of the perpetrator been modified. Again, it is the Eighth Circuit Court of Appeals that has outlined this child-abuse exception in the leading case on the matter. *See United States v. Renville*, 779 F.2d 430 (8th Cir.1985).

Flores, supra.[1]

In *Stallnacker v. State*, 19 Ark. App. 9, 715 S.W.2d 883 (1986), our court of appeals considered the *Renville* approach in deciding whether a trial court had properly admitted a physician's testimony regarding a victim's identification of her father as her sexual abuser. The identification was made in response to the physician's questions. *Stallnacker, supra.* The victim was admitted to the emergency room of the hospital complaining of abdominal pain. The treating physician, while completing a menstrual and sexual history to rule out certain medical conditions, asked the child if she had ever engaged in sexual intercourse. *Id.* The child responded "only when my father made me." *Id.* This statement

[1] In *Flores*, we concluded that the *Renville* analysis did not apply to the facts of that case.

was introduced into evidence at trial through the treating physician. Stallnacker sought to exclude the evidence on appeal. *Id.*

The court of appeals, in its consideration of whether the evidence should have been admitted looked to the Eighth Circuit's *Renville* opinion and quoted the following language with approval:

> We believe that a statement by a child abuse victim that the abuser is a member of the victim's immediate household presents a sufficiently different case from that envisaged by the drafters of rule 803(4) that it should not fall under the general rule. Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment.

Stallnacker, supra. (*quoting Renville, supra.*).

The court of appeals noted that child abuse extends further than physical injury, and the "physician must be attentive to treating the emotional and psychological injuries which accompany this crime." *Stallnacker, supra* (*citing Renville, supra*). Additionally, the court of appeals noted that "prevention of recurrence of the injury is a paramount consideration in the treatment of children who have been sexually abused in the home." *Stallnacker, supra.* The court of appeals also explained that this consideration is expressed in the legislatively imposed duty placed on physicians to report suspected cases of child abuse.[2] *Id.* Finally, the court of appeals noted that the obligation on the physician to prevent the abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse "is most immediate where the abuser is a member of the victim's household." *Id.* (*citing Renville, supra.*) The court of appeals concluded that the trial court properly admitted the hearsay evidence from the treating physician identifying Stallnacker as the patient's abuser.[3] *Stallnacker, supra.*

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[2] Arkansas Code Annotated § 12-12-507 (Supp. 2001) requires medical personnel to report suspected child maltreatment.

[3] Our court of appeals has also extended the *Renville* analysis to include situations involving physical abuse when the victim answers a doctor's inquiry about what happened. *See Clausen v. State*, 50 Ark. App. 149, 901 S.W.2d 35 (1995).

Remaining mindful of the reasoning of these cases, we must now determine whether the trial court properly admitted Dr. Hawawini's testimony. Dr. Hawawini testimony was as follows:

> Q: [PROSECUTING ATTORNEY] What did she [R.T.] come to your office for on that date? What was her problem?
>
> A: [DR. HAWAWINI] On that date she was brought by her grandmother, complaining of pain when urinating, dysuria.
>
> Q: How was she acting on that day?
>
> A: It was actually brought to my attention. I was examining another patient in another room when I heard [R.T.] screaming and crying and saying that — and I went out to see what was going on. My nurse was trying to give her a urine cup to have a sample, to give us a sample, and that's when she was crying that she didn't want to go pee.
>
> Q: Had you ever seen her act like that before?
>
> A: No.
>
> Q: How does she normally act?
>
> A: She's been always sweet and cooperative and, a very sweet and outgoing girl, yeah.
>
> Q: Were you able to get her calmed down where you could perform some sort of examine on her?
>
> A: Yes. What happened is, I told her it's okay. We don't have to do it if it's that painful at that point. Let's just talk and do a physical exam first. And we quieted her down first.
>
> Q: And after she got quieted down, did you perform a physical exam on her?
>
> A: Yes. I had to talk to her first a little while and calm her down. And then I started interviewing her and do a physical exam on her, yes.
>
> Q: And when you talk about a physical exam, do you examine the genitalia?
>
> A: Well, as a part of a complete physical exam, especially when you have such a complaint, urinating, any problems with urination, a genitalia exam is a part of your exam. You should perform that, yes.

Q: And you performed that on her at that time?

A: Yes.

Q: What were your physical findings, if any, did you see on her then?

A: It was, it was severe erythema and edema, which is like severe redness and swelling of the genital area, the labia minora, and all around, the tissue around it. It was very tender to touch.

It was really hard at that point to kind of calm her down. We were talking to her all through. But it was very tender to touch.

* * *

A: Well, I had prepared some Q-tips to do cultures and we obtained a few cultures. But I didn't do all the cultures. It was very hard to continue. But then I quiet down [R.T.] and then sat down and asked her if there is anything that she wants to tell me about, that there is something going on or —

Q: And was that what you call a patient history? Was a patient history taken of [R.T.] by you at that time?

A: Yes. It was, the detail was really afterward when I was, after I examined her.

Q: And did you use that history in making you final diagnosis of [R.T.] on that day?

A: Yes ma'am.

Q: What did she tell you happened to her?

Ms. Byrd: [DEFENSE COUNSEL] I just object to hearsay, your honor.

The court: All right. That will be overruled.

Q: [PROSECUTING ATTORNEY] What did she tell you happened to her?

Dr. Hawawini: I would like to read my note, your honor.

The court: That would be good.

Dr. Hawawini: Okay. I started interviewing [R.T.]. She was crying, and then she said that she wants to tell me about it and asked to be alone, that me and her be alone, left alone in the

room. And started to cry again and said, I don't know how to tell you.

I said, quote to quote, "Do you want me to ask you questions?"

She said, quote to quote, "Yes."

I said, "Did somebody try to hurt you?"

She said, "Yes."

I said, "Is it a stranger?"

She said, "No."

I said, "Is it a man or women?" She started crying then and I started talking.

Quote to quote, she said, "It's a man. He is no stranger. He lives with us. He is a truck driver. He is my stepfather." And stopped again to cry.

Then, I said, "It's okay. Everything will be okay." And she nodded her head and stopped crying. And I said, "Can you tell me just what, tell me what happened?"

She said, "He hurt me. He put his private parts between my legs."

I said, "How many times did it happen? Did it happen only one time?"

She said, "No, more."

I said, "When was the last time?"

She said, "A while ago, in February on a Tuesday," and started crying again and did not want to talk about it anymore.

And I said, "Just one last question. Did you tell anybody else?"

She said, "No. Only you."

Q: [PROSECUTING ATTORNEY] And based upon that, what did you do after?

A: Well, after that, I had, I had, you know, reassured her, spent a little time with her. And then I told her that I am going to have to tell somebody about it so we make sure to see what happen in

> that, it will never happen again. And then I went and called the DHS office. I called Dr. Jerry Jones at Child House at Children's for further evaluation.

We now address the issue whether Dr. Hawawini's testimony regarding the identification of appellant as R.T.'s rapist was properly admitted under Rule 803(4). R.T.'s identification of appellant as her abuser allowed Dr. Hawawini to take steps to prevent further abuse by her stepfather, who was a member of her household. Additionally, R.T.'s identification of appellant as her abuser allowed Dr. Hawawini to take steps to treat the emotional and psychological injuries which accompanied the rape. Moreover, we note that based on R.T.'s statements Dr. Hawawini referred her to a physician at Children's Hospital who specialized in treating children who are sexually abused. Finally, R.T.'s identification of appellant as her abuser permitted Dr. Hawawini to fulfill her legislatively imposed duty of calling the child-abuse hotline and reporting the crime. Under our analysis it was not necessary that the victim's statement be made following a physician's explanation to the child that the question is important to the diagnosis or treatment, nor is it necessary that the victim manifest an understanding of the importance of her statements to the treating physician. *But see Olesen v. Class*, 164 F.3d 1096 (8th Cir. 1999). Accordingly, we hold that R.T.'s statements to Dr. Hawawini fall within the medical-treatment exception set out in Rule 803(4) and were properly admitted by the trial court.

4-3(h) Review

In compliance with Ark. Sup. Ct. R. 4-3(h), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no error has been found.

Affirmed.

IMBER, J., not participating.

Jason McGEHEE *v.* STATE of Arkansas

CR 00-760 72 S.W.3d 867

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Sam T. Heuer, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. Jason McGehee appeals the trial court's denial of his petition for postconviction relief. His prior appeal from the denial of his petition for postconviction relief was reversed and remanded for the trial court to make the specific findings of fact and conclusions of law required under Ark.

R. Crim. P. 37.5, and due to a flagrantly deficient abstract. *McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001). McGehee's convictions on capital murder and kidnapping, and respective sentences of death and life imprisonment, were affirmed in *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999) ("*McGehee I*").

McGehee asserts five separate errors by counsel that he alleges required the trial court to find he is entitled to relief under Rule 37. More particularly, McGehee asserts ineffective assistance of counsel in: 1) failure to request a jury instruction declaring that Candace Campbell and Robert Diemert were accomplices to the capital murder; 2) failure to seek a similar ruling from the trial court as a matter of law; 3) failure to raise the issue of the constitutionality of his sentence given that others similarly involved were sentenced to lesser terms; 4) failure to raise on direct appeal the issue of the denial of transfer where co-defendant Benjamin McFarland had just been convicted of Melbourne's murder in Baxter County; and 5) abandonment of the issue of consideration of victim-impact evidence in the sentencing phase.

We find no reversible error and affirm the denial of the petition for postconviction relief.

Facts

This case arose from the murder of fifteen-year-old John Melbourne, Jr. In August of 1996, Melbourne was acquainted with Jason McGehee, Benjamin McFarland, Christopher Epps, and Candace Campbell, all of whom were older than he was. They were occupying a house in Harrison and ranged in age from seventeen to twenty-one years old. The facts show that McGehee was the twenty-one-year-old and the leader of the group.

McGehee moved into the house in Harrison while it was still being rented by Robert Diemert. However, Diemert moved shortly thereafter and ceased paying rent. Nonetheless, McGehee remained in the house, and the others moved in with McGehee. Melbourne stayed the night there occasionally. There was no power at the house, and the group apparently financed their

purchase of food, alcohol, and drugs by stealing property and passing stolen checks.

On August 19, 1996, Melbourne was sent by McGehee to obtain cash by providing a stolen check made out for more than the amount required to purchase shoes. Melbourne made two attempts at Cooper Store in Harrison and was able to purchase shoes on the second attempt. The store owner became suspicious and called the bank. Upon determining that the check was stolen, the store owner called police who picked up Melbourne and Anthony Page and questioned them. Melbourne told the officers about stolen property and checks that could be found at and near McGehee's house. Melbourne was then released into his father's custody but was soon back on the streets in downtown Harrison.

Police proceeded to the house where they attempted to contact those living there. No one answered the door, and according to Christopher Epps's testimony, the police proceeded directly to the stolen items including the stolen checks under the house. The police located the stolen property. This activity by police was observed by McGehee and the others who were hiding inside the house.

Later that night, John Melbourne, Jr., was murdered. The facts show escalating events that commenced with the visit by police and culminated with Melbourne's death.

After the police left upon finding the stolen goods, the group at the house agreed that Melbourne had "snitched." The facts show that the group then agreed that Melbourne needed to be taught a lesson. They decided that upon Melbourne's return, they would beat him to teach him not to "snitch."

Anthony Page testified that the group was always talking about beating someone. McFarland and Epps found Melbourne in town and asked him to return to the house, which he did. Upon his return, Melbourne was attacked by Epps as he spoke with McGehee about his arrest. Then McGehee began to beat Melbourne as well. At this point, Melbourne was being beaten with fists and also being kicked. McFarland joined in, as did Campbell. Melbourne was stripped naked, and the assault continued. There

was some evidence that Campbell sprayed him in the face with Lysol and burned him with a candle.

This initial beating lasted about an hour and a half or possibly two hours. The evidence fails to show that there was any discussion of killing Melbourne throughout this time. The first mention of death in the evidence comes shortly thereafter from a conversation between McGehee and Charla Bright. Bright was their neighbor who came over twice as she heard the noises of Melbourne being beaten. She observed Melbourne as he was being assaulted. She testified that she was later assured by McGehee that Melbourne would not be hurt. However, she also testified that MeGehee told her that if this had occurred in a bigger city, he would be killed for what he had done. McGehee told her Melbourne had "narked them out."

The next mention of death was in a car on a trip to Utah that included a stop in Omaha, Arkansas. The trip was undertaken because both McGehee and Epps were wanted by the police and were now more fearful of arrest because of the police visit to their home. According to Epps's testimony, they overheard the police use their names while hiding from the police in the house as the police searched for the items they were told of by Melbourne. Near the close of the two-hour beating, Diemert arrived. He had a car. Diemert testified that McGehee had discussed moving to Utah with him previously, and when McGehee suggested that they go that night, he agreed.

By the time Diemert arrived, McGehee had allowed Melbourne to put his shirt and shorts on. Diemert testified that as they loaded the car he was unaware that Melbourne had his hands bound. Bright testified she heard the group leave that night.

They then left for Utah, but headed first for a house in Omaha that McGehee's uncle had rented until recently. According to Campbell's testimony, she understood they were going to the house in Omaha to leave McFarland, Epps, and Melbourne there. According to Epps's testimony, they were going to leave Melbourne there.

Campbell testified that during the ride to Omaha, she was sitting in McGehee's lap in the front passenger seat, and someone in the back seat asked Melbourne how it felt to know he was going to die. Again, according to Campbell's testimony, upon their arrival in Omaha, they took Melbourne in the house there. He was stripped naked again, and the assault on Melbourne began again. Everyone present was engaged in the assault on Melbourne. According to Diemert, Melbourne was kicked, hit with fists, hit with a box fan, and struck with a piece of wood used like a bat. Diemert also testified that a butcher knife was placed at Melbourne's throat. According to Epps's testimony, the butcher knife was placed at Melbourne's stomach. Diemert further testified that Campbell kicked and then burned Melbourne's genitals with a candle. Campbell testified that during this beating McGehee asked Melbourne how it felt knowing he was going to die. Melbourne attempted escape but was grabbed and brought back.

It appears the group decided to take a break from their brutal assault, and they went outside to have a smoke. According to Campbell's testimony, Epps was guarding Melbourne while the rest talked outside. Again, according to Campbell, McGehee asked McFarland if he was going to take care of Melbourne, which Campbell understood meant they intended to kill him. She testified that McFarland was hesitant, but that McGehee was suggesting they get rid of Melbourne. Campbell testified further that then she and Diemert were told to go wait in the car, which they did. Diemert testified that McGehee led Melbourne down a path into the woods. McFarland and Epps followed along. At this time, Melbourne again had his hands bound and had not been allowed to dress. Again according to Diemert, the three returned about thirty minutes later without Melbourne.

Standard of Review

McGehee's conviction and sentence were affirmed by a decision of this court handed down June 17, 1999. Pursuant to Ark. R. Crim. P. 37.5(k) "Special Rule for Persons Under Penalty of Death," Rule 37.5 is applicable to McGehee because he became eligible to file a petition under Rule 37.2(c) after March 31, 1997.

A five-page order setting out findings of fact and conclusions of law is provided. Therein, the trial court discusses each issue raised by McGehee and makes specific findings and conclusions. The trial court denied McGehee's petition.

Where ineffective assistance of counsel is asserted, the reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Thomas v State*, 330 Ark. 442, 954 S.W.2d 255 (1997). In order to rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., that the decision reached would have been different absent the errors. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.* In determining a claim of ineffectiveness, the totality of the evidence before the factfinder must be considered. *Chenowith v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000). This court will not reverse the denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000).

To prevail on a claim of ineffective assistance of counsel, McGehee must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Kemp v. State*, 347 Ark. 52, 60 S.W.3d 404 (2001) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

Failure to Request Jury Instruction or seek a Determination as a Matter of Law that Campbell and Diemert were Accomplices

McGehee's first two assertions of ineffective assistance of counsel — the failure to request a jury instruction declaring Campbell and Diemert were accomplices to the capital murder or the failure to seek a similar ruling from the trail court as a matter of law — are so closely related that we will discuss both assertions together.

The State relied heavily upon the testimony of Campbell and Diemert in its proof of the capital murder. As this court stated in

its opinion on McGehee's direct appeal, the trial court instructed the jury that Epps was an accomplice to the capital murder as a matter of law, and that Epps, Campbell, and Diemert were accomplices to the kidnapping as a matter of law. *McGehee*, 338 Ark. at 160. However, as this court also noted, it is not apparent from the record that McGehee ever requested that Campbell and Diemert be declared accomplices with respect to the capital-murder charge as a matter of law or that the issue be submitted to the jury. This court held McGehee was procedurally barred from pursuing this issue on appeal, and McGehee now argues this failure was ineffective assistance of counsel requiring relief under Rule 37. More specifically, McGehee argues that this constitutes a failure to preserve a challenge to the sufficiency of the evidence and, as such, is a proper ground for postconviction relief, citing *Thomas v. State*, 322 Ark. 670, 911 S.W.2d 259 (1995).

[redacted] If Campbell and Diemert had been found to be accomplices either by the court or by the jury, their testimony would have required corroboration. A person cannot be convicted of a felony based upon the testimony of an accomplice, unless that testimony is "corroborated by other evidence tending to connect the defendant with the commission of the offense." Ark. Code Ann. § 16-89-111(e) (Supp. 2001); *McGehee, supra.* We must then determine whether Campbell and Diemert were accomplices. The law is well settled that a witness's status as an accomplice is a mixed question of law and fact. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996); *Hummel v. State*, 210 Ark. 471, 196 S.W.2d 594 (1946). However, when the facts show conclusively that the witness was an accomplice, the issue may be decided as a matter of law. *King, supra.* When the accomplice status instead presents issues of fact, the question is submitted to the jury. *Id.* The trial court was never asked to declare Campbell and Diemert accomplices nor to submit the issue to the jury. McGehee argues that his counsel's failure to do so constitutes ineffective assistance of counsel because if the testimony of Epps, Campbell, and Diemert is excised, there is no direct or circumstantial evidence to link McGehee to the murder scene.

Before we discuss the status of Campbell and Diemert, we must note that McGehee's argument is based on an assumption that death was inflicted by strangulation by McGehee, Epps, and McFarland after they led Melbourne down the path into the woods.

In *McGehee I* we stated at 158:

> The beating initially occurred at Appellant's house in Harrison and later continued at Appellant's uncle's house in Omaha, Arkansas. After having beaten the boy for approximately two hours, Appellant, McFarland, and Epps took Melbourne out behind the house in Omaha, into a wooded area, and strangled him.

At page 166 we stated:

> Dr. Charles Kokes, an associate medical examiner at the State Crime Laboratory, performed an autopsy on Melbourne's body, which was severely decomposed. Dr. Kokes testified that there was evidence of trauma to Melbourne's skull. Particularly, he found numerous small fractures on the front of the cranium, around the nasal apeture, on the left cheekbone, and near the left orbit, the bony depression that houses the eyeball. Additionally, there were two traumatic indentions on the right side of the front of the skull. Dr. Kokes stated that the fractures were indicative of blunt force being used on the victim, and that the injuries he observed would be consistent with multiple beatings over a long period of time by persons using fists, feet, and various other devices. Dr. Kokes indicated that the manner of Melbourne's death was homicide, and that the blunt-force injuries to the victim's head played a part in his death.
>
> [FN 1] Dr. Kokes was not able to examine the body for evidence of strangulation, as the soft tissue around the neck had already completely decomposed.

Campbell was present at the beating in Harrison, and both Campbell and Diemert were present at the beating in the house in Omaha. Diemert was present in Harrison, but it appears he arrived there after the beating had ceased. Neither was present at the events in the woods. McGehee's reliance on death by strangulation as the only cause of death is in error. Dr. Charles Kokes's initial opinion in this case was that death was caused by blunt-

force head injuries and strangulation. Dr. Kokes further testified that the body was so decomposed that there was no soft tissue evidence of strangulation in this case, and strangulation was included in his opinion based on investigative material he was given. He testified that the bony injuries that they would normally look for to indicate strangulation were not present. According to Dr. Kokes, this was likely a consequence of Melbourne's young age. More specifically, Dr. Kokes's testified, "Concerning the cause of death, we know that there was infliction of blunt force trauma to the head and face area." Thus, the expert evidence as to the cause of death was the blunt force trauma to the head and face area.[1]

Those who inflicted the blunt-force trauma to Melbourne's face and head caused or played a part in his death. The question in this case is whether Campbell and Diemert were accomplices to McGehee in causing Melbourne's death. Under Ark. Code Ann. § 5-2-403 (Repl. 1997), an accomplice is defined as follows:

> (a) A person is an accomplice of another person in the commission of an offense if; with the purpose of promoting or facilitating the commission of an offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit it; or
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
>
> (3) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.
>
> (b) When causing a particular result is an element of an offense, a person is an accomplice in the commission of that offense if, acting with respect to that result with the kind of culpability sufficient for the commission of the offense he:
>
> (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the result; or

[1] We note that in *McFarland v. State*, 337 Ark. 386, 391, 989 S.W.2d 899 (1999), we stated that "Epps, McFarland, and McGehee took turns strangling Melbourne until he died," and that "McFarland admitted that he was the one strangling Melbourne with an orange cord when he expired." Benjamin McFarland was a co-defendant of McGehee's. However, in *McFarland* there is no discussion of Dr. Charles Koke's testimony. Dr. Kokes performed the autopsy on Melborne's body.

(2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the result; or

(3) Having a legal duty to prevent the conduct causing the result, fails to make proper effort to do so.

This statute was enacted by Act 280 of 1975. In *Wilson & Dancy v. State*, 261 Ark. 820, 827-828, 552 S.W.2d 223 (1977), this court stated that an appropriate definition of accomplice was found in *Simon v. State*, 149 Ark. 609, 233 S.W. 917 (1921), and quoted in *Burke v. State*, 242 Ark. 368, 373-374, 413 S.W.2d 646(1967):

> The test, generally applied to determine whether or not one is an accomplice, is, could the person so charged be convicted as a principal, or an accessory before the fact, or an aider and abetter upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice.
>
> * * * * *
>
> The term 'accomplice' cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge, or is morally delinquent, or who was even an admitted participant in a related, but distinct offense.
>
> To constitute one an accomplice, he must take some part, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice. Nor can the concealment of knowledge, or the mere failure to inform the officers of the law when one has learned of the commission of a crime.

In *Atkinson, supra*, this court noted that 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. In *Atkinson, supra*, this court stated:

> Relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in proximity of a

> crime, the opportunity to commit the crime, and an association with a person involved in a manner suggestive of joint participation. Id. A defendant is an accomplice so long as the defendant renders the requisite aid or encouragement to the principal with regard to the offense at issue, irrespective of the fact that defendant was not present at the murder scene and did not directly commit the murder. *See Sumlin v. State*, 273 Ark. 185, 618 S.W.2d 372 [617 S.W.2d 372] (1981) (holding that it is irrelevant that Sumlin, who was in jail at the time of the murder, did not pull the trigger, if he aided, solicited, or encouraged his wife, Ruth Sumlin, in committing the murder).

347 Ark. at 347.

In its Findings of Fact and Conclusions of Law on the Rule 37 petition, the trial court erred when it found that counsel was not ineffective in failing to submit the issue of the accomplice status of Campbell and Diemert to the court or to request a jury instruction on the issue. There was sufficient evidence to submit the issue of accomplice liability to the jury as to Campbell and Diemert had counsel requested a jury instruction. Both Campbell and Diemert were friends with McGehee. Both were present and could see that Melbourne was deprived of his freedom and was being subjected to physical assault. Campbell was present both at the beating in Harrison and at the beating in Omaha. Diemert was present in Harrison just after the beating ceased there and present in Omaha. Campbell and Diemert were present in the car when someone in the back asked Melbourne how it felt to know he was going to die, and both were present at the Omaha house when McGehee asked Melbourne during the beating how did it feel knowing he was going to die. Standing alone, that would constitute sufficient facts, but by their own admission both participated in the beating of Melbourne to some extent. The evidence of the degree of their involvement was in question, and the issue should have been submitted to the jury, had counsel so requested. This court has stated that the question must be presented to the jury where there is any evidence to support a jury's finding that the witness was an accomplice. *Bradford v. State*, 325 Ark. 278, 927 S.W.2d 329 (1996); *King, supra.*

Even though we hold that the issue of accomplice liability should have been submitted to the jury, had counsel so requested, relief under Rule 37 is not required. Even if Campbell and Diemert had been found accomplices by the jury, their testimony was corroborated. The test for corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Henderson v. State*, 337 Ark. 518, 990 S.W.2d 530 (1999). Corroborating evidence must be sufficient standing alone to establish the commission of the offense and to connect the defendant with it. *Gordon v. State*, 326 Ark. 90, 931 S.W.2d 91 (1996). *See also, Hogue v. State*, 323 Ark. 515, 915 S.W.2d 276 (1996); *Daniels v. State*, 308 Ark. 53, 821 S.W.2d 778 (1992); *Andrews v. State*, 305 Ark. 262, 807 S.W.2d 917 (1991).

In *Gordon, supra*, this court noted that the corroborative evidence must be substantial evidence, which is stronger evidence than that which merely raises a suspicion of guilt. *Gordon, supra; Hogue, supra.* Circumstantial evidence qualifies as corroborating evidence but it, too, must be substantial. *Gordon, supra.* But corroboration need not be so substantial in and of itself as to sustain a conviction. *Id. See also, Rhodes v. State*, 280 Ark. 156, 655 S.W.2d 421 (1983). In *Henderson v. State*, 279 Ark. 435, 440-441, 652 S.W.2d 16 (1983), this court stated:

> Corroboration must be evidence of a substantive nature since it must be directed toward proving the connection of the accused with the crime and not directed toward corroborating the accomplice's testimony. *Olles v. State*, 260 Ark. 571, 573, 542 S.W.2d 755, 758 (1976), citing *Yates v. State*, 182 Ark. 179, 31 S.W.2d 295 (1930). In addition to being substantive, the corroborating evidence must be substantial. *Olles*, at 573, 542 S.W.2d at 757. Substantial evidence is stronger evidence than that which merely raises a suspicion of guilt. It is evidence which tends to connect the accused with the commission of the offense charged. However, it is something less than that evidence necessary in and of itself, to sustain a conviction. *Olles*, at 573, 542 S.W.2d at 757-58; *Klimas v. State*, 259 Ark. 301, 534 S.W.2d 202 (1976). The corroborating evidence may be circumstantial, but it must be of a material nature and legitimately tend to connect the

> accused with the commission of the crime. *Pollard* at 756, 574 S.W.2d at 658, citing *Roath v. State*, 185 Ark. 1039, 50 S.W.2d 985 (1932). Corroboration may be furnished by the acts, conduct, declarations or testimony of the accused. *Olles*, at 574, 542 S.W.2d at 758. False statements to the police and flight by an accused may constitute corroborating evidence. *Bly*, at 619-20, 593 S.W.2d at 454.

The evidence does not have to be sufficient to sustain the conviction but it must, independent from the testimony of accomplices, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *King v. State*, 254 Ark. 509, 494 S.W.2d 476 (1973). Moreover, corroboration can be provided by the acts, declarations, or testimony of the accused. *Barnett v. State*, 346 Ark. 11, 53 S.W.3d 527 (2001). *Daniels, supra.*

Evidence of the events in Harrison came from witnesses other than Campbell, Diemert, and Epps. Charla Bright lived next door to the home Jason McGehee and the others were occupying. She testified she knew both McGehee and Melbourne. According to her testimony, on the afternoon of August 19, she was in her bedroom and heard thumping on the wall in the house next door. She went over to see what was going on but was not let in. She returned to her home, but still heard the same noises. Bright went back, and this time she stuck her foot in the door and used her hip to force the door open some. She saw they had Melbourne up against a wall, and McFarland and Epps were hitting and kicking him. Bright asked Campbell why this was happening and she responded, "Don't worry about it, you're just going to get yourself into trouble." McGehee then came to the door and told Bright, "Don't worry about it, he's our 'homey,' we're not going to hurt him." She further testified that McGehee told her that if they "were in a bigger city, he'd be killed for what he's done. . . he's our friend and we're just going to teach him a lesson." Again according to Bright's testimony, soon thereafter McGehee came over to Bright's house and told her not to worry about it, that Melbourne was his "homey," and that they were not going to hurt him. McGehee assured her that Melbourne was their friend and that they were just going to teach him a lesson. Later that

same evening, Bright, Epps, and McFarland drove into town looking for drugs. According to Bright's testimony, McFarland and Epps discussed the kicks they were giving Melbourne, whether they were "good or not and how hard. . . ."

There was also testimony from Anthony Page that connected Melbourne and McGehee. There was also testimony from Mandy Trice that Melbourne spent time in the company of McGehee. Page also testified that on August 19, 1996, he went with Melbourne to the shoe store to cash the stolen check and was subsequently arrested along with Melbourne. Page further testified that he knew that the check was stolen because it was on the same account as a check that he had previously cashed for McGehee. Page also testified that on the night that he and Melbourne were arrested, Page was approached by McFarland on the town square. Page testified that McFarland told him that Melbourne had snitched on them, and that they had him at the house where "he was in the process of getting the worse [sic] ass beating of his life." According to Page, McFarland then asked Page if he wanted to help, which he declined to do.

Page also testified that he did not wish to go to McGehee's house at that point out of fear because he, too, had given information to the police and because "all they ever talked about was beating people's asses." Page additionally testified to an event a week or so before where he was asked to take McGehee, McFarland, Melbourne, and a man named Clinton Spears to an outlying area to smoke marijuana. However, when they got there Spears was beaten for snitching, and McGehee made multiple threats that he wished to kill Spears. Further evidence was provided in the property receipt given to Melbourne by the police when they took the shoes he'd purchased, which were found in the home in Harrison, and which bore McGehee's finger print.

The testimony of Page and Bright established that Melbourne was beaten in the house in Harrison because he had "snitched." Thus, the beating was established as an intended act, and both Bright and Page put McGehee in the house and established a relationship between McGehee and Melbourne. *See Stickley v. State*, 294 Ark. 44, 740 S.W.2d 616 (1987). Addition-

ally, "proof of ill will and threats" is sufficient to corroborate an accomplice's testimony. *Sargent v. State*, 272 Ark. 336, 339, 614 S.W.2d 503 (1981); *Roberts v. State*, 96 Ark. 58, 131 S.W. 60 (1910). Bright testified that McGehee told her that had Melbourne "snitched" on his cohorts in a big city, he would have been killed. According to Page's testimony, he was present when McGehee beat up Spears for "snitching," and again according to Page's testimony, McGehee voiced threats to Spears that he wanted to kill him.

Additional evidence places McGehee in the house in Harrison and in the house in Omaha. According to Bright's testimony, she heard them leave the house in Harrison. The next day, McGehee and the others were gone. According to Epps's testimony, McGehee and Epps wanted to leave Arkansas because of outstanding warrants. McGehee wanted to go to Utah and wanted Diemert to take him there. Just as the accomplices testified, McGehee and Diemert, as well as others, were arrested in Utah. McGehee was charged with crimes there. There is evidence McGehee was in the house in Harrison on August 19 and that he was in Utah a few days later. There was also the testimony of Charles McMahan, who owned the property where Melbourne was killed. He testified that he had rented the property to a man named McGehee in the winter of 1995-1996, but that by summer no rent was being paid. This is consistent with the testimony that McGehee directed Diemert to drive the group out to an isolated farm his uncle had previously rented. There is also testimony from accomplices that Melbourne was stripped naked and beaten both in Harrison and in Omaha. According to Dr. Kokes's testimony, the body recovered bore no clothing.

Thus, aside from the testimony of accomplices, there was evidence of a material nature that legitimately tended to connect McGehee with the commission of the crime. Therefore, even if Campbell and Diemert had been found to be accomplices, their testimony would have been corroborated by other evidence tending to connect McGehee with the commission of Melbourne's murder. Neither the failure of counsel to request a jury instruction declaring Campbell and Diemert accomplices to the capital murder, nor the failure to seek a similar ruling from the

trial court as a matter of law requires relief under Rule 37 because this failure did not make any difference in the result of the trial. *See Strickland, supra; Thomas, supra.*

Sentence of Other Defendants to Lesser Terms

McGehee alleges that there was equal culpability on the part of McFarland, Epps, Campbell, and Diemert. He notes that while McFarland and Epps received a sentence of life without parole for the murder, Campbell received a sentence of twenty years, and Diemert received a sentence of ten years, he received the death sentence. The argument is flawed in that neither Campbell nor Diemert were charged, tried, or sentenced for murder. In any event, such an argument has been rejected by this court. The issue is whether the imposition of the death penalty is arbitrary. *Heard & Ferguson v. State*, 272 Ark. 140, 612 S.W.2d 312 (1981). In *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), we noted that we no longer required proportionality reviews of death sentences, citing *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995), and noting our discussion in *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995), where we stated that a comparative-proportionality review is not constitutionally mandated in every case where the death sentence is imposed, citing *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). We went on to note that our legislature, by enacting recent sentencing procedures, has provided a statutory check on arbitrariness by requiring a bifurcated proceeding where the jury is provided with information on aggravating and mitigating circumstances, and with standards in the use of that information. *See* Ark. Code Ann. §§ 5-4-103, 5-4-603 — 605 (Repl. 1997 and Supp. 2001).

Failure to Appeal the Trial Court's Denial of the Motion for a Change of Venue

McGehee asserts his appellate counsel was ineffective for failure to argue on direct appeal that the trial court erred when it denied his change-of-venue motion. Venue had already been moved once from Boone County to Baxter County, but McGehee claims he should not have been tried in Baxter County because McFarland had just been tried there four months before.

[redacted] The trial court found that in the Rule 37 hearing, McGehee made no showing of prejudice in the trial in Baxter County. The trial court further found there was no showing that the jury panel had any information about the pending charges against McGehee. McGehee argues prejudice because McFarland was tried in Baxter County just four months before him. McGehee then references two affidavits of community members who opined that McGehee could not receive a fair trial, as well as newspaper articles his counsel presented to the trial court. In short, McGehee offers no evidence of actual prejudice by any juror. This court in *Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996), found that *voir dire* of the jury provides adequate safeguards against pretrial publicity. Here there is no evidence *voir dire* revealed anything other than a jury committed to giving McGehee a fair trial and following the instructions of the court. Thus, there was no showing of an abuse of discretion by the trial court in the denial of the motion, which is required for a reversal. *Hill v. State* 331 Ark. 312, 323, 962 S.W.2d 762 (1998). There is no merit to a claim of ineffective assistance of counsel on the failure to raise the denial of the change-of-venue motion on the direct appeal.

Victim Impact

McGehee argues his counsel was ineffective in failing raise the issue of the constitutionality of victim-impact evidence on direct appeal. McGehee challenges the constitutionality of Act 1089 of 1993, alleging it is void for vagueness because it requires a jury to consider victim-impact evidence under Ark. Code Ann. § 5-4-602(4) (Repl. 1997) in the context of weighing aggravating and mitigating circumstances under Ark. Code Ann. § 5-4-603 and § 5-4-604. He also argues that it gives insufficient guidance to the jury and judge. McGehee also discusses the use of victim-impact testimony to prove aggravating factors. McGehee then refers to an additional aggravating circumstance submitted to the jury, which is a reference to the victim-impact testimony.

[redacted] The arguments as presented have already been presented to this court and rejected. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998). Again, on the argument presented, this

court has already found victim-impact evidence relevant and admissible on this matter at issue here regarding whether the death penalty should be imposed. *Lee v. State*, 327 Ark. 692, 703, 942 S.W.2d 231 (1996). Speaking generally, in *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), we upheld the underlying constitutionality of victim-impact testimony. *See Nooner*, 322 Ark. at 322-23, 907 S.W.2d at 688-89 (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)). This decision has been reaffirmed since. *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000); *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000). Based on the arguments presented, the admission of the victim-impact evidence in this case was consistent with prior case law. Thus, under these facts and arguments there is no merit to the claim of ineffective assistance of counsel.

Affirmed.

IMBER, J., not participating.

Leonard MAGBY *v.* STATE of Arkansas

CR 02-24 72 S.W.3d 508

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Petitioner, pro se.

No response.

PER CURIAM. On January 13, 1969, Leonard Magby entered a plea of guilty to grand larceny and burglary and was sentenced to three years' imprisonment. More than thirty-two years later, on September 19, 2001, Magby filed a *pro se* petition for writ of error *coram nobis* in the trial court.[1] Petitioner explained in the petition that he was challenging the judgment because the conviction was used to enhance a sentence imposed

[1] In those instances where the judgment of conviction was entered on a plea of guilty or *nolo contendere,* or the judgment of conviction which could have been appealed was not appealed and subsequently affirmed on appeal, the petition for writ of error *coram nobis* is filed directly in the trial court. If the judgment of conviction was affirmed on appeal, the petitioner must first proceed in this court and gain leave to file a petition in the trial court by means of a petition to reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis*. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001).

on him in a federal court proceeding. The petition was denied, and petitioner Magby filed a notice of appeal from the order rather than a petition for writ of certiorari in this court. We declared in *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984), that review of the denial of a writ of *coram nobis* was by certiorari, not appeal. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997). Petitioner took no further action in this court, until he was notified on December 19, 2001, that the circuit clerk had forwarded the record to this court in response to the notice of appeal.

Now before us is petitioner's motion seeking to file a belated petition for writ of certiorari to proceed with a review of the court's decision to deny the *coram nobis* petition. As we find that there is no sound reason to continue to require a petition for writ of certiorari to be filed in this court rather than a notice of appeal to be filed in the trial court from the denial of a petition for writ of error *coram nobis*, the motion is moot. Our clerk is directed to lodge petitioner Magby's appeal and set up a briefing schedule.

We further overrule our holding in *Skinner v. State*, 344 Ark. 184, 40 S.W.3d 268 (2001), which provided that a petitioner whose petition for writ of error *coram nobis* was denied must proceed in this court with a timely petition for writ of certiorari rather than a notice of appeal filed in the trial court. Any other case that is contrary to our holding in this matter is also overruled.

The writ of error *coram nobis* is an ancient writ developed from the common law of England that provides a remedy where the convicted criminal defendant is not protected by his right of appeal because the record on its face discloses no error to the appellate court. *See* Woods, *The Writ of Error Coram Nobis in Arkansas*, 8 ARK. L. BUL. 15 (1940). The review by this court of the denial or granting of a writ of error *coram nobis* by means of a petition for writ of certiorari is also a matter of common law. Either the convicted defendant or the State may seek review of the lower court's decision to grant or deny the writ. *State v. Hudspeth*, 191 Ark. 963, 88 S.W.2d 858 (1935).

As we noted in *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (1999), we do not overrule our common law cava-

lierly or without giving considerable thought to the change. Adhering to precedent promotes stability and predictability and respect for judicial authority. Nevertheless, we have long recognized that "Precedent, it is said, should not implicitly govern, but discreetly guide. . . ." *Roane v. Hinton*, 6 Ark. 525, 527 (1846). In *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), we concluded that the test is whether it is more important that the matter remain settled than that it be settled correctly. One of the reasons to change the common law is when it has become outmoded and unjust. *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997).

When dealing with a procedural change in the common law, the common law may be said to be outmoded and a change warranted when the procedure is needlessly complicated and there is no good cause to continue with the existing procedural rule. In the instant matter, requiring the petitioner to file a petition for writ of certiorari in this court within thirty days requires the petitioner to also produce a certified record of the lower court proceedings within that relatively short period of time inasmuch as the petition cannot be filed here without such a record. Moreover, the issues raised in the trial court in a *coram nobis* proceeding can be complicated and numerous and thus lend themselves to being fully briefed in accordance with our rules governing appeals.

While we treat an appeal from the denial of bail as a petition for writ of certiorari, the denial of bail is an exercise of the lower court's discretion for which there is no other immediate mode of review provided and which can be reviewed ordinarily with a limited record. *See Smith v. State*, 345 Ark. 472, 48 S.W.3d 529 (2001). By contrast, the review of an order denying a petition for writ of error *coram nobis* is similar to the review of an order denying a petition for writ of *habeas corpus*. In *Fulks v. Walker*, 224 Ark. 639, 275 S.W.2d 873 (1955), we held that there was no good cause to continue to require that denial of a petition for writ of *habeas corpus* in child-custody cases be reviewed by certiorari rather than appeal. As we said in *Fulks*:

> Continued use of the term certiorari would needlessly complicate appellate procedure, which certainly should be as simple as it can possibly be made to be. Henceforth, we shall call these pro-

> ceedings by their true names, appeals, and shall regard them as being governed by the statutes pertaining to appeals.

Fulks, supra.

[redacted] We also concluded in 1985 that the review of a finding of contempt, which had been heard on a petition for writ of certiorari for some 100 years, was reviewable as a final order by means of an appeal. *Frolic Footwear v. State*, 284 Ark. 487, 683 S.W.2d 611 (1985). In doing so, we noted that the rules of appellate procedure provided that the mode of bringing up a judgment, degree, or final order for review was by appeal. There being no real distinction between the review of an order of contempt by certiorari or review by appeal, we said that henceforth, as with *habeas corpus* matters, we would call the proceeding by its true name, an appeal, and regard it as being governed by the statutes and rules pertaining to appeals. There is likewise no real distinction to be made between review of the denial or granting of a petition for writ of error *coram nobis* by certiorari or by appeal.

[redacted] The mere change in the mode of review of an order, however, does not alter the standard of review employed by this court in determining whether the order should stand. The standard of review of the denial of a writ of error *coram nobis* shall remain whether the trial court abused its discretion in granting or denying the writ. *Larimore v. State*, 341 Ark. 397, 406, 17 S.W.2d 87, 96 (2000).

[redacted] We now turn to the retroactive or prospective application of this change in procedure. Because the retroactive application of this change to the present petitioner is not likely to create significant harm, we conclude that the petitioner will be permitted to proceed in this court on appeal of the order. *See Parish v. Pitts, supra.* Prospective application of our holding that this court's review of the denial of a petition for writ of error *coram nobis* shall be by appeal rather than by writ of certiorari shall commence with orders granting or denying petitions for writs of error *coram nobis* entered on or after the date of this opinion. Motion moot; appeal of order lodged.

William Keith McDANIEL *v.* STATE of Arkansas

CR 02-325] 72 S.W.3d 511

Supreme Court of Arkansas
Opinion delivered April 25, 2002

Ray A. Waters, for appellant.

No response.

PER CURIAM. Appellant William Keith McDaniel, by and through his attorney, has filed a motion for rule on clerk. His attorney, Ray A. Waters, states in the motion that the record was tendered late due to a mistake on his part.

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

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Scharel Ann BURLEY *v.* STATE of Arkansas

CR 01-1240 73 S.W.3d 600

Supreme Court of Arkansas
Opinion delivered May 2, 2002

[redacted]

Jeffrey W. Hatfield, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

W. H. "DUB" ARNOLD, Chief Justice. The appellant in this case, Scharel Ann Burley, appeals from a Washington County Circuit Court order denying her motion for directed verdict and denying her motion in limine. Burley raises two points on appeal: (1) the evidence introduced at trial was insufficient to support the jury's verdict of guilty on the charge of murder in the second-degree; and (2) the trial court abused its discretion in denying defendant's motion in limine to exclude from evidence an investigation of alleged child abuse by the defendant against another child. We affirm.[1]

On Wednesday, January 12, 2000, Central Emergency Medical Services responded to a 911 call from Prairie Grove, Arkansas. The paramedics arrived at the caller's home at 8:48 p.m. to assist a

[1] *Reporter's note*: *See Burley v. State*, 75 Ark. App. 311, 57 S.W.3d 746 (2001).

baby in distress. Moments after the paramedics arrived, the baby stopped breathing. The child was identified as eighteen-month-old Samuel Sams. Samuel had been vomiting clear liquid and green mucus, and was breathing at a rate of ten breaths per minute. The paramedics began CPR and transported Samuel to Washington Regional Medical Center. He was pronounced dead at 10:47 p.m.

Dr. Charles Kokes, a medical examiner with the State Crime Lab, performed the autopsy. The cause of death was determined to be acute peritonitis caused by a tear in the child's bowel. The tear was caused by an end-cap of a thermometer, measuring about three inches in length. The end-cap was still inside Samuel at the time of the autopsy. Dr. Kokes testified that peritonitis is associated with severe pain, but is not necessarily fatal. He further testified that the perforation of the rectal wall occurred six to twenty-four hours prior to Samuel's death. Dr. Kokes opined that the force necessary to cause this type of tear would be roughly equivalent to pushing the eraser end of a pencil through six sheets of Saran Wrap. The medical examiner ruled Samuel's death a homicide, and concluded that the perforation of his rectum wall by a thermometer cap was "not an accidental happenstance."

Burley was the child's caregiver at the time that the emergency call was made. Samuel had been in her care since Saturday, January 8, 2000. She told investigators that Samuel had a fever when she picked him up from his mother's home on Saturday and that she had taken his temperature each day he had been in her care using a digital ear thermometer. Burley denied ever using a rectal thermometer on Samuel and stated that although she did own a rectal thermometer, she had not seen it for several months. She also told the investigator that she had called the emergency room when Samuel's condition began to deteriorate and was told that Samuel would be fine as long as she could keep him hydrated. During the course of the investigation, Burley admitted that Samuel had not left her sight while he was in her charge, and that she was his only caregiver during the time period in question.

A search of a trash can in Burley's home produced a clear piece of a thermometer cover that matched the piece found inside

of Samuel's abdominal cavity. The police also found a rectal thermometer on a bookshelf in Burley's apartment. Paul Williams testified that around Thanksgiving he gave appellant a rectal thermometer that he received during a promotional event held by his employer, Wal-Mart. He further testified that he had seen Samuel the evening prior to his death and that there "was nothing wrong with him." However, Williams also testified that the next morning he observed Samuel in a crib and he "was just laying there like he was dead."

Brenda Westphall testified that her son had been in Burley's care on Sunday, January 9, 2000. She further stated that she borrowed a rectal thermometer from Burley on Sunday when she came to pick up her son. After taking her son's temperature, she left the thermometer, with both pieces of the protective cover intact, on a night stand in Burley's apartment. According to Westphall's testimony, the following day she noticed that the thermometer had been moved from the night stand. Two other witnesses testified that they had observed appellant taking Samuel's temperature using a rectal thermometer. Finally, Burley's telephone records were subpoenaed and the police found no evidence that Burley had made a call to the emergency room to seek advice on Samuel's care.

On February 18, 2000, Burley was first charged with second-degree murder; however, the information was later amended to first-degree murder. A jury trial was held on August 8-9, 2000. A jury found Burley guilty of murder in the second degree, sentenced her to eighteen years' imprisonment in the Arkansas Department of Correction, and imposed a $12,000 fine.

Sufficiency of the Evidence

First, Burley challenges the sufficiency of the evidence to support the jury verdict of second-degree murder. Specifically, Burley argues that the State failed to prove that she "knowingly" caused the death of the victim. In response, the State argues that the issue was not properly preserved for appeal. Burley did move for a directed verdict at the conclusion of the State's case and again at the close of all the evidence in connection with the charge of

second-degree murder. The State admits that Burley's motion for a directed verdict as to second-degree murder was properly executed, but contends that appellant failed to get a ruling on her motion. In denying Burley's directed-verdict motions, the trial court ruled only that the State has made a prima facie case on the murder in the first-degree charge. We hold that the motion is deemed denied pursuant to Arkansas Rule of Criminal Procedure 33.1(c), and we affirm.

[redacted] This court has held numerous times that the burden of obtaining a ruling is on the movant, and objections and questions left unresolved are waived and may not be relied upon on appeal. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996); *Williams v. State*, 289 Ark. 69, 709 S.W.2d 80 (1986). In *Donald v. State*, 310 Ark. 197, 833 S.W.2d 770 (1992), a case very similar to this one, the appellant moved for a directed verdict at the close of the State's case, and the motion was denied. Donald renewed his motion at the close of all the evidence, as required by Ark. R. Crim. P. 36.21(b), but he failed to obtain a ruling from the court. In that decision, we held that, the burden of obtaining a ruling is on the movant, and the failure to secure a ruling constitutes a waiver, precluding its consideration on appeal. *Id.* at 198, 833 S.W.2d at 771 (citations omitted).

However, according to Rule 33.1(c) of the Arkansas Rules of Criminal Procedure:

> The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. *If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of*

> *obtaining appellate review on the question of the sufficiency of the evidence.*

(Emphasis added.) Ark. R. Crim P. 33.1(c).

Here, Burley did move for a directed verdict at the close of the State's case-in-chief and, again, at the close of the evidence. The trial court ruled that the State had made a prima facie case for murder in the first-degree. The burden of obtaining a ruling on the second-degree murder motion for directed verdict was on Burley. Therefore, the motion was deemed denied for purposes of obtaining appellate review on the question of sufficiency of the evidence with regards to the second-degree murder charge. Accordingly, this point is preserved for appellate review.

It is well settled that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001) (citing *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995)). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith, supra.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.* Only evidence supporting the verdict will be considered. *Smith, supra.*

Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Such a determination is a question of fact for the fact-finder to determine. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). The credibility of witnesses is an issue for the jury and not the court. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.* We will disturb the jury's determination only if the evidence did not meet the required standards, thereby leaving the jury to speculation and conjecture in reaching its verdict. *Phillips, supra.* When we review

a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002).

Burley was charged with first-degree murder for "knowingly caus[ing] the death of a person fourteen (14) years of age or younger at the time the murder was committed." Ark. Code Ann. § 5-10-102(a)(3) (Repl. 1997). The jury was instructed on first-degree murder, second-degree murder, manslaughter, and negligent homicide. She was convicted by a jury of second-degree murder, having "knowingly" caused the death of the victim "under circumstances manifesting an extreme indifference to the value of human life." Ark. Code Ann. § 5-10-103(a)(1).

[redacted] In her argument, Burley offers various purportedly exculpatory facts to be weighed against evidence presented at trial by the State. This court, however, views only the evidence that is most favorable to the jury's verdict and does not weigh it against other conflicting proof favorable to the accused. *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994). The jury is permitted to consider evidence of cover-up as proof of a purposeful mental state. *Steggall v. State*, 340 Ark. 184, 194, 8 S.W.3d 538, 545 (2000).

Here, the evidence was sufficient to establish that Burley knowingly caused the minor victim's death. Burley inserted a thermometer and its three-inch cap into the victim's rectum with such extraordinary force that she must have known that the result could be serious injury or death. The medical testimony of the physician who examined the victim presented evidence of maltreatment, particularly his description of the blunt force required to tear the child's bowel, and his conclusion that this act was "not an accidental happenstance." The autopsy studies indicated that the life-threatening injury occurred six to twenty-four hours prior to the victim's death, during the time in which Burley was the only caregiver of the child, and she admitted that the minor victim had not left her sight during this time period. The medical examiner further testified that peritonitis is not necessarily fatal; therefore, Burley's refusal to seek medical attention after the victim began a steady decline in health is further evidence that she mani-

fested an extreme indifference to the value of the minor victim's life. Finally, Burley's statements that she had not used a rectal thermometer on the minor victim and that she misplaced her rectal thermometer months before the incident are improbable explanations of incriminating circumstances and are contrary to the physical evidence and testimony presented by the State at trial.

[redacted] According to Arkansas Code Annotated § 5-2-202 (Repl. 1993), a person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997). A jury need not lay aside its common sense in evaluating the ordinary affairs of life, and it may infer a defendant's guilt from improbable explanations of incriminating conduct. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997); *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). The evidence was sufficient to show that Burley forcefully inserted an object into the minor victim's rectum knowing that the result could be serious injury or death. Therefore, the trial court is affirmed.

Rule 404(b)

[redacted] Burley next argues that the trial court erred by admitting evidence of a police investigation into an allegation that Burley abused a child in her care approximately three months prior to the victim's death. However, it is well settled that the admission or rejection of evidence under Arkansas Rule of Evidence 404(b) is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *Warner v. State*, 59 Ark. 155, 954 S.W.2d 298(1998). No abuse occurred here, therefore we affirm the trial court.

On October 18, 1999, Fayetteville Detective Shawn Juhl began an investigation based upon a patrol officer's report of a possible child-abuse case against Burley involving the victim's sister, three-year-old sister Chelsea Sams. The abuse centered on the fact that Chelsea had several bruises on her buttocks along with a mark that appeared to have been made with something other than a hand. After interviewing the child's grandmother and the child herself, Detective Juhl developed Burley as the suspect. Although

Detective Juhl forwarded the results of his investigation to the prosecutor's office with a recommendation that charges be filed against Burley, no charges were ever filed. The trial court denied Burley's motion to exclude this testimony, but granted her request to give a cautionary instruction concerning the relevance of this evidence.

Appellant Burley argues that the State relies on its theory of the case, and not the facts of the case to argue the admissibility of the unsubstantiated allegation of child abuse. Burley contends that the testimony elicited at trial indicates that some time did elapse between the time the thermometer punctured the victim's rectum and the time that the paramedics were called. However, Burley argues that there are absolutely no facts to support the State's theory that the delay was due to Ms. Burley's fear that she would be exposed to criminal liability.

Burley contends that "buying into the State's argument can easily lead this Court down a slippery slope where evidence is admissible based on counsel's theories of the case and not the facts." Burley asserts that it is not plausible that an unsubstantiated allegation of a completely separate event, remote in time and not similar in nature, is relevant to any issue in this case. At trial, the State offered this evidence to show the jury that since Burley had been investigated before for child abuse, hence she is a person who probably committed the crime in the present action. Burley argues that this evidence is clearly in violation of Rules 401, 403, and 404 of the Arkansas Rules of Evidence.

Burley argues three independent reasons that this evidence should not have been admitted. First, Rule 404(b) states that "crimes, wrongs, or acts," which are commonly and collectively referred to as "bad acts," may be admissible to prove motive, opportunity, intent, etc., but there was no "act" here. We agree, and determine that the unsubstantiated allegation does not amount to a "crime, wrong, or act" under Rule 404(b), and therefore it should not have been allowed. Second, even if an unsubstantiated allegation was a "bad act," the testimony does not prove any purpose such as intent, plan, motive, etc., set forth in 404(b). Finally, even if the evidence did satisfy the elements of

404(b), it still cannot pass the balancing test set forth in Rule 403. We disagree.

The State's theory of the case was that Burley intentionally forced a thermometer cap through the minor victim's rectum into his abdominal cavity and, instead of seeking medical care when obvious signs of distress appeared, failed to take him to the hospital out of fear that she would expose herself to further criminal liability and become a prime suspect in the minor victim's murder. To that end, the State introduced evidence that Burley had been investigated just months before for abusing the victim's sister while in her care and that she was told by the police that a warrant would be issued for her arrest.

If the introduction of testimony of other crimes, wrongs, or acts is independently relevant to the main issue, rather than merely to prove that the defendant is a criminal, then evidence of that conduct may be admissible with a cautionary instruction by the court. *Regalado v. State*, 331 Ark. 326, 961 S.W.2d 739 (1998). Thus, if the evidence of another crime, wrong, or act is relevant to show that the offense of which the appellant is accused, it will not be excluded. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994)(plurality opinion).

First, there is no requirement under 404(b) that there must be a "bad act" as a prerequisite for admissibility. This Court has upheld the admission of evidence under 404(b) to prove motive based on the fact that the defendant was mainly a white supremacist sympathizer. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986). Moreover, even assuming that the State's proof does not amount to a "bad act" under 404(b), the evidence is admissible as simply relevant evidence of Burley's motive. The testimony offered by Detective Juhl was that he was going to arrest Burley. Therefore, Burley's motive for not reporting the incident with the minor victim in this case was her fear of arrest. This motive evidence was independently relevant to explain why Burley did not seek medical care sooner when faced with a child exhibiting obvious signs of deteriorating health. Moreover, the evidence did not unfairly prejudice Burley because the child-abuse allegation

occurred near the time of the minor victim's death and involved a child in Burley's care.

However, Detective Juhl did not actually see the bruises on the child. He prepared his investigation from various statements and the patrol officers report. Detective Juhl testified at trial concerning his investigation into Chelsea's suspected child-abuse case. During his testimony, he testified as to statements made by Chelshea and her grandmother. Burley did not object to the hearsay testimony given until after the testimony was given.

Second, this proof was offered by the State to establish Burley's motive for failing to seek medical attention for the victim. Furthermore, this Court has frequently upheld the admissibility of proof that defendants commit other crimes not similar to the present crime in order to prove motive. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998) (upholding the admissibility of evidence that defendant used cocaine to prove motive for murder under 404(b)).

Burley admitted that she was the sole caregiver for the twenty-four hours prior to when the child was admitted to the hospital. She admitted that the minor victim never left her sight. Further, Burley knew that she had an ongoing criminal investigation, and she knew that if anything else were to happen she could face possible criminal prosecution. Therefore, because of her fear of arrest she did not take the victim to the hospital or seek medical treatment.

Finally, the evidence passed the Rule 403 balancing test. This court has repeatedly stated that when the purpose of evidence is to show motive, anything and everything that might have influenced the commission of the act may, as a rule, be shown. *Ward v. State*, 338 Ark. 619, 1 S.W.3d 6 (1999). Moreover, the jury was given a cautionary instruction regarding the evidence. As this Court affords great deference to a trial court's ruling on relevancy and prejudicial impact, *Lee v. State*, 327 Ark. 697, 942 S.W.2d 231 (1997), the trial court here did not abuse its discretion by admitting this evidence of Burley's motive.

The trial court in this case made the determination to allow the previous child-abuse investigation into evidence. However, the trial court also gave a cautionary instruction to the jury regarding the evidence. Therefore, the exercise of the discretion of the trial judge should be affirmed.

Affirmed.

Raymond Anthony MONDAY *v.*
CANAL INSURANCE COMPANY

01-1038 73 S.W.3d 594

Supreme Court of Arkansas
Opinion delivered May 2, 2002

Wright, Chaney, Berry, Daniel, Hughes & Moore, P.A., by: *Rodney P. Moore*, for appellant.

Matthews, Sanders & Sayes, by: *Marci Talbot Liles* and *Roy Gene Sanders*, for appellee.

DONALD L. CORBIN, Justice. This case presents an issue of first impression: Whether Ark. Code Ann. § 23-89-209 (Repl. 1999), requires an insurer to offer underinsured-motorist coverage in a commercial automobile liability policy. The Hot Spring County Circuit Court ruled that it did not and granted summary judgment to Appellee Canal Insurance Company. Appellant Raymond Anthony Monday now appeals the

order of summary judgment. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We affirm.

The facts of this case are not in dispute. On August 2, 1999, Monday was driving a truck for his employer, Alygar Trucking, Inc., when he was struck by a vehicle driven by Jada Montgomery. Monday was seriously injured in the accident, and he incurred medical expenses in excess of $40,000. Monday succeeded in collecting the limits of Montgomery's liability insurance, in the amount of $25,000. However, because his damages exceeded the amount recovered from Montgomery, Monday filed a claim with Canal for underinsured-motorist benefits. Canal denied Monday's claim on the ground that Alygar's policy did not contain underinsured-motorist coverage. Monday then filed suit in the circuit court, claiming that Canal was required to offer Alygar underinsured-motorist coverage pursuant to section 23-89-209. Because Canal had failed to do so, Monday asserted that such coverage should be implied as a matter of law and that Canal should be ordered to pay his claim.

Both parties filed motions for summary judgment, asserting that the only issue was one of law regarding the interpretation of section 23-89-209. Canal argued that section 23-89-209(a) only requires an insurer to offer underinsured-motorist coverage when issuing "private passenger automobile liability insurance." Canal asserted that it was not required to offer such coverage to Alygar because the policy issued was a commercial policy, covering nine trucks and tractors used in Alygar's business. In support of its motion, Canal offered the affidavit of its senior vice president, Carleton Dunn. Dunn stated that Canal is a commercial transportation speciality insurer, and that the policy issued to Alygar was a standard commercial truck liability policy. Dunn also stated that Canal was not authorized to insure private-passenger vehicles because it does not have private-passenger rates filed with any insurance department in the nation.

In contrast, Monday argued that the focus of section 23-89-209 is on the type of vehicle insured, not the type of policy issued. He argued that the type of vehicle that he was driving at the time of the accident, a dual-wheeled pickup truck, is a private-passen-

ger automobile. He distinguished such private-passenger automobiles from public-owned, common-carrier vehicles, such as buses or other forms of mass transit. He thus asserted that because the policy issued to Alygar covered pickup trucks, Canal was required to offer Alygar underinsured-motorist coverage regardless of whether the policy was a commercial one.

The trial court agreed with Canal and concluded that the legislature did not intend the underinsured-motorist statute to apply to commercial automobile liability policies covering vehicles that were used for commercial purposes. The trial court viewed the statute as being applicable only to those liability policies issued to individuals for personal automobiles. Accordingly, based on its construction of section 23-89-209, the trial court granted summary judgment to Canal.

This court has repeatedly held that summary judgment, although no longer viewed as a drastic remedy, is to be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *See, e.g., Foreman Sch. Dist. No. 25 v. Steele*, 347 Ark. 193, 61 S.W.3d 801 (2001); *City of Barling v. Fort Chaffee Redev. Auth.*, 347 Ark. 105, 60 S.W.3d 443 (2001); *Thomas v. Stewart*, 347 Ark. 33, 60 S.W.3d 415 (2001). In the present case, the facts are undisputed. Indeed, both parties filed cross motions for summary judgment. As such, the case was decided purely as a matter of statutory interpretation.

We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *See Mississippi River Transmission Corp. v. Weiss*, 347 Ark. 543, 65 S.W.3d 867 (2002); *Mayberry v. Flowers*, 347 Ark. 476, 65 S.W.3d 418 (2002). Thus, although we are not bound by the trial court's construction, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Id.* The basic rule of statutory construction is to give effect to the intent of the legislature. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001); *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001). In determining the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in

common language. *Id.* The statute must be construed so that no word is left void or superfluous and in such a way that meaning and effect are given to every word therein, if possible. *Id.* If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no reason to resort to rules of statutory interpretation. *Id.* If, however, the meaning of a statute is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Id.* Statutes relating to the same subject are said to be *in pari materia* and should be read in a harmonious manner, if possible. *Id.*

The issue here is whether section 23-89-209 requires an insurer to offer underinsured-motorist coverage when issuing a commercial automobile liability policy. The statute provides in pertinent part:

> (a)(1) No *private passenger automobile liability insurance* covering liability arising out of the ownership, maintenance, or use of any motor vehicles in this state shall be delivered or issued in this state or issued as to any private passenger automobile principally garaged in this state unless the insured has the opportunity, which he may reject in writing, to purchase underinsured motorist coverage. [Emphasis added.]

This provision was originally enacted by the General Assembly as Act 335 of 1987. Act 335 was titled "AN ACT to Require that Insurers Offer Underinsured Motorist Coverage to Insureds Purchasing Private Passenger Automobile Liability Policies; and for Other Purposes." The initial codification of Act 335 did not limit its scope to insurers issuing "private passenger automobile liability insurance." Rather, the statute's requirements were originally applicable to "[e]very insurer writing automobile liability insurance." *See* Ark. Code Ann. § 23-89-209(a) (Supp. 1987). In Act 1180 of 1993, the General Assembly amended section 23-89-209(a) to specifically apply to insurers issuing "private passenger automobile liability insurance."

■ ■ The question then is what is meant by the words "private passenger automobile liability insurance"? Construing

this term just as it reads, giving the words their ordinary and usually accepted meaning in common language, we conclude that the language describes a particular type of automobile liability insurance, namely that issued to individuals or families covering their personal automobiles. The words "private passenger automobile liability" obviously modify the word "insurance." Thus, we agree with the trial court that the focus of the statute is on the type of insurance coverage or policy being issued by the insurer, not on the particular type of vehicle being insured. Commercial automobile liability insurance policies that cover vehicles used for delivering goods or for other business purposes are not included within the parameters of "private passenger automobile liability insurance." Accordingly, it is of no consequence that the insured vehicle in this case, a dual-wheeled pickup truck, may be used by an individual as a personal vehicle.

Moreover, our holding today is supported by the legislature's declared intention in passing Act 335: "[T]o Require that Insurers Offer Underinsured Motorist Coverage to Insureds *Purchasing Private Passenger Automobile Liability Policies.*" (Emphasis added.) We view this as a clear indication that the applicability of the underinsured-motorist statute depends on the type of insurance policy being purchased, not on the particular type of vehicle being insured.

Our conclusion finds further support in related statutes. For example, in Ark. Code Ann. § 23-89-301(5) (Repl. 1999), the legislature distinguished those policies purchased by individuals and families from commercial policies. That section, which is included in the subchapter pertaining to cancellation and nonrenewal, provides in pertinent part:

> (5) "Policy" means an automobile liability, automobile physical damage, or automobile collision policy, or any combination thereof delivered or issued for delivery in this state *insuring a single individual or husband and wife resident of the same household*, as named insured, and *under which the insured vehicles therein designated are of the following types only*:
>
> (A) A motor vehicle of the private passenger or station wagon-type *that is not used as a public or livery conveyance for passengers, nor rented to others*; or

> (B) Any other four-wheel motor vehicle with a load capacity of one thousand five hundred pounds (1,500 lbs.) or less *which is not used in the occupation, profession, or business of the insured*, provided however, that this subchapter shall *not* apply to any policy:
>
> (i) Issued under an automobile assigned risk plan;
>
> (ii) *Insuring more than four (4) automobiles*; or
>
> (iii) Covering garage, automobile sales agency, repair shop, service station, or public parking place operation hazards[.] [Emphasis added.]

Similarly, Ark. Code Ann. § 23-89-202 (Repl. 1999) demonstrates the legislature's intent to require certain minimum protections based on the type of coverage or policy issued. That section sets out the minimum requirements for medical and hospital benefits, income-disability benefits, and accidental-death benefits that must be provided by an insurer issuing any "automobile liability insurance policy covering any private passenger motor vehicle." Thus, the focus of this section is on the type of policy or coverage issued, not on the nature of the vehicle being insured.

In sum, construing the plain language of section 23-89-209(a)(1) together with the stated purpose of the underinsured-motorist statute, we conclude that the legislature intended to require insurers to offer underinsured-motorist coverage when issuing "private passenger automobile liability insurance" policies covering personal or private vehicles. The statute does not require insurers issuing commercial automobile liability policies to offer underinsured-motorist coverage. The undisputed proof in this case demonstrates that the policy issued by Canal to Alygar, Monday's employer, was a standard commercial truck liability policy, covering a fleet of vehicles used in Alygar's business. This is not the type of policy to which section 23-89-209 applies. Accordingly, we affirm the trial court's grant of summary judgment to Canal, as it was not required by law to offer Alygar underinsured-motorist coverage in conjunction with its commercial automobile liability policy.

We reject Monday's reliance on this court's and the court of appeals' holdings in *National Life & Accident Ins. v. Abbott*, 248 Ark. 1115, 455 S.W.2d 120 (1970), *Horn v. Imperial Cas. & Indem. Co.*, 5 Ark. App. 277, 636 S.W.2d 302 (1982), and *Cole-*

man v. MFA Mut. Ins. Co., 3 Ark. App. 7, 621 S.W.2d 872 (1981). Those cases involved the interpretation of "private passenger automobile" and "automobile" as those terms were used and defined in insurance policies. They did *not* involve the interpretation of the term "private passenger automobile liability insurance," as that term is used in the underinsured-motorist statute. Indeed, each of those cases was decided before the legislature enacted the underinsured-motorist statute.

We likewise reject Monday's reliance on the court of appeals' decision in *Columbia Mut. Ins. Co. v. Estate of Baker*, 65 Ark. App. 22, 984 S.W.2d 829 (1999). The issue in that case was whether the uninsured-motorist statute, Ark. Code Ann. § 23-89-403 (Repl. 1999), required an insurer to offer uninsured coverage in conjunction with a garage owner's liability policy. The holding in that case is not applicable here because the language of section 23-89-403 is decidedly different from that used in section 23-89-209. Section 23-89-403 provides in pertinent part:

> (a)(1) No *automobile liability insurance* covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto and is not less than limits described in § 27-19-605, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. [Emphasis added.]

Notably missing from this provision are the words "private passenger" as a modifier of the term "automobile liability insurance." Clearly, the legislature saw fit to require insurers to offer *un*insured-motorist coverage whenever *any* automobile liability insurance policy is issued or delivered. The fact that the legislature chose specifically to require the offering of *under*insured-motorist coverage only in conjunction with the issuance of "private passen-

ger automobile liability insurance" policies demonstrates its desire to exclude commercial policies from the requirements of section 23-89-209.

Finally, we reject Monday's contention that subsection (b) of 23-89-209 requires reversal in this case. That section provides:

> (b)(1) Underinsured motorist coverage as described in this section shall not be available to insureds nor shall insurers be mandated to offer same unless the insured has elected uninsured motorist coverage as provided by § 23-89-403.
>
> (2) Underinsured motorist coverage shall not be issued without uninsured motorist coverage being issued in combination therewith.

Monday argues that this section requires an insurer to offer underinsured coverage any time that the insured elects uninsured coverage. This argument is misplaced. As stated in the preceding paragraph, uninsured coverage must be offered in conjunction with any type of automobile liability insurance coverage, while underinsured must only be offered with one particular type of automobile liability insurance, namely private-passenger coverage. Thus, we view this provision as requiring only that in those instances where underinsured-motorist coverage must be offered, *i.e.*, when issuing "private passenger automobile liability insurance," and the insured elects uninsured-motorist coverage, the insurer must offer underinsured coverage in coordination therewith. Accordingly, we affirm the trial court's grant of summary judgment to Canal.

IMBER, J., not participating.

Jewell POLK *v.* STATE of Arkansas

CR 01-1278 73 S.W.3d 609

Supreme Court of Arkansas
Opinion delivered May 2, 2002

[redacted]

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

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

JIM HANNAH, Justice. The State of Arkansas petitions for review of the court of appeals' partial reversal of Appellant/Respondent Jewell Polk Jr.'s convictions of possession of a controlled substance with intent to deliver, simultaneous possession of drugs and firearm, and theft by receiving. The court of appeals in *Polk v. State*, 75 Ark. App. 338, 57 S.W.3d 781 (2001), affirmed Polk's conviction for possession of a controlled substance with intent to deliver, but reversed his convictions for simultaneous possession of drugs and firearms and theft by receiving.

At 2:30 a.m. on April 22, 1999, Officer Elliot Young of the Little Rock Police Department had a residence under surveillance that was the subject of several complaints alleging that narcotics activity was taking place there. Officer Young observed a 1994 black 530i BMW registered to Clarence Duckworth leave the residence. The car stopped briefly at the Waffle House and remained there for several minutes. Young asked Officer Charles Allen of the Little Rock Police Department, who was in another vehicle, for assistance in watching the car. After Allen saw the car weaving back and forth between the lanes of traffic, he stopped the car. Allen asked Polk, the sole occupant of the car, for his driver's license, which Allen discovered had expired. Allen cited Polk for improper lane usage and driving with an expired license and impounded the vehicle. Young inventoried the car, and he saw a piece of plastic sticking out above the driver's sun visor. He pulled the visor down and found a plastic bag containing several pieces of an off-white, rock-like substance later analyzed as 2.804

grams of eighty-five percent cocaine base and procaine. Young also saw a lump in the rear passenger-side floor mat, and underneath the mat he found a loaded .380 semi-automatic handgun that had been reported as stolen.[1] Young further testified that the gun was not visible without moving the floor mat. However, he testified that the lump was "something that jumped out at you."

The case was tried to the court sitting without a jury. At the conclusion of the State's case, Polk moved for a directed verdict, contending that there was no showing that he was "ever in actual possession of either the firearm or the drugs." Polk noted that the cocaine was found behind the sun visor, the gun was underneath a floor mat in the rear floorboard, and the car was registered to another person. The State replied that Polk was the only person in the car and had exclusive control of the vehicle, that the plastic bag was sticking out of the sun visor, which was immediately above Polk's head, and that the gun was found underneath the rear passenger floor mat, which, the State contended, was the most accessible place in the rear of the car to the driver. The State further noted that the lump was readily discernible by the officers. The court denied the motion.

In his own defense, Polk testified that he borrowed the car from his girlfriend, who he knew did not own the car, so that he could drive somewhere to eat. Polk stated that he drove the car two to three minutes to the Waffle House, where he remained approximately ten minutes while his hamburger and fries were cooking. He was driving back to the house when he was stopped by police. Polk testified that, at most, he was in the car for fifteen minutes. He further testified that he did not know that either a gun or drugs were in the car. Polk, however, admitted that he was a cocaine user and had been using cocaine that night at the house. He further stated that he had previously pled guilty to possession of cocaine and drug paraphernalia but that he did so in those cases because he knew about that cocaine and drug paraphernalia.

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[1] Polk and the State stipulated that the gun actually belonged to Michael Purtle, who reported the gun stolen on April 10, 1999.

At the close of the evidence, Polk again moved to dismiss. Polk noted a number of factors to be considered to establish constructive possession of contraband found in a car when the vehicle is jointly occupied. He pointed out that the car was not his, that he was in the car only a short time, that he did not act suspiciously, and that the handgun was not within his immediate proximity, on the same side of the car, in plain view, on his person, or with his personal effects. Polk further noted that the officers did not testify that he was moving the visor or floor mat when he was driving.

The court denied appellant's motion. The court noted that while Polk was in the car only a short time, he testified that he used cocaine, and cocaine was found in the car. The court also noted that both the handgun and the cocaine were within easy access. Further, the court noted that Polk was in sole possession and control of the car. The circuit judge convicted Polk of the crimes of simultaneous possession of drugs and firearms, possession of a controlled substance with the intent to deliver, and theft by receiving. The court sentenced him to a total of sixteen years' imprisonment in the Arkansas Department of Correction.

Polk appealed to the court of appeals and, in a decision issued on October 31, 2001, the court of appeals affirmed the trial court on the charge of possession of a controlled substance, and reversed on the charge of simultaneous possession of drugs and firearms and theft by receiving. The majority determined that Polk's occupancy of the vehicle was analogous to a joint-occupancy situation, although there were no other occupants in the vehicle, because Polk had only been in the car for a few minutes after borrowing the car from his girlfriend who borrowed it from another person. The dissent concurred with the majority on the possession of a controlled substance conviction, but dissented regarding the simultaneous-possession and theft-by-receiving convictions. The dissent argued that the majority's use of the "joint occupancy" analysis was misplaced because Polk was alone in the car, and it was unimportant that his occupancy was merely "transitory" and for a short duration. As such, the dissent asserted that because Polk had control over the car and was in "near proximity" to the loaded pistol, the simultaneous possession charge should stand.

Following this decision, the State filed a petition for review from the court of appeals's decision reversing the trial court's ruling on the simultaneous possession of drugs and firearms conviction. The State argued that the court of appeals erred in using a joint-occupancy analysis for a situation involving only one occupant in the car, and that the court's cited cases support the contention that joint occupancy in the vehicle context necessarily requires occupancy by more than one person. Polk replies that the court of appeals was correct in applying a joint-occupancy analysis because the car was owned by someone other than the defendant, and the gun could have easily been present before Polk took possession of the car. He argues that this situation is no different from those in which roommates occupy a shared apartment or a person visits a friend's apartment. Therefore, while Polk does not challenge the trial court's conclusion that he knew about the bag of cocaine above the driver's sun visor, he does challenge the court's presumption that he had knowledge of the gun because it was hidden under a floor mat in the back seat. As such, he argues that the court of appeals properly applied joint-occupancy law, and that review is not warranted.

When we grant a petition for review pursuant to Ark. Sup. Ct. R. 2-4, we treat the appeal as if it were filed in this court originally. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). It is well settled that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001); *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith, supra.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.* Only evidence supporting the verdict will be considered. *Id.*

Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Sublett v. State*, 337

Ark. 374, 989 S.W.2d 910 (1999). Such a determination is a question of fact for the fact-finder to determine. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). The credibility of witnesses is an issue for the fact-finder. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.* We will disturb the fact-finder's determination only if the evidence did not meet the required standards, thereby leaving the fact-finder to speculation and conjecture in reaching its verdict. *Id.* When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it. *Id.*

Generally, it is not necessary for the State to prove literal physical possession of contraband in order to prove possession. *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000); *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994). Possession of contraband can be proved by constructive possession, which is the control or right to control the contraband. *Id.*; *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994). In order to prove constructive possession, the State must establish beyond a reasonable doubt that the defendant exercised care, control, and management over the contraband. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998); *Darrough v. State*, 330 Ark. 808, 957 S.W.2d 707 (1997); *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994); *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991). This court has previously explained:

> Under our law, it is clear that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed.

Darrough, 330 Ark. at 811. Constructive possession may be established by circumstantial evidence, but when such evidence alone is relied on for conviction, it must indicate guilt and exclude every other reasonable hypothesis. *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990). A showing of constructive possession, which is the control or right to control the contraband, is sufficient to

prove a defendant is in possession of a firearm. *Banks, supra.* Constructive possession can be implied where the contraband was found in a place immediately and exclusively accessible to the accused and subject to his control. *Crossley, supra.*

To date, this court has not determined whether a single occupant in a borrowed car or car owned by another is only subject to the general inquiry for constructive possession, or whether the single occupant may benefit from the increased inquiry afforded those in a joint-occupancy situation. We hold that in such situations, the State need only prove constructive possession of the contraband without including any inquiry into the elements for joint occupancy.

Looking at this case under the constructive-possession inquiry, there was sufficient evidence to link Polk to the drugs in the sun visor and to the handgun in the back seat. Here, Polk himself testified that he had been using the same type of drugs earlier that evening, and that he had a drug problem. He was sitting immediately behind the visor, and the packaging was in plain view. The handgun was in the back seat under the floor mat, and he had access to the gun due to the proximity of the gun to the driver's seat. Furthermore, according to Polk's testimony, he was nervous when the police began to follow him from the Waffle House, and he admitted that he began weaving across the lines on the road because he was looking behind him at the police lights as they pulled him over. It is not necessary for the State to prove an accused physically held the contraband in order to sustain a conviction if the location of the contraband was such that it can be said to be under the dominion and control of the accused. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994); *Crossley, supra.* The State need only prove constructive possession, and constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Id.* Furthermore, an accused's suspicious behavior coupled with proximity with the contraband is clearly indicative of possession. *Id.* Polk was found with a sufficient amount of drugs to warrant a charge for "intent to deliver," and this court has recognized that firearms are considered a tool of the narcotic's dealer's trade, further suggesting that Polk knew of

the presence of the loaded gun on the floorboard. *See Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995); *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994). Here, both the drugs and the firearm were immediately and exclusively accessible to Polk, and we find that he was in possession of both.

Affirmed.

GLAZE, J., concurring.

IMBER, J., not participating.

TOM GLAZE, Justice, concurring. The majority court is correct that the appellant, Jewell Polk, was not entitled to any defense of joint occupancy under the facts of this case. He was the single occupant of the car he was driving when he was placed under arrest for improper lane usage and for driving with an expired license. The officer arrested Polk and impounded the car. The officer then conducted an inventory of the car. Arkansas Rule of Criminal Procedure 12.6(b) provides that a vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.[1] It was during the inventory that the officer found contraband inside the car.

Because the officer conducted a proper inventory search, the items of contraband found in the car he was driving were considered to be in his constructive possession. *See Fultz v. State*, 333 Ark. 586, 596, 972 S.W.2d 222, 226 (1998) (where contraband is under the dominion and control of the accused, he is considered in constructive possession of the contraband). In this case, Polk had dominion and control over the car. Polk was the only person in the car and was the driver of the car. This court has also held that actual ownership is not required for the exercise of dominion and control. *See Kilpatrick v. State*, 322 Ark. 728, 734, 912 S.W.2d 917, 920 (1995).

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[1] Polk never objected to the inventory search and, while he made a motion that his arrest was pretextual and the judge denied it, Polk fails to raise any pretextual issue on appeal.

Simply stated, the other facts considered by the majority court to link Polk in possession of the contraband are wholly unnecessary. Polk's conviction can be affirmed based solely on the legal inventory search.

IMBER, J., not participating.

Robert Wayne GRADY *v.* STATE of Arkansas

CR 01-1061 73 S.W.3d 608

Supreme Court of Arkansas
Opinion delivered May 2, 2002

Scott Adams, for appellant.

No response.

PER CURIAM. Attorney Scott Adams represents appellant Robert Grady, who was convicted of capital murder and sentenced to life without parole. A notice of appeal was filed on Mr. Grady's behalf, and the appellate record was subsequently filed in this court. Thereafter, on November 16, 2001, December 13, 2001, and February 13, 2002, Mr. Adams received extensions of the deadline for the filing of Mr. Grady's brief. In granting these extensions, we cautioned Mr. Adams that the February 13 extension was a final extension. The final deadline for Mr. Adams to file Mr. Grady's brief was April 11, 2002. The deadline was not

met; instead, on April 11, 2002, Mr. Adams filed a fourth motion for an extension of time in which to file Mr. Grady's brief.

On April 24, 2002, Mr. Adams filed an amended motion for an extension of time in which to file Mr. Grady's brief. On the same day, Mr. Adams filed a second amended motion for an extension of time in which to file Mr. Grady's brief.

Based on the circumstances described above, we order Scott Adams to appear before this court on Thursday, May 16, 2002, at 9:00 a.m., to show cause why he should not be held in contempt for failing to file his client's brief on or before April 11, 2002, as previously ordered.

Danny HARRIS, Jr. *v.* STATE of Arkansas

CR 02-377 73 S.W.3d 615

Supreme Court of Arkansas
Opinion delivered May 2, 2002

Bart Ziegenhorn, for appellant.

No response.

PER CURIAM. Appellant Danny Harris, Jr., by and through his attorney, has filed a motion for rule on clerk. His attorney, Bart Ziegenhorn, states in the motion that the record was tendered late due to a mistake on his part.

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

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Eddie A. TAYLOR *v.* STATE of Arkansas

CR 02-375 74 S.W.3d 205

Supreme Court of Arkansas
Opinion delivered May 2, 2002

Bart Ziegenhorn, for appellant.

No response.

PER CURIAM. Appellant Eddie A. Taylor, by and through his attorney, has filed a motion for rule on clerk. His attorney, Bart Ziegenhorn, states in the motion that the record was tendered late due to a mistake on his part.

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

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Harold TROUP *v.* STATE of Arkansas

CR 02-376 74 S.W.3d 205

Supreme Court of Arkansas
Opinion delivered May 2, 2002

Bart Ziegenhorn, for appellant.

No response.

PER CURIAM. Appellant, Harold Troup, by and through his attorney, has filed a motion for belated appeal. Attorney Bart Ziegenhorn admits by motion that the appeal was not timely filed due to a mistake on his part.

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

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

CASH IN A FLASH CHECK ADVANCE OF ARKANSAS, L.L.C., Yvonne Clark, and Robert E. Blake *v.* Jimmie Sue SPENCER and Dorothy Barnes, Individually and on Behalf of a Class of Similarly Situated Persons

01-1210 74 S.W.3d 600

Supreme Court of Arkansas
Opinion delivered May 9, 2002

Crone & Mason, PLC, by: *Alan G. Crone*, for appellant.

Todd Turner and *Dan Turner*; and *Orr, Sholtens, Wilhite & Averitt*, by: *Chris Averitt*, for appellee.

W. H. "DUB" ARNOLD, Chief Justice. Appellant Cash In A Flash Check Advance of Arkansas, L.L.C. (hereinafter "CIAFCA"), appeals the order of the Craighead County Circuit Court denying its motions to stay litigation and compel arbitration. Appellee Jimmie Sue Spencer filed a class-action lawsuit against CIAFCA alleging it had violated Arkansas's usury law. For reversal, CIAFCA argues that the trial court erred by not enforcing the language contained in the "Agreement" prepared by

CIAFCA signed by appellees which purported to require arbitration of all claims. We disagree, and thus, affirm.

This appeal stems from a dispute regarding the legality of certain transactions involving CIAFCA and appellees. CIAFCA is in business for a twofold purpose: to immediately cash the checks of its customers who desire that service, and to defer presentment to the bank upon which the check is drawn for other of its customer's checks. CIAFCA charges a fee for each of these services and operates pursuant to the provisions of the Arkansas "Check-Casher's Act." Ark. Code Ann. § 23-52-104 (Repl. 2000).

Appellee Jimmie Sue Spencer filed a purported class-action complaint against CIAFCA. This complaint alleged that CIAFCA was really in the loan business and that the fees it charged for the deferred presentment service were usurious. The complaint arose out of appellee Spencer's transactions with CIAFCA, each of which was memorialized with a written agreement and each of which contained an identical arbitration agreement.

CIAFCA filed a motion to stay litigation and compel arbitration. CIAFCA argued that pursuant to the Arkansas Code, the action must be stayed and sent to arbitration for its resolution. Spencer made her reply to CIAFCA's motion arguing that the agreement was void for usury and the arbitration agreement was otherwise unenforceable on the contract grounds of unconscionability, lack of mutuality, and because it did not comport with the provisions of the Arkansas Arbitration Act.

Spencer, then, filed a motion seeking to certify this action as a class action and a group supplemental exhibit allegedly in support of her position in attacking the arbitration agreement. Spencer amended her complaint to add Dorothy Barnes, Robert Blake, and Yvonne Clark as new defendants and to state an additional cause of action for alleged violation of the Arkansas Deceptive Trade Practices Act. CIAFCA responded to the amendment by filing a second motion to stay litigation and compel arbitration. CIAFCA made the same arguments as its prior argument. A hearing was held on CIAFCA's motion's to stay litigation and compel arbitration. The trial court entered essentially identical orders denying the motions to stay litigation and compel arbitration.

Appellant CIAFCA requests that this Court reverse the decision of the trial court, direct the claimants to arbitration for resolution of this dispute and stay the proceedings pending resolution of the arbitration. CIAFCA asserts four points on appeal: this dispute is subject to arbitration; appellees are not giving up any substantive rights by pursuing their claims in arbitration, as opposed to judicial forums; agreements are legally enforceable contracts; and that the trial court erred in finding the contract unconscionable. We agree with appellee's contentions and hold that the Agreement entered into between CIAFCA and appellee's was not a legally enforceable contract due to lack of mutuality.

At the outset, we note that an order denying a motion to compel arbitration is an immediately appealable order, Ark. R. App. P. Civ.—2(a)(12); *E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001); *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000); *Walton v. Lewis*, 337 Ark. 45, 987 S.W.2d 262 (1999). We review a trial court's order denying a motion to compel *de novo* on the record. *Id.*

Arbitration Clause

On appeal, CIAFCA argues that both the Arkansas Arbitration Act and the Federal Arbitration Act apply. CIAFCA's written "Agreement," in addition to detailing the amount of the loan and terms of repayment, also contained language which CIAFCA contends constitutes a valid arbitration clause. The subject language in the agreements states:

> ARBITRATION: To pursue any claim, demand, dispute or cause of action ("claim") arising under this Agreement or the transaction in connection with which this Agreement has been executed, the claimant must submit to the other party in writing an explanation of the claim and a demand that the claim be resolved by arbitration, provided, that if the claim is against Cash In A Flash Advance of Arkansas, L.L.C., claimant shall mail said notice to D & E Enterprises, 3030 Covington Pike, Suite 181, Memphis, Tennessee 38127. If the other party does not respond to the submittal in writing within ten (10) days of its receipt, the claim must be submitted to binding arbitration in accordance with and pursuant to the laws as enacted in the State of Arkansas

> at Ark. Code Ann. § 16-108-101 et seq., as may be amended from time to time ("Act"). The arbitration shall be conducted by a single arbitrator selected by agreement between Cash in a Flash Check Advance of Arkansas, L.L.C. or, if no agreement on the arbitrator can be reached, by the Chancery Court of Arkansas sitting in the county where this Agreement was signed. The expenses of the arbitration, including attorney's fees, will be paid in accordance with the award issued by the arbitrator. The finality and binding effect of the arbitration award shall be as set forth in the Act.
>
> GOVERNING LAW: Both this Agreement and the Application were executed at out offices in the State of Arkansas. The Application , the Agreement and this transaction and arrangement with us, shall be governed by and construed and enforced solely in accordance with the internal laws of the State of Arkansas. YOU AGREE THAT THE STATE COURTS LOCATED IN THE STATE OF ARKANSAS WILL HAVE EXCLUSIVE JURISDICTION AND VENUE OF ANY PERMITTED ACTION ARISING UNDER THIS AGREEMENT.

[redacted] The issue presented in this case is whether this language created a valid and enforceable arbitration agreement under Arkansas law. The Arkansas Uniform Arbitration Act, found at Ark. Code Ann. § 16-108-201 to § 16-108-224 (1987, Supp. 2001), outlines the scope of arbitration agreements in Arkansas. Arkansas Code Annotated section 16-108-201 (Supp. 2001), states:

> (a) A written agreement to submit any existing controversy to arbitration arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> (b) A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that this subsection shall have no application to personal injury or tort matters, employer-employee disputes, nor to any insured or beneficiary under any insurance policy or annuity contract.

Arkansas Code Annotated section 16-108-202 further states:

> *Proceedings to compel or stay arbitration.*
>
> (a) On application of a party showing an agreement described in 16-108-201 and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.
>
> (b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.
>
> (c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending a court having jurisdiction to hear applications under subdivision (a) of this section, the application shall be made therein. Otherwise, and subject to 16-108-218, the application may be made in any court of competent jurisdiction.
>
> (d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section, or, if the issue is severable, the stay may be with respect thereto only. When the application is made in the action or proceeding, the order for arbitration shall include the stay.
>
> (e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

These two statutes, read together, provide that a party in a lawsuit may apply to the trial court to obtain a stay of the proceedings and an order for arbitration pursuant to their agreement. The party resisting arbitration may only dispute the existence or validity of the agreement to arbitrate.

In Arkansas, as a matter of public policy, arbitration is strongly favored and is looked upon with approval by courts as a less expensive and more expeditious means of settling litigation and relieving docket congestion. *Showmethemoney Check Cashers v. Williams*, 342 Ark. 112, 27 S.W.3d 361; *May Constr. Co. v. Thompson*, 341 Ark. 879, 20 S.W.3d 345 (2000); *Anthony v. Kaplan*, 324 Ark. 52, 918 S.W.2d 174 (1996); *Lancaster v. West*, 319 Ark. 293, 891 S.W.2d 357 (1995); see also, *Estate of Sandefur v. Greenway*, 898 S.W.2d 667 (Mo. App. W.D. 1995).

The question of whether a dispute should be submitted to arbitration is a matter of contract construction. *Showmethemoney, supra; International Union, United Auto., Aerospace, & Agri. Implement Workers of Am. v. General Elec. Co.*, 714 F.2d 830 (8th Cir. 1983). The same rules of construction and interpretation apply to arbitration agreements as apply to agreements generally. *May Constr. Co., Inc. v. Benton Sch. Dist. No. 8*, 320 Ark. 147, 895 S.W.2d 521 (1995). The essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Foundation Telecommunications v. Moe Studio*, 341 Ark. 231, 16 S.W.3d 531 (2000). Therefore, the court should seek to give effect to the intent of the parties as evidenced by the arbitration agreement itself, with doubts and ambiguities being resolved in favor of arbitration. *Showmethemoney, supra.* The Federal Arbitration Act and the laws of other jurisdictions do not restrict the scope of arbitration as we do in this state. Generally, the scope of arbitration is defined by the contract between the parties. See *Anthony, supra.* The Act contemplates that the courts will effectuate the agreement.

CIAFCA argues to this Court that the subject matter of this dispute is subject to arbitration. CIAFCA cites to *Showmethemoney* where this Court held that the question of whether a dispute should be submitted to arbitration is a matter of contract construction with only certain matters being excepted from arbitration. *Showmethemoney v. Williams, supra*, citing *International Union, United Auto., Aerospace & Agri. Implement Workers of Am. V. General Elec. Co.*, 714 F.2d 830 (8th Cir. 1983). The Arkansas Uniform Arbitration Act provides that only certain claims may legitimately be found to be outside the scope of arbi-

tration. *Terminix Int'l Co. Stabbs*, 326 Ark. 239, 930 S.W.2d 345 (1996). Those areas of subject matter expressed to be off limits to arbitration are limited to personal injury tort claims, employment disputes, and insurance policy or annuity contract disputes. Ark. Code Ann. § 16-108-201(b). CIAFCA claims that since this dispute does not fall into one of these areas, the matter is proper for arbitration. CIAFCA goes further and discusses federal law, however this matter is decided under Arkansas law and the Arkansas Uniform Arbitration Act. Further, the CIAFCA arbitration clause specifically states that it is to be governed by the Arkansas Arbitration Act and Arkansas law.

In this case, the trial court properly analyzed the payday loan agreement to determine whether arbitration was appropriate. The construction and legal effect of a written contract to arbitrate are to be determined by the court as a matter of law. *E-Z Cash v. Harris, supra.*

CIAFCA claims that the Arbitration clause, separately initialed and contained in each appellees agreement with CIAFCA, was contracted for by both appellees and CIAFCA and requires that any claim arising out of the subject transaction be directed to arbitration. Under this clause, CIAFCA argues that neither appellees nor CIAFCA are relinquishing any substantive right or remedy.

CIAFCA contends that in addition to a clear statutory mandate in favor of arbitration and an enforceable arbitration agreement, Arkansas courts have consistently looked upon arbitration with approval as a less expensive, more expeditious means of resolving disputes. *May Construction Co. v. Thompson*, 341 Ark. 879, 20 S.W.3d 345 (2000). Further, Arkansas courts have consistently held that any doubt as to the scope or reach of the question or arbitrability should be resolved in favor of arbitration. *Walton v. Lewis*, 337 Ark. 45, 987 S.W.2d 262 (1999).

CIAFCA asserts that although appellee failed to request arbitration, that failure does not negate the parties' bargained for choice of forum. In fact, to submit this dispute to any forum other than the one specifically contemplated by the parties at the time of their entering into the Agreement would be con-

trary to both the clear mandate of the Arkansas Legislature and Arkansas's judicial precedent. Here, the trial court properly held that the appellees could not receive appropriate relief through arbitration because of the Agreement itself and its lack of mutuality.

Legally Enforceable Contract

The Arkansas legislature has stated that "a written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable . . ." Ark. Code Ann. § 16-108-201(b). The Legislature has further mandated "a written agreement to submit any existing controversy to arbitration arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Ark. Code Ann. § 16-108-202(a).

This Court has addressed the enforceability of arbitration agreements in the context of the check-cashing industry. *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000); *EZ Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001); *Luebbers v. Money Store*, 344 Ark. 232, 40 S.W.3d 745 (2001).

In *Showmethemoney Check Cashers, Inc. v. Williams*, this Court held that arbitration agreements will be enforced the same as any other agreement. The court held that the essential elements for an enforceable arbitration agreement are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement and (5) mutual obligation. *Showmethemoney, supra.* CIAFCA contends that there can be little doubt that the agreements entered into between them and appellees meet the *Williams* elements. CIAFCA further asserts that both parties are bound to the agreement by its own terms and may only pursue legal action if the other party does not respond to the arbitration demand within ten days of its receipt. Here, neither party made a written explanation of their claim or demand for arbitration, as required by their agreements; therefore, according to CIAFCA neither party is entitled to pursue this matter in a judicial forum.

Specifically, the fact that the check casher had the right to seek redress in a court of law, while the customer was limited strictly to arbitration, demonstrated a lack of mutuality. This court explained:

> A contract to be enforceable must impose mutual obligations on both of the parties thereto. The contract is based upon the mutual promises made by the parties; and if the promise made by either does not by its terms fix a real liability upon one party, then such promise does not form a consideration for the promise of the other party. ". . .[M]utuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other.

E-Z Cash Advance, Inc. v. Harris, supra; Showmethemoney, 342 Ark. at 120, 27 S.W.3d at 366. Thus, under Arkansas law, mutuality requires that the terms of the agreement impose real liability upon both parties. *Showmethemoney, supra*; *Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 363 S.W.2d 535 (1962). There is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system. See *Showmethemoney, supra.*

In this case, the trial court properly ruled that the arbitration agreements at issue are unenforceable. The Agreement employed by CIAFCA allow the appellant at its option to exercise any of the remedies listed in the "Consequences of Default" provision of the Agreement. Within the Agreement, CIAFCA states:

> CONSEQUENCES OF DEFAULT: Should you stop payment on the Check or otherwise default under this Agreement, we may, at our option, exercise any one of the following remedies:
>
> (a) if payment is not made after written demand, we may go to court and get a judgment against you for the then unpaid amount of your obligation to us. In the event judgment is entered in our favor, we may seek to collect this judgment

through all judicial means necessary, including attaching your non-exempt property, or garnishing your wages:

(b) if we are advised by your bank or other financial institution that the Check was been altered, forged, stolen, obtained through fraudulent or illegal means, negotiated without proper legal authority, or represents the proceeds if illegal activity. If the Check is returned to us by our bank for any of these reasons, we may not release the Check without the consent of the proper authority or other investigating law enforcement authority.

(c) if the check is returned Account Closed and Stop Payment, we may seek any and all criminal charges as prescribed by State Law.

(d) any check returned unpaid by any payer financial institution shall be assessed a return check charge not to exceed $20.00.

(e) if this matter is placed with an attorney for collections of any and all monies dues and owing Cash in a Flash Cash Advance of Arkansas L.L.C. all reasonable costs and expenses of collection, specifically included, but not limited to reasonable attorney fees, court costs, and other damages, as set forth by the court, shall be paid by the customer.

Therefore, the Agreement contains inconsistent language in the "Arbitration" provision and the "Consequences of Default" provision. CIAFCA may, at its option, exercise any one of the remedies listed in the default portion of the Agreement; however, the appellees are bound to arbitration. Thus, the Agreement lacks mutuality and cannot stand. We affirm the trial court.

Affirmed.

GLAZE, J., not participating.

Timothy Lamont HOWARD *v.* STATE of Arkansas

CR 00-803 79 S.W.3d 273

Supreme Court of Arkansas
Opinion delivered May 9, 2002

[Petition for rehearing denied June 27, 2002*]

* BROWN, THORNTON, and HANNAH, JJ., would grant. CORBIN, J., not participating.

Arkansas Public Defender Commission, by: *Dorcy Corbin*, for appellant.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., and *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellee.

W. H. "Dub" Arnold, Chief Justice. This appeal, by Timothy Lamont Howard, is from a judgment of conviction for two counts of capital murder and one count of attempted capital murder from Little River County Circuit Court. Howard was sentenced to two death sentences on the two capital murder convictions and a thirty-year sentence plus a $15,000 fine on the attempted capital murder conviction. He appeals on multiple grounds, which include: (1) insufficient evidence to convict Howard of capital murder and attempted capital murder; (2) error by the trial court in allowing the prosecutor to comment on Howard's right not to testify; (3) error by the trial court in allowing untimely exculpatory information provided by the prosecutor; (4) error by the trial court in refusing Howard the opportunity to present to the jury the manner in which the exculpatory evidence was withheld; (5) error by the trial court in allowing hearsay testimony; (6) error by the trial court in refusing to grant Howard's motion to suppress; (7) error by the trial court in allowing improper argument by the prosecutor during closing argument; and (8) error by the trial court in admitting handcuffs purchased by the state into evidence. We conclude that all points raised are without merit, and affirm.

Background

On Saturday, December 13, 1997 at 10:30 a.m., the police discovered Brian Day's body in the back of a U-Haul truck in Ogden, Arkansas. Brian Day had been beaten and had been shot once in the head with a .38 caliber bullet. Once Brian Day's body was identified, the police went to notify Shannon Day of her husband's death. At the Day home, the police forced their way into the home and found Shannon's dead body in a closet in a bedroom. Trevor Day, the Days' seven-month-old child, was found by the police crying with a cord tied around his neck underneath a pile of cloths in a zipped bag in one of the bedrooms of the Day home.

Appellant Timothy Lamont Howard was arrested on Wednesday, December 17, 1997, for the capital murders of Brian Day and Shannon Day and the attempted capital murder of Trevor Day. Howard had been friends with Brian and Shannon Day for years, and the nature and depth of their friendship was not disputed. Brian Day and Howard sold drugs together, and on the eve of the day the bodies were discovered, Howard expected to receive $4,500.00 from a deal with Brian Day. Additionally, Penny Granger testified at trial that, shortly before the murders, Shannon Day suspected that she was pregnant with Howard's child. However, the most incriminating evidence against Howard was his inappropriate and unexplainable behavior both before and after the discovery of Brian, Shannon, and Trevor Day. During a period of time before and after the bodies were located, Howard relied on three different girlfriends, their homes, and several vehicles interchangeably to plan and to attempt to conceal his crimes. Consequently, Howard's behavior is best understood in a chronological order beginning with the Thursday before the crimes.

On Thursday, December 11, 1997, Howard went with Brian to rent a U-Haul truck. Brian Day revealed conflicting stories regarding the rental of the U-Haul truck. He told one person that he was going to be moving furniture, but he also disclosed that he was going to be receiving stolen merchandise. Howard stated that he was going to help the Days move furniture.

At 3:00 a.m. on Friday, December 12, 1997, Vicki Howard, appellant Howard's ex-wife, left work at Cooper Tire in Texarkana and drove to Ashdown, where she intended to go to Brian and Shannon's house. Before continuing to the Day home, Vicki stopped at a restaurant, at 4:00 a.m., where she sat and spoke with Howard. Howard acknowledged to Vicki that he was upset with the Days because they would not admit to dealing drugs and they allowed others to believe that Howard was the only person dealing drugs and bringing them to Ashdown. Howard also discouraged Vicki from going on to stay overnight with Brian and Shannon Day because they were in a fight. Howard, then, told Vicki that he would rent a hotel room in Texarkana if she would return there. Vicki Howard did rent a room and stayed the night in Texarkana.

Later that same Friday morning, Howard, driving the U-Haul truck, arrived at the motel in which Vicki Howard rented a room. Howard advised Vicki not to tell anyone about the U-Haul because the information would get her killed. Howard left the U-Haul truck parked at the motel, and Vicki drove Howard in her car to a farm which the Howard family owned in Ogden, Arkansas. Once at the farm, Howard drove to a small shack, illuminated it with the headlights of the car and went inside the shack. While in the shack, Howard bent down, picked something up, and put it in one of his pockets. Afterwards, Vicki dropped Howard off at Kim Jones's apartment. Kim Jones was, at that time, Howard's girlfriend, but since the two have been married.

Later that Friday at 5:00 p.m., Howard called Vicki at her motel room in Texarkana. Howard requested Vicki to come pick him up at Kim Jones's apartment. Vicki picked up Howard and they returned to the motel room. Vicki testified that Howard had a camera bag that he said contained "some stuff to have kinky sex" and that he mentioned handcuffs and a rope. Howard then drove Vicki's car to Wal-Mart and returned to the motel with a .38 caliber handgun stuck in the front of his pants. Vicki testified that Howard left the motel room at 9:40 p.m. wearing a black sweatshirt, jeans, and she thought a pair of work boots.

At approximately 11:00 p.m. on Friday, December 12, 1997, Howard called Kim Jones's sister, Jennifer Qualls, with whom he was also involved, and asked Qualls to pick him up at a rest stop on Highway 71 by the Red River Bridge, which is several miles from the Howard family farm. Qualls testified that when she arrived, Howard got out of Kim Jones's car and was acting "weird."

Jennifer Qualls drove appellant Howard to her house and the two went to bed. Howard got up at 1:00 a.m. on that Saturday morning stating he had to go get his money. He returned at approximately 3:00 a.m. and woke Qualls, to tell her that Shannon and Trevor Day would be staying with Qualls while he and Brian went to take care of some business. During the night, Jennifer saw Shannon and heard Trevor crying.

When Jennifer next awoke between 6:30 a.m. and 7:00 a.m. on Saturday, December 13, 1997, no one was in the house. How-

ard arrived at about 7:30 a.m. at Qualls's home and told her that the Days were hiding out and that he was the only person that knew their whereabouts. Further, Howard was the last person seen with Shannon and Trevor Day. Howard also gave Jennifer $200.00 in cash and told her that he needed a ride back out to the rest stop on Highway 71 to pick up Kim Jones's car. On the way to the rest stop, Jennifer noticed a woman's purse and other bags in the back seat of her car. Howard told her that they belonged to Shannon Day. Once at the rest stop, Howard took the purse and the other items from the back seat. Howard also asked Qualls if she thought Robin Jones, one of Qualls's former co-workers, would let him borrow his truck to help Brian and Shannon move furniture.

Jennifer Qualls then returned to her home by herself where she started to get ready to report to work at 9:00 a.m. Howard arrived at her home approximately twenty minutes after she returned home from dropping him off at Kim Jones's car and demanded Robin Jones's truck. Around five minutes after Qualls had reported to work, Howard arrived, asking if she had spoken with Robin Jones about the truck. Qualls called Robin to inquire about the vehicle, and Howard left to obtain the truck from Robin Jones.

Eddie Scroggins, a salesman at Pro-Truck outfitters in Texarkana, testified that Howard came into the store that Saturday morning and paid $140.00 cash for the largest toolbox in stock. Howard told Scroggins that he would have to come back for the toolbox because he was driving a car, and he would have to go get a truck to load the toolbox. Howard did pick up the toolbox a short time later, however, it is not known what vehicle he was driving.

Little River County Sheriff Danny Russell testified that, shortly before 10:00 a.m. on Saturday, December 13, 1997, he received a call that a U-Haul truck was parked in a wooded area in East Ogden. This was only two-and-a-half hours after Howard told Qualls that he was the only person who knew the Days' whereabouts. The dispatcher reported that there was blood dripping from the back of the U-Haul and the back door was pad-

locked shut. Sheriff Russell drove to the scene with lights and sirens on, where he discovered Brian Day's body in the back of the U-Haul truck on a farm owned by the Howard family. Russell called for other police personnel and an ambulance to the scene. The time of death of Brian Day is unknown, but the medical examiner did determine that he had been involved in a struggle and had been shot once in the head with a .38 caliber bullet. There were bloodstains found on a piece of carpet near the U-Haul truck and the position of the leaves on the ground indicated that Brian's body had been dragged to the U-Haul from the small shack on the farm. Investigators found Howard's fingerprints on the U-Haul truck. Also, a passerby found a pair of work boots two miles from the Howard family farm at the corner of Highway 71 and East Ogden Road in a cleared area. The boots found were the same size and type that Howard's ex-wife, Vicki Howard, had bought for him and thought she had seen him in the previous day. There was also a hair found inside the boots that matched Howard's DNA, plus blood on top of the left boot matched Brian Day's DNA.

In his statement to the police, Howard contends that he went looking for Brian Day shortly after borrowing Robin Jones's pickup truck that Saturday morning. When he did not find Brian at his house, he drove toward his family farm in Ogden. Howard stated that police cars passed him on the road toward the farm and that he yielded to a passing ambulance. Howard stated that he knew something was wrong, so he drove Robin Jones's pickup truck back to Texarkana and called Vicki Howard.

Vicki Howard testified that Howard called her at 11:00 a.m. Saturday morning. Howard told Vicki to pick him up in Texarkana. When Vicki arrived, Howard was in Robin Jones's truck and was wearing tennis shoes. Howard handed the truck keys to Vicki and told her to do something with them. He also handed her $120.00 to rent another motel room in Texarkana. After leaving Howard at the motel, Vicki picked up Robin Jones and took him to his truck. Vicki then returned to the motel, picked up Howard, and drove him to Kim Jones's apartment.

In the meantime, after Brian Day's body was identified, the police went to the Day home, where there was no answer. The police then forced their way into the home and found Shannon Day in a closet under a mattress, window frames, and picture frames. Shannon's hands had been handcuffed behind her back with handcuffs that were described at trial by the State as "identical" to the pair that Qualls testified Howard had once purchased from Saks, a Texarkana lingerie store. There was a ligature around her neck, and there were bruises on her body indicating some sort of struggle. The police found Trevor Day inside a zipped bag full of cloths with a cord around his neck, but he was still alive. Howard's fingerprints were also found on a bottle in the Days' living room.

Between 12:30 p.m. and 1:00 p.m. on Saturday afternoon, Howard called Jennifer Qualls at work and informed her that the police had found a dead body in a U-Haul. He stated that he was unsure if it was Brian, but he asked Qualls to clean out her car because the police would probably be wanting to talk with her. Qualls also testified that Howard asked her if she was going to turn him in. Later that afternoon, Qualls discovered the tool box purchased by Howard in her front yard, full of cleaning supplies that had been taken from Qualls's cabinets.

Howard and Kim Jones arrived at Qualls's house shortly after Qualls arrived home from work, and the three of them agreed to leave town. Qualls asked Howard what had happened to Shannon's purse and other belongings, and Howard told her that he had gotten rid of it. Jennifer Qualls testified that, before they left town on Saturday, December 13, 1997, Vicki Howard phoned and told Howard that the police wanted to talk to him, but Howard did not speak with the police at that time. Instead, the three left town, drove to Shreveport, Louisiana, and then spent the night in a motel in New Boston, Texas.

On Sunday afternoon, they returned to Ashdown and gave statements to the police. Howard instructed Jennifer Qualls not to say anything about the money. After Qualls gave the police her statement Howard asked whether she had said anything about the

toolbox. The three returned to Kim Jones's apartment and spent the evening there.

On Monday, December 14, 1997, Jennifer Qualls went to work and was to be back at Kim's home by dark that night. When Qualls did not return, Kim became worried but Howard knowing that Jennifer was staying at the motel that evening told her not to worry. On Tuesday, Howard went there and had sex with Qualls. The next day, Qualls went to the police and spoke with the chief investigator in charge of the Days' murder investigation and made a statement which led to Howard's arrest that day, Wednesday, December 17, 1997.

Within a month of Howard's charge, the defense filed a motion for discovery. In January 1998, the defense was provided a file containing 101 items from the prosecutor. There was also a cover letter that reflected that if any additional information was gathered it would be sent to the defense. In November 1998, the defense learned of the existence of a file at the Ashdown Police Department. Early in the investigation the file had been taken to the prosecutor, but certain items were removed from it and the remainder of the file was returned to the Ashdown Police Department. The defense did not receive this file until February 1999. The file contained witness statements which were given in close proximity to the murders. In all, there were twenty-nine statements previously not provided to the defense. Information supporting the statement that Howard had given the police was in this file. Also, the file contained information concerning supposed drug deals, deals involving Brian Day receiving stolen property, and witnesses who saw Brian arguing with white men about money the week of the murder. Just prior to the April 13, 1999 pretrial motion hearing, one of the police officers found another part of Howard's file in the trunk of his car. That file was given to the defense in April 1999.

From these files, the defense learned, prior to trial, that the night before Brian Day's body was found, Day had spoken with several friends about illegal deals he had going. Brian revealed to some that he was going to be receiving a load of stolen merchandise around midnight from a person he had not dealt with before.

Brian Day was also trying to collect money from several people so he could pay off someone to whom he was indebted. One person gave Brian $800 and a quarter ounce of methamphetamine that night. Shannon Day had expressed fear for their lives because she thought Brian was getting in too deep.

The defense also discovered that, within the month before the murders, a friend of Brian's had introduced him to an individual from Oklahoma, who drove a red, late-1980's model pickup truck and was interested in trading marijuana for methamphetamine. Further, just four days before the murders, Brian Day was seen arguing with two Caucasian men.

The jury trial began on December 6, and concluded on December 9, 1999. At the end of the State's case, and again after the defense rested, Howard moved for a directed verdict for lack of sufficient evidence to convict Howard of capital murder or attempted capital murder. The trial court denied both motions for directed verdict. Howard was convicted on two counts of capital murder and one count of attempted capital murder, and was sentenced to two death sentences and thirty years in the Arkansas Department of Correction plus a $15,000 fine.

Sufficiency of the Evidence

When a defendant makes a challenge to the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000); *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998); *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). It is well settled that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001) (citing *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995)). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith, supra.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other

beyond suspicion or conjecture. *Smith, supra.* Only evidence supporting the verdict will be considered. *Smith, supra.*

Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Such a determination is a question of fact for the fact-finder to determine. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). The credibility of witnesses is an issue for the jury and not the court. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Phillips, supra.* We will disturb the jury's determination only if the evidence did not meet the required standards, thereby leaving the jury to speculation and conjecture in reaching its verdict. *Philips, supra.* When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it. *Phillips, supra.* Additionally, the longstanding rule in the use of circumstantial evidence is that the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused to be substantial, and whether it does is a question for the jury. *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000).

The jury may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Chapman v. State,* 343 Ark. 643, 38 S.W.3d 305 (2001); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998). We have also held that a defendant's improbable explanation of suspicious circumstances may be admissible as proof of guilt. *Chapman, supra; Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997); *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993).

In this case, the State presented both direct physical and circumstantial evidence linking Howard to the murders of Brian and Shannon Day and the attempted murder of Trevor Day. The police discovered Brian Day's body in a U-Haul truck, with Howard's fingerprints, while it was parked on the Howard family farm in Ogden, Arkansas. Earlier that morning, a pair of work

boots were located by a disinterested witness in a cleared area several yards from Highway 71 and about two miles from where Brian Day was discovered. This witness testified that he did not see the boots at 8:30 a.m., but by 8:50 a.m. they were located in the clearing along with footprints leaving the boots going toward a wooded area. The boots were found in a side-by-side position with Brian Day's blood on one of them and a Negroid hair compatible with Howard's DNA inside one of the boots. However, there were also two unidentified Caucasian hairs found inside one of the boots.

Howard argued at trial that the location of the boots indicated that someone deliberately placed the boots so they would be found. Howard also argued that it was impossible for the boots to have been thrown, which the State argued, and land in the side-by-side position in which they were found. Howard further charged that Brian Day's blood, which was located on one of the work boots, was never in contact with the floor mats of the car that Howard had been driving that day. But the boots were the same size and type that Vicki Howard testified Howard may have been wearing the day before. Further, when Vicki saw Howard the next morning, he was wearing tennis shoes and not the boots.

Inside the Day home, where Shannon Day and Trevor Day were discovered, there were fingerprints on a Mountain Dew bottle in the living room that were identified as Howard's. However, there were unidentified fingerprints found on the window frames and picture frames covering Shannon's body. Regardless, there was other substantial circumstantial evidence that connected Howard to the murder of Shannon Day and the attempted murder of Trevor Day which a jury could exclude every other reasonable hypothesis than that of the guilt of Howard.

[redacted] In addition to the direct physical evidence presented at trial, the jury was presented with substantial circumstantial evidence. Although circumstantial, evidence that an accused was seen in proximity to the scene of a crime, as well as evidence that he offered an improbable explanation of suspicious circumstances, can be evidence of guilt. *Engram, supra.* Furthermore, flight following the commission of an offense is a factor that

may be considered with other evidence in determining probable guilt and may be considered as corroboration of evidence tending to establish guilt. *Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001)(Chapman's attempted flight at the scene of the search provides additional evidence of guilt).

Vicki Howard testified at trial that she saw Howard with a .38 caliber handgun and driving the U-Haul truck on the day before the bodies were found. Brian Day was shot in the head with a .38 caliber bullet, and his body was found in the back of the U-Haul truck on Howard's family farm in Ogden, Arkansas.

Further, at 11:00 p.m. on the Friday before the bodies were discovered, Jennifer Qualls testified Howard appeared agitated at a rest stop close to the Howard family farm. Later that same night he awoke from sleep and stated to Qualls that he had to go get his money. Then, on Saturday morning, he was handing out large amounts of cash, for the purchase of the largest toolbox a store had available and for various motel rooms. Furthermore, Howard attempted to explain that he was the only one who knew where the Days were, and that they were hiding out. Moreover, despite driving the U-Haul the day before, Howard was desperate to borrow Robin Jones's pickup truck to help the Days move furniture on that Saturday morning. Howard abandoned that pickup truck once he saw the police had discovered Brian Day's body. Additionally, once he heard about the discovery of the Days, Howard left town. Lastly, he sought to control the information that Jennifer Qualls gave to the police.

Vicki Howard testified that Howard told her that his bag contained objects for kinky sex, including a pair of handcuffs. When the police located the camera bag after the discovery of the bodies, there were no handcuffs in the bag. There was testimony that Howard never used handcuffs with any girlfriend, but Qualls did testify that she saw handcuffs once in Howard's possession.

The jury heard testimony from witness Penny Granger concerning conversations she had with Shannon Day. Granger stated that she saw a positive result from a pregnancy test taken by Shannon and Shannon feared that Howard might be the father of the

child. The credibility of Granger is an issue for the jury and not this court.

Therefore, in addition to the physical evidence linking Howard to the murder of Brian Day and Shannon Day and the attempted murder of Trevor Day, there was circumstantial evidence that Howard was seen in close proximity of the crime scene. Additionally, Howard's flight following the discovery is a factor that may be considered by the jury in determining guilt by the jury.

[redacted] We hold that there was sufficient evidence to affirm the denial of the motion for directed verdict.

Prosecutor's Comments During the Guilt Phase and Penalty Phase

Howard argues to this court that the prosecutor improperly commented on his right not to testify during both the guilt phase of his trial and, again, during the penalty phase. While being questioned by the defense during the guilt phase, defense witness Kim Jones testified that Howard had asked her to call Vicki Howard and tell Vicki to pick him up. The prosecutor objected to this testimony and without asking to approach the bench, the prosecutor argued in front of the jury:

> I would object to the Defendant saying . . . What the Defendant is saying. . . He can say what he said, but she can't. That's self-serving hearsay.

At that point the defense asked to approach the bench and moved for a mistrial. In response to defense counsel's motion, the trial court stated at the bench:

> . . . I guess you are going to have to be careful about what you say in front of the jury . . . and do not make any improper comment on the Defendant's failure to testify should he fail to testify.

The trial court then denied the defense's motion for a mistrial. Howard argues the mistrial should have been granted because the comment made by the prosecutor violated Howard's right not to testify during trial.

The State asserts that the prosecutor's objection did not constitute an improper comment because there was no direct reference to Howard's decision not to testify. The prosecutor did not suggest that the jury should draw any inferences in the event Howard chose not to testify. The prosecutor made his objection during the defense case, when, for all the jury knew, it was still possible that Howard would take the stand. Furthermore, the State contends that the objection was not a reference to Howard's failure to testify, but rather a hearsay objection.

A mistrial is a drastic remedy, to be employed only when an error is so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000). The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent a showing of abuse or manifest prejudice to the appellant. *Jones, supra*. Prejudice is presumed. *Adams v. State*, 263 Ark. 536, 566 S.W.2d 287 (1978). An abuse of discretion may be manifested by an erroneous interpretation of the law. *Wilburn v. State*, 346 Ark. 137, 56 S.W.3d 365 (2001); *Seeco, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1993).

In this case, the trial court's denial of Howard's motion for a mistrial during the guilt phase was not so prejudicial that justice could not be served by continuing the trial. The decision to deny the mistrial was within the sound discretion of the trial court, and an abuse of this discretion cannot be found. The trial court admonished the prosecutor not to improperly comment on Howard's failure to testify and did not rule that the prosecutor had made such a comment. Therefore, the trial court's ruling to deny the mistrial was correct, and no error can be found.

During the penalty phase of Howard's trial, Howard contends the prosecutor commented on his right not to testify during the State's closing argument. The prosecutor stated:

> Ladies and Gentlemen, the only comment that I guess I would make on the Defendant's witnesses and its testimony, and I listened very carefully and even discussed it with Mr. Cooper. Did

> you ever once hear the word of remorse? Did you hear it just once? You've been here for four days. . .

The defense objected to this comment as being an improper comment on Howard's right not to testify. The trial court stated, "Well, I don't know that it is a comment. It might could be reflected or could be reflected, so let's just avoid it." Howard asserts that his convictions were based on minimal circumstantial evidence and the prosecutor's comments as such cannot be deemed harmless.

When an objection to a statement during closing argument is sustained, an appellant has been given all of the relief requested, and, consequently, there is no basis to raise the issue on appeal unless the appellant requests admonition to the jury or a mistrial. *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999). Furthermore, a comment is improper when it draws attention to the fact, or comments on, the defendant's failure to testify. *Jones, supra.*

An allegedly improper comment on the defendant's failure to testify usually occurs during the prosecutor's closing argument, when the evidence is closed and the defendant's opportunity to testify has passed. *Adams, supra.* Under those circumstances, a comment that draws attention to the defendant's failure to testify is improper because it creates the risk that the jury will surmise that the defendant's failure was an admission of guilt. *Adams, supra.* Consequently, the comment has the effect of making the defendant testify against himself in violation of the Fifth Amendment. *Jones, supra.* Under the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, a defendant has the privilege of deciding whether to testify.

Here, Howard did not seek further relief by moving for a mistrial or requesting an admonition to the jury. However, even if Howard had moved for a mistrial or an admonition to the jury, the comment did not refer to Howard's failure to testify. Rather, Howard never expressed remorse to the witnesses that testified, not that he failed to express remorse to the jury.

Therefore, we find no error and affirm the trial court.

Discovery

Prior to trial, defense counsel filed a motion alleging that the trial court should dismiss the charges against Howard because the prosecutor did not provide timely exculpatory information. Specifically, Howard argued to the trial court that, while he received information by May 19, 1999, seven months before the beginning of his trial in December, 1999, the delay hindered his investigation of the case and his effort to show that someone else was responsible for the murders of Brian and Shannon Day and the attempted murder of Trevor Day. The trial court denied Howard's motion, finding that the defense had received all of the information before the trial date.

Howard filed his first motion for discovery on January 7, 1998, when the murders were less than one month old. On January 27, 1998, the prosecutor sent Howard a file containing 101 items with a cover letter by the prosecutor stating they would provide Howard with any additional information as provided to the prosecutor.

In November 1998, defense counsel went to the Ashdown Police Department to review photographs concerning the investigation. After a long delay, the defense was told about interviews with nine witnesses who were previously unknown to the defense. Howard argues that these nine statements included valuable information to the defense. The statements included information stating that Brian Day was dealing in stolen merchandise; Brian Day was seen arguing with a Caucasian male about money; Brian Day was dealing with nonlocal people; a new Corvette was seen in the Days' driveway the morning of the murders; and, Brian Day owed someone about $2,000. There was also a part of the Howard file found in the trunk of a police car a couple of weeks before one of the pretrial hearings in the matter. Howard further contends the fingerprint expert, from the crime lab, testified that an anonymous caller requested a particular individual's prints be compared to those prints found on the frames found on Shannon Day's body. A match was never made, but this particular name was never heard nor seen by the defense until this testimony was given at trial, and

there was no documentation of this in the file. Howard contends this failure to provide that information is also prejudicial.

Howard further asserts that this prejudice was compounded by the trial court's ruling that the defense could not explain to the jury how the police investigation had been conducted. The defense's motion to dismiss set forth facts concerning the manner in which the defense received the discovery. At a hearing on this motion, the trial court denied the motion and granted the prosecutor's request to prevent the defense from telling the jury of the piecemeal fashion they had received the information.

Arkansas Rule of Criminal Procedure 17.1 provides in part:

> (d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Ark. R. Crim. P. 17.1(d) (2001). The prosecutor must disclose information in sufficient time to permit the defense to make beneficial use of it. *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000). When error consists of withholding significant evidence which denies the defendant a fair trial, the case will be reversed and remanded. *Strobe v. State*, 296 Ark. 74 (1988). Furthermore, a defendant cannot rely upon discovery as a total substitute for his own investigation. *Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 373 (1998). The choice of an appropriate sanction is within the trial court's discretion. *Reed v. State*, 312 Ark. 82, 847 S.W.2d 34 (1993).

Here, the information was turned over to Howard when the State was presented with the information or when the State learned of the information. All information was given to Howard seven months before trial. Furthermore, Howard had every opportunity to conduct his own investigation regarding other suspects and other witnesses. Therefore, because Howard had all of the alleged exculpatory information before his trial began, there was no discovery violation. Accordingly, the trial

court did not abuse its discretion by granting the State's motion in preventing Howard from conveying to the jury the piecemeal fashion in which the defense had received such information, nor in denying Howard's motion to dismiss. We, therefore, affirm the trial court.

Hearsay

It is well-settled law that hearsay is not acceptable. While there are exceptions to the rule, the testimony in this case does not fit into one of the exceptions. During Jennifer Qualls's testimony, the defense objected to an answer after the answer had been given. The trial court overruled the objection and the testimony resumed. The following is the questioned testimony:

> A. I called my mother and I told her I called a friend of mine and they both — I asked them what should I do and they told me I needed to talk with the police, so that Tuesday I had a hard time at work, you know —
>
> Q. Is that what your mother told you? You need to talk to the police?
>
> A. Her and Etonia, my friend, did.
>
> By Mr. Carder: I'll object to that.
>
> By Mr. Cooper: She'd already answered Judge. There was no objection.
>
> By the Court: Overruled.

Howard contends that this piece of information that Jennifer Qualls's mother and friend told her to speak with the police was so important to the State that it came up again on direct and then again during the State's closing argument. Howard asserts that there is no requirement that an attorney anticipate every word that may be spontaneously uttered by a witness. The State argues that Howard only stated a general objection upon which he cannot now advance his hearsay argument, and, even assuming any hearsay was erroneously admitted, any error was harmless.

Pursuant to Rule 801(c) of the Arkansas Rules of Evidence, "hearsay" is a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; such testimony is inadmissible evidence unless it fits within one of the exceptions outlined in Rule 803. Ark. R. Evid. 801(c) (2001).

A general objection will not preserve a specific point. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). Thus, in order to preserve a hearsay objection, a defendant must make a timely, specific objection, stating that ground. *Hooper v. State*, 311 Ark. 154, 842 S.W.2d 850 (1992). When a question calls for a hearsay answer, the attorney's responsibility is to object at the first opportunity. *Hill v. State*, 285 Ark. 77, 785 S.W.2d 495 (1985).

Here, Howard only stated a general objection upon which he cannot now advance a hearsay argument. But, even assuming Howard made a specific hearsay objection at trial, the trial court did not err in denying the objection because Qualls may testify to hearsay as a basis to explain her actions, such as going to the police. A hearsay statement may be related by a witness to show the basis of action, such as contacting the police. *Mills v. State*, 321 Ark. 621, 906 S.W.2d 674 (1995). Therefore, we affirm the trial court's ruling.

Motion to Suppress

Prior to trial, the defense filed a motion with the trial court to prohibit Penny Granger from testifying to a statement that Shannon Day might have been pregnant with Howard's baby. Howard contends that this testimony should not have been admitted because the allegation had never appeared in any other statement made by Granger. Further, there was no evidence that Shannon Day was, in fact, pregnant. The State asserts that the testimony was correctly admitted because it proved a possible motive.

Howard argues that the prejudicial impact of allowing unsubstantiated testimony that Shannon was pregnant was immeasurable. And, to add to this prejudice, testimony was allowed that Howard might have been the father. The defense asserts this testimony is both irrelevant and highly prejudicial, and a proper appli-

cation of Arkansas Rule of Evidence 401 and 403 would have excluded this testimony.

The admission of evidence showing motive is a matter left to the discretion of the trial court which will be reversed only for an abuse of that discretion. *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997). Where the purpose of evidence is to disclose a motive for killing, anything and everything that might have influenced the commission of the act may, as a rule, be shown. *Cooper v. State*, 324 Ark. 135, 919 S.W.2d 205 (1996). Further, the credibility of witnesses is an issue for the jury and not for this court. *Chapman, supra; Marta v. State*, 336 Ark. 67, 983 S.W.2d 921 (1998). Here, the decision of the trial court was well within its sound discretion, and the decision is therefore affirmed.

Closing Argument

The trial court has a fundamental duty to insure that a defendant's rights are protected and that the defendant receives his constitutionally guaranteed fair trial. Prejudicial remarks by a prosecutor seeking the death penalty should not be tolerated. In this case, during the State's closing argument the prosecutor made the following comment:

> . . . but probably the most horrible, horrible thing that happened in this case, probably the most horrible thing that happened that night was that she watching her seven-month-old child being strangled in front of her. I submit to you ladies and gentlemen, the last thing, the last thing that Shannon Day saw before she died was her seven-month-old baby hanging from an extension cord, that's how she left this world. That's what you are here for today is to determine what the punishment is . . .

Howard argues that there was no evidence that Shannon Day watched her infant being hung from an extension cord. There was not even evidence that the baby was ever hung from an extension cord. These comments were made to inflame the passion of the jury. Howard asserts that since there was no evidence that Shannon Day did in fact watch Trevor Day hanging from an extension cord, it is reasonable to conclude that the thought never

occurred to the jury. The statement by the prosecutor was highly prejudicial, and the court, on its own, should have prevented the prosecutor from making the argument. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

The State argues that Howard did not preserve this issue for appeal because he did not object at the trial-court level. Even constitutional issues may not be raised for the first time on appeal. *Willett v. State*, 322 Ark. 613 91 S.W.2d 937 (1995).

The remark did not amount to an error that required a *sua sponte* admonition or mistrial without an objection. Furthermore, the parties are given great leeway in closing argument, and reversible error must show an abuse of discretion by the trial court in permitting that leeway. *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998). And, the jury was instructed that the closing argument was not evidence.

Here, the remark that Shannon Day saw her child hanging from an extension cord before she died is a fair inference from the evidence. Every plausible inference may be argued in closing. *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). It is plausible that Shannon Day watched the attempted murder of Trevor because of the antemortem wounds discovered on Shannon's body. It is not unreasonable to infer Howard would first bind Shannon before causing harm to Trevor, as the State argued. Therefore, we find no error and affirm the trial court.

Relevant Evidence

The trial court allowed the State to introduce a pair of furry handcuffs which the prosecutor had purchased from Saks, the same store where Howard had purchased similar handcuffs. Over the objection of the defense, the prosecutor argued, in front of the jury, that the handcuffs "are identical to the handcuffs on the victim . . . We've had testimony that the defendant purchased a pair at Saks, this very same place, for Jennifer Qualls." Howard's relevancy objection was overruled. The record is void of any testimony that the handcuffs found on Shannon Day were identical to the handcuffs the prosecutor purchased. No one testified that the handcuffs on Shannon Day belonged to Howard, only that How-

ard told Vicki Howard that he had them. No one testified whether there was glue residue on the handcuffs that were on the victim, and no one testified that traces of fur had been found anywhere.

Howard argued that the State's handcuffs should not have been admitted under Arkansas Rule of Evidence 401 (relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence). However, if relevant, it was highly prejudicial and inadmissible pursuant to Ark. R. Evid. 403 (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence).

[redacted] [redacted] The relevancy of evidence under Arkansas Rule of Evidence 401 is a matter of discretion for a trial court, whose determination is entitled to great deference. *Owens v. State*, 313 Ark. 520, 856 S.W.2d 288 (1993). Determinations about the use of demonstrative evidence, like other evidentiary decisions, are also left to the discretion of the trial court and reversed only for an abuse of that discretion. *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995).

[redacted] Here, the State admitted that it had purchased the handcuffs and they were not the ones used on the victim, nor were they the handcuffs Qualls testified she had seen in Howard's possession. The trial court allowed the State-purchased handcuffs into evidence, but this was not an abuse of its discretion. Therefore we affirm the trial court's order in allowing the handcuffs into evidence, and we further find no error.

Rule 4-3(h)

In compliance with Ark. Sup. Ct. R. 4-3(h), the record has been examined for adverse rulings objected to by Howard but not argued on appeal and no prejudicial error is found.

In sum, in light of the physical and substantial circumstantial evidence presented to the jury, who determined his guilt and recommended his sentence, we cannot say that the trial committed error in this case. Accordingly, we find no reversible error in the trial court's rulings. We affirm the trial court on all points and Howard's judgment of conviction.

Affirmed.

Special Justice MIKE KINARD joins in this opinion.

BROWN, THORNTON, and HANNAH, JJ., dissent.

CORBIN, J., not participating.

ROBERT L. BROWN, Justice, dissenting. The critical question for this court to resolve is whether the evidence was sufficient to convict Howard for the murder of Shannon Day. I do not believe it was. Surely, it was not forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *See Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001). For that reason, I respectfully dissent. I would reverse Howard's convictions for Shannon's murder and Trevor's attempted capital murder and the death sentence as well. I would remand this case for resentencing solely on Howard's conviction for the capital murder of Brian Day.

The proof implicating Howard in Shannon's murder is paper thin. The majority, in fact, says as much when it states that it is relying on Howard's "inappropriate and unexplainable behavior" as the most incriminating evidence against him. Inappropriate and unexplainable behavior, in my mind, is not forceful evidence that would compel a conclusion. The State's evidence consists of a fingerprint on a Mountain Dew bottle in Shannon's living room, the fact that Howard was with Shannon for part of Saturday morning, and various statements that Jennifer Qualls and Vicki Howard attribute to Howard during the relevant time period. Those statements include (1) that Brian and Shannon were hiding out and only Howard knew where they were; (2) that Shannon's purse and bags were in the back of Jennifer's car and he had gotten rid of them; (3) a statement to Jennifer to clean out her car; (4) a question to Jennifer, "Are you going to turn me in?"; and (5) a state-

ment to Vicki that he had handcuffs in his Wal-Mart bag for kinky sex. Shannon was found in handcuffs. This can best be described as an extremely weak circumstantial case.

What is most notable about this case is what is not known. Various pieces of the puzzle are missing, and we are forced to engage in speculation to fill in the gaps. For example, we know next to nothing about the drug deal Brian was involved in Thursday night before the Saturday morning murders. The same is true about Brian's deal involving stolen property scheduled for Friday night. We do know that Brian needed a U-Haul truck to transport *something* but whether it was drugs or stolen property or for some other purpose is totally a mystery based on the record before us. Most importantly, we do not know whom Brian was dealing with in these criminal matters. We do know from Shannon's conversation with a friend that she feared for their lives because Brian was getting in "too deep." There can be no doubt that Brian's criminal activity was integrally connected to the killings.

We also know that Shannon's body was found under picture frames with unidentified fingerprints on them. I agree with Howard that these fingerprints are much more likely to have come from the perpetrator of Shannon's murder than Howard's fingerprint on a Mountain Dew bottle found on a table in her home. By everyone's admission, Howard was a close friend of the Days, and a soft drink bottle with his prints in their home was to be expected.

It is axiomatic under our caselaw, and we cite the principle repeatedly, that if circumstantial evidence is used to provide the basis for a conviction, it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *See, e.g.*, *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002); *Whitfield v. State*, 346 Ark. 43, 56 S.W.3d 357 (2001); *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000); *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000). Thus, if you have two equally reasonable conclusions as to what occurred, this merely gives rise to a *suspicion* of guilt which is not enough to support a conviction. *Fudge v. State*, *supra*; *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000). As this court recently said:

With respect to the exclusion of every other reasonable hypothesis, Judge Butler, speaking for the court, said in the case of *Bowie v. State*, 185 Ark. 834, 49 S.W.2d 1049 (1932):

> This demands that in a case depending upon circumstantial evidence the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than that of the guilt of the accused. Circumstances, however strong they may be, ought never to coerce the mind of the jury to a conclusion of guilt if they can be reconciled with the theory that one other than the defendant has committed the crime, or that no crime has been committed at all.

Gregory, supra, 341 Ark. 243, 15 S.W.3d 690 (2000). In the words of Justice George Rose Smith, "The issue is simple: Was the evidence so evenly balanced that the jury had to resort to guesswork in finding that the crime was committed by [appellant] rather than by someone else?" *Surridge v. State*, 279 Ark. 183, 650 S.W.2d 561 (1983).

I do not believe that there is sufficient evidence to prove Howard killed Shannon and that he tried to kill Trevor. There is simply too much guesswork and speculation involved. I further believe the jury clearly erred in not finding that a reasonable hypothesis existed that a third party killed Shannon, particularly in light of the unknown fingerprints on the picture frames under which Shannon's body was found. Clearly, the fact that sufficient evidence exists to convict Howard for the murder of Brian does not lead inescapably to a conclusion that he also killed Shannon and strangled Trevor or provide sufficient evidence for those offenses.

Because I would affirm Howard's conviction on Brian and reverse his conviction for the murder of Shannon and attempted murder of Trevor, Howard's sentence becomes problematic. At the sentencing phase, the jury found four aggravating circumstances to warrant the death penalty:

> In the commission of the capital murder, Tim Howard knowingly created a great risk of death to a person other than the victim;

> In the commission of the capital murder, Tim Howard knowingly caused the death of Brian Day & Shannon Day in the same criminal episode;
>
> The capital murder was committed for pecuniary gain;
>
> The capital murder was committed in an especially cruel and depraved manner.

No mitigating circumstances were found. All four aggravating circumstances related to the joint murders of Brian and Shannon. Because the two murders were intertwined, and no effort was made to treat the two convictions separately for sentencing purposes, I would remand for resentencing solely on the capital murder of Brian Day.

RAY THORNTON, Justice, dissenting. I agree with Justice Brown's dissent concluding that there was not sufficient evidence to convict appellant of the murder of Shannon Day and the attempted murder of Trevor Day and that appellant's conviction of these charges must be reversed. In addition, I also believe that the evidence to support a conviction for the murder of Brian Day was very thin. Even if the evidence, considered in the light most favorable to the State, was sufficient to submit to the jury the question of appellant's guilt of the murder of Brian Day, the trial was flawed by errors which in my view require a new trial on the charges relating to Brian Day.

As pointed out in Justice Hannah's dissent, I agree that the trial court committed several reversible errors during the trial. First, the trial court erred in allowing Penny Granger to testify that Shannon Day believed that she might be pregnant by appellant. Next, I believe the statement made by the prosecutor in closing argument that the last thing Mrs. Day saw before her death was her baby being hung from an extension cord was so prejudicial and inflammatory, not to mention unsupported by any evidence, that a new trial must be ordered. Also, I find the admission of the handcuffs purchased by the police troublesome. I cannot agree with the majority's reasoning that such flaws do not constitute reversible error.

I am further troubled by the State's last minute responses in producing evidence sought during discovery, and by the State's

reference to appellant's failure to testify. In my view, several reversible errors occurred during the trial.

I am also greatly troubled by the skimpy circumstantial evidence linking appellant to the murder of Brian Day, as analyzed by Justice Hannah's dissent. In my view, even if the minimal amount of evidence is barely sufficient to present the fact question to the jury, the case is deeply flawed by prejudicial errors and I must conclude that a new trial should be ordered for the charge of murdering Brian Day.

In summary, I would reverse and dismiss appellant's convictions for the murder of Shannon Day and the attempted murder of Trevor Day because of insufficiency of the evidence. I would also reverse appellant's conviction for the murder of Brian Day, and remand for a new trial on that charge.

I respectfully dissent.

JIM HANNAH, Justice, dissenting. It is with great reluctance that I must dissent and argue that a jury verdict should be overturned. However, I am compelled to do so because the jury was left to speculation and conjecture which may not support a conviction. The demands of due process are not satisfied by suspicion, speculation, and conjecture.

This case was based entirely upon circumstantial evidence. Circumstantial evidence can certainly constitute substantial evidence and support a jury's verdict. However, requirements must be met that have not been discussed by the majority. Justice Butler in the case of *Bowie v. State*, 185 Ark. 834, 49 S.W.2d 1049 (1932), stated that the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than that of the guilt of the accused. This has always been the standard, and these words have been cited since 1932, and were last cited in 2000. However, it appears that seventy years of precedent is being abandoned. Rather than being presented with substantial evidence or, in other words, evidence forceful enough to compel a conclusion Howard committed the murders and the assault, the jury received credible

evidence of at least two reasonable hypotheses and was left to speculate. Neither hypothesis was supported by substantial evidence.

The jury received evidence that tended to incriminate Howard and evidence that tended to incriminate others with whom Brian was making a drug deal. Evidence was presented that Brian was deeply in debt, that he and his wife feared for their lives, that he had set up a drug deal that took place about the time of the murders at the place where his body was found, that a substantial sum of money was involved, that he was to receive something that required a truck to haul, and that in the days before his murder he had been in confrontation with unidentified persons, who were apparently the persons he met the night of his murder. The jury was also given evidence argued to show that Howard committed the murders and assault, characterized by the majority as the most incriminating because it is "inappropriate and unexplainable." There is no doubt that the evidence offered made Howard a suspect. The problem is the evidence is not sufficient to constitute substantial evidence under any circumstantial-evidence standard that has ever been stated by this court. Stating that it meets the standard does not make it so.

The jury was placed in an untenable position, and abandoned to either speculate or come to no conclusion. Not surprisingly under the facts they were presented, they convicted Howard. The jury's verdict is not based upon proof of guilt beyond a reasonable doubt. It is not supported by substantial evidence. Howard has been convicted of two murders and sentenced to death twice. Howard was also convicted of attempted capital murder and sentenced thirty years plus a $15,000.00 fine. However, Howard has also been denied fundamental fairness and due process rights guaranteed him under both the United States and the Arkansas Constitutions.

Facts

The motive for the murders and assault offered by the State was money Howard was expecting from the drug deal, or that Shannon was pregnant by Howard. The persons with whom Brian met on the night of the murders had a great deal more to

gain from the murders and assault, either by making him an example of what happens when a person does not meet his obligations, or in gaining Brian's "white" and keeping their "green" or "stuff."

The record fails to show Howard even knew Shannon thought she might be pregnant by Howard. The record also fails to show that Brian owed Howard money or that Howard showed up with a substantial sum after the murders. The few hundred dollars Jennifer Qualls testified to is hardly the sum Howard was expecting. She specifically testified that he did not have a big "wad" of money after the murders.

What the record does reveal is that Brian and Howard had been involved in drug deals for some time. It also shows that deals had been consummated previously at the Howard farm, which was a suitable secluded location for such endeavors. These deals were not the sale of drugs to users, but rather sales between suppliers.

The record also shows that Brian owed other people money, and that people were mad. He was trying to gather up cash from his users or from anywhere he could get it. Shannon told Kimberly Howard a day or two before her death that Brian owed "Chicken" money, that Chicken had been out to the house three or four times looking for Brian, and that Chicken was mad. Shannon told Kimberly further that "she did not know what Brian was doing with the money but they were going to kill him." Shannon also told a friend that if anything happened to her it would be because of Chicken. Chicken was identified as one of Brian's suppliers. Harvey Hope testified that about a week before the murders, he was at Brian's house and that a white man was there who was driving a white car. Hope testified further that Brian said to the man, "I don't have that kind of money."

Penny Granger testified that Shannon feared for their safety because "Brian owed everybody money and Brian is in over his head." Vicki Howard also testified similarly. Shannon also told Granger that Brian was buying from Pokey Booth, "making dope with Mike May," and getting drugs from Richard McClanahan. Shannon told Granger further that she was worried when he did

not come back from McClanahan's place. Granger also testified that Shannon told her that Brian was digging holes in the back yard and pouring concrete over things. Upon being told of his death, Brian's father told police, "I knew this was going to happen."

Vicki Howard testified that she knew Brian had a deal going down that night and that Howard did not know who he was dealing with. Further, events of the days before the murders show that a deal was to be made at the Howard farm on the night of the murders. There was testimony that in the past, Howard and Brian had done their deals together, but this time Brian had set up his own deal, and although Howard was helping him indirectly, Howard did not know who Brian was dealing with. Granger testified that Shannon told her she and Brian had been to Oklahoma to view drug labs. Phillip Bush testified that a month to three weeks before the murders, he had introduced Brian to a "gentleman" who was looking to trade some "green for some white," which Bush understood to mean marijuana for methamphetamines. Bush further testified that the man was driving a late 80s red Ford pick-up, and that the man returned for another meeting about two weeks before the murders. According to the testimony of Nicole Smith, on the Tuesday before the murders on Friday, she and her mother drove past the Day home, and there was a red Chevrolet pick-up in the drive. She testified that there were two Caucasian men there, and it appeared Brian was in an argument with one of them because there was gesturing and loud talking or hollering.

In the very early hours of Friday morning, Howard met Vicki at McDonald's. She testified that Howard suggested they get a motel room in Texarkana, which they agreed to do. Shortly thereafter, they met at the motel. At this time, Howard was driving the U-Haul truck that was later found at the Howard farm with Brian's body in it. Howard warned Vicki not to tell anyone about the U-Haul because "it would get me killed." The U-Haul was to be used in the deal that night at the Howard farm.

Howard and Vicki then drove to the Howard farm where Howard went out to the shack where they did their deals and

picked something up off the ground. Howard then returned to Kimberly's in Ashdown where he slept on and off that day. At one point Brian came by but did not wake him. The facts are sketchy between 4:00 p.m. and the next morning at 7:30 a.m. when Howard returned. Howard did appear there at about 3:00 a.m. with Shannon and Trevor. And the next day he was in the possession of Shannon's purse.

Brian's body was discovered about 10:00 a.m. Saturday morning Shannon's body and Trevor were discovered several hours later after Brian's body had been removed to the morgue. It is unclear exactly what time they were discovered. However, it is clear that several hours had passed since they were with Howard at Kimberly's apartment.

The evidence does put someone at the Howard farm with Brian the night he was killed. It does not put Howard there. It is unclear where he was. Brian was going to do a drug deal with someone new. The evidence infers it was one or more of the persons Brian had been meeting in the days before the deal. Brian was found dead in the U-Haul that was there for the deal. The evidence puts Howard with Shannon and Trevor at 3:00 a.m. at Kimberly's, and the inference is tht they left with him sometime after that. According to Dr. Kokes, she was murdered sometime between 5:30 a.m. and 1:30 p.m.

There is abundant evidence that all of these people were nervous about something that has never been revealed. After the murders were discovered, Jennifer Qualls met with police at a park because she did not want to go to the police station. According to the officer's testimony, she was shaking so badly that someone had to light her cigarette for her. She did not tell them that she was afraid of Howard, but that she did not want to be seen by anyone from Ashdown, and that she was scared "because a lot of things were going on." That might be argued to infer she was frightened of Howard. The stronger inference is that there was someone else she feared. Prior to the murders, Howard was concerned about being seen, and cautioned Vicki not to talk about the U-Haul. Howard changed cars at least five times on the Friday before the murders, and was picked up in various locations by girlfriends.

In short, the facts are far from reaching substantial evidence. At best, two reasonable hypotheses are raised and neither was proven sufficiently to support a jury verdict. That is not to say this case had to be tried in this posture. Doubtless, further investigation would have helped. Nonetheless, it was tried as it was, and we must review the record presented.

The Evidence Relied on by the State

A brief discussion of the evidence relied upon by the State is required before I go further. According to the record, Shannon was last seen alive with Howard. On this record that is true, and provides some inference of proximity and time. However, there is nothing in the record about the individual or individuals who met with Brian at the Howard farm about this same time and who likely had been at the Day home on several occasions prior to that night.

Howard had and disposed of Shannon's purse. That raises an inference similar to the one above. His disposal could mean he wanted to dispose of evidence that he had murdered her or that he did not want to be caught with the purse given that someone else had killed her. There was also the money Howard was supposed to be expecting. The evidence was that Howard was to receive $4,500.00 from the deal. Qualls testified Howard gave her $200.00 the next day after the murder, and that he did put some money back in his pocket, but that he did not have a wad of money. It raises but a weak inference if any.

The boots offered into evidence were found several feet from the side of the road and in an open area. Blood on the top of one boot was identified as belonging to Brian. There was testimony that the boots were similar to Howard's boots, testimony that Howard might have been wearing his boots on Friday, and that "Negroid" hairs were found in the boots that were microscopically similar to Howard's. Other Caucasian hairs were found in the boots that were never identified. Most significantly, the boots were found at the side of the road at 8:45 a.m. by a man who testified that there were dew prints of feet in the grass showing someone had walked out of the woods, set the boots out in the

open, and then returned to the woods. When the man walked by at 8:30 a.m., the boots were not there. It was on his return trip that they appeared. In spite of this evidence, the State argued Howard threw the boots from a car. The boots were found side by side consistent with having been placed there. If the State's argument were correct, this would have been a pretty remarkable throw. Also, by 7:30 a.m., an hour and forty-five minutes before the boots appeared, Howard was in town. Also, Howard was wearing the same clothing on Saturday morning as he had been wearing the night before. There was no blood on them. If he had worn the boots, the blood would have been on his pants leg. Dr. Kokes testified that the murder of Brian would have transferred blood, but none was found on Howard's clothes. Too, Howard showed no bruises or other marks, and the evidence was Brian was a fellow who did not back down. Also, Shannon showed defensive marks.

Fingerprints were also relied upon. Prints found on the door to the U-Haul were introduced. That was of no significance. There was abundant testimony that Howard was driving the truck the day before. Fingerprints from a Mountain Dew bottle in the Day home were also introduced. Again, they were of little significance. Howard was a frequent guest in the home. More significant, and still unexplained, were the unidentified fingerprints on the frames that sat atop Shannon's body.

There was evidence that Howard had a .38 caliber handgun. Brian was shot with a .38. No doubt that raises an inference, but the question is how strong an inference given there is probably not a more common caliber than .38. The handcuffs introduced were not similar to the ones found on Brian and Shannon. There is also the tool box purchase. No assertion of relevance is made by the majority. If Howard had the "green" Brian was trading for, he might have wanted the tool box to move it. That would be significant evidence. But there is no such evidence. It was too small to transport a body, and why would he have needed it? He had the U-Haul, which a person of average intelligence would not have left at his own farm with a body in the back of it. One also wonders who called the sheriff to report a U-Haul dripping blood on a remote farm.

I do not dispute this evidence made Howard a proper suspect. I dispute, however, that this constitutes substantial evidence. This case need not have been presented as it was. It appears that once Howard was a suspect, the investigation narrowed and resulted in its present posture. In the words of Hays McWhirter of the Arkansas State Police, "Yes, I continued to work up the case. We continued from the different leads and information we were getting we continued to work to see if anybody else was involved with Mr. Howard."

Due Process

The majority holds there was both direct and circumstantial evidence linking Howard to the murders. Circumstantial evidence is evidence of circumstances from which a fact may be inferred. *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982); *Williams v. State*, 258 Ark. 207, 523 S.W.2d 377 (1975). Direct evidence is evidence that proves a fact without resort to inference, when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. Fingerprints, which are at issue in this case are circumstantial evidence. *Brown v. State*, 310 Ark. 427, 837 S.W.2d 457 (1992). The blood found on the boots alleged to belong to Howard is also circumstantial evidence. *Hogan v. State*, 281 Ark. 250, 663 S.W.2d 726 (1984).

I am unable to identify any direct evidence in this case, and the majority fails to identify any. The testimony of witnesses involves only the majority's asserted "inappropriate and unexplained" behavior. There is no testimony placing Howard at the murder scenes. This case involves entirely circumstantial evidence.

The majority's primary error is in their analysis with regard to circumstantial evidence. Although the existence of a fact may be proved by circumstantial as well as by direct evidence, the circumstantial evidence must be sufficient to lead to the inference. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). Where circumstantial evidence is relied upon to establish a fact, the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. *Id.* There is a great

deal of circumstantial evidence that Howard was at the least indirectly involved in the drug deal with Brian on the night of the murders, and that Howard's whereabouts that night are unclear. That is suspicious but not more.

The State argues that the evidence infers Howard's guilt to the exclusion of all other reasonable hypotheses. He was viable suspect. However, the evidence taken in total shows a substantial drug deal was planned for the night of the murder, and that it was set to take place in the woods on Howard's farm. The evidence also shows that Brian was in serious financial trouble with one or more persons, and that they were angry. Shannon feared for their lives. Others feared for their lives. The evidence shows that Brian was trying to raise money to appease someone. It also shows that Howard and Brian prepared for the deal. The truck was obtained, and the site of the deal was visited beforehand. The person or persons making the deal were there at or near the time of the murder, and they have never been identified.

For a jury verdict to stand in a criminal case, there must be substantial evidence to support it. *Hale v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other without resort to suspicion or conjecture. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). The majority concludes that the most incriminating evidence in this case was Howard's "inappropriate and unexplainable" behavior. This appears to mean his conduct was suspicious. That the majority so concludes is deducible not only from the use of "inappropriate and unexplainable" in the opinion, but is also equally apparent from the analysis. Still, it is not clear what is meant by "inappropriate." The word generally means "unsuitable." *Webster's Third New International Dictionary* 1140 (1993). What is meant by "unexplainable," is also unclear; however, the term is occasionally used in the context of circumstantial evidence cases where the circumstantial evidence is unexplainable except in connection with the crime charged. *Harshaw v. State*, 275 Ark. 481, 631 S.W.2d 300 (1982). Clearly that cannot be the meaning intended in this case where the evidence is susceptible of a number of different interpretations. This court in *Ayers v. State*, 247 Ark. 174, 177-178, 444 S.W.2d 695 (1969),

quoted 20 AM. JUR. *Circumstantial Evidence* § 1217 where the following is found:

> Where circumstantial evidence is relied upon in a criminal prosecution, proof of a few facts or a multitude of facts all consistent with the supposition of guilt is not sufficient to warrant a verdict of guilty.

No matter how suspicious, inappropriate, or unexplainable the behavior may be, it will not support a jury verdict. This court has stated more than once with regard to suspicion and circumstantial evidence and its inferences that where inferences are relied upon, they should point to guilt so clearly that any other conclusion would be insufficient. *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990); *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978). This court went on in these two opinions to state that this is so regardless of how suspicious the circumstances are. *Hodges, supra; Ravellette, supra.* Almost fifty years ago, in a time argued by some to be far less enlightened than our own, this court stated quite bluntly:

> The rule is forcibly stated by the Supreme Court of Virginia in the case of *Dotson v. Commonwealth*, 171 Va. 514, 199 S.E. 471, at page 473, in this language: "From the facts shown, no reasonable inference of guilt can be deduced which will be equivalent to proof of guilt beyond a reasonable doubt which is always necessary. Where inferences are relied upon to establish guilt, they must point to guilt so clearly that any other conclusion would be inconsistent therewith. This is true no matter how suspicious circumstances may be."

Williams v. State, 222 Ark. 458, 463, 261 S.W.2d 263 (1953). *See also, Bowie, supra.* Where the evidence does not meet the required standards, the jury verdict will be overturned. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). Where the evidence offered only raises suspicion and the jury would thereby be left to decide based upon speculation and conjecture, then the directed verdict motion should be granted. *Nichols v. State*, 280 Ark. 173, 655 S.W.2d 450 (1983). Conjecture and speculation, however plausible, can not be permitted to supply the place of proof. *First Electric Cooperative Corp. v. Pinson*, 277 Ark. 424, 642 S.W.2d 301 (1982);

Kapp v. Sullivan Chevrolet Company, 234 Ark. 395, 353 S.W.2d 5 (1962); *Russell v. St. Louis S.W. Ry. Co.*, 113 Ark. 353, 168 S.W. 135 (1914). Where a jury verdict is the result of chance and surmise, as in this case, the decision will be subject to a *habeas corpus* review in federal court. A conviction based upon insufficient evidence violates due process under the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307 (1979).

Just last year, this court stated in a case relying on circumstantial evidence, "Upon review this court must determine whether the jury resorted to speculation and conjecture in reaching its verdict." *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). *See also*, *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000). This is not surprising because obviously guilt in a criminal case must be based upon proof beyond a reasonable doubt. Long ago in *Williams v. State*, 222 Ark. 458, 463, 261 S.W.2d 263 (1953), we discussed that any inference of guilt deduced from circumstances must be equivalent to proof of guilt beyond a reasonable doubt, which is always necessary. *Williams, supra. See also Jackson*, 443 U.S. at 317-318. Where such inferences are relied upon, they must point to guilt so clearly that any other conclusion would be insufficient. *Hodge, supra; Ravellette supra.*

Two primary errors were committed. The first was committed when the trial court denied the motion for a directed verdict and submitted the case to the jury because it is only when the evidence is substantial, rises above suspicion, and is properly connected, and the jury is therefore not left to speculation and conjecture, that it may be submitted to the jury to determine whether the evidence excludes every other reasonable hypothesis. *McDole v. State*, 339 Ark. 391, 6 S.W.3d 74 (1999). The jury verdict should be overturned by this court on this basis. The second error is made by the majority on review of the jury verdict, which they must review to determine whether the jury resorted to speculation and conjecture in reaching its verdict. This analysis is nowhere in the majority opinion.

After reading the briefs, abstract, and record, the majority's opinion seems rather meager. It stretches and reaches to assert unsupported conclusions. In large part this is so because in the

analysis, the lives of Howard, Brian, Shannon, and Trevor Day are deftly lifted and separated from a virtual cesspool of crime teeming with any number of vermin who quite likely had both cause and motive to harm Shannon and Brian, as well as Howard and others. However, in this way, Howard and the Days can be viewed in isolation, and therefore the facts are not too difficult. However, if this case is viewed as it ought to be, the record we have received is hopelessly complicated, and to dive into the facts of all the witnesses is to nearly drown in a nether world of any number of threats, of drug dealers dealing one drug for another, of trips to other states to view other drug operations, of mysterious unidentified out-of-state drug dealers, of such fear among witnesses that they are careful not to be seen by anyone talking to the police. The most reasonable hypothesis that the evidence will support is that Brian was trying to do a deal with those to whom he was deeply indebted, and it went bad. He and his family may well have been made examples — examples that might have even convinced Howard to keep quiet. We do not know who those people were, but there is evidence that they were there that night when Brian was murdered. This case fails because of a lack of proof offered by the prosecutor. Howard may well be the murderer, but the evidence presented is insufficient.

This is the court of last resort for many issues. Fundamental due process issues have been presented to us. As we quoted in *Bowden v. State*, 256 Ark. 820, 822, 510 S.W.2d 879 (1974), this "'. . . . inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses." *Malinski v. New York*, 324 U.S. 401 (1945), *cited in Rochin v. California*, 342 U.S. 165 (1952)." The jury verdict should not stand.

Motion to Suppress

This case could also be reversed and remanded for a new trial based upon the trial court's error in denying the motion to suppress certain testimony by Penny Granger. The majority recites the events at trial involving the admission of the testimony of

Penny Granger regarding a statement that Shannon told her that she might be pregnant by Howard. The majority then states the law that admission of evidence showing motive is left to the discretion of the trial judge, and then fails to provide any analysis, or even a statement as to any conclusion reached. The majority just passes on the issue. The trial court erred when it denied the motion to suppress.

Penny Granger testified that she was present when Shannon performed an at-home urine test for pregnancy. She further testified that upon seeing the "stick" was a color indicating pregnancy, she told Penny, "Oh, no, Brian's going to be mad." Granger testified that she asked Shannon why Brian would be mad, and she purportedly told Granger that there was a "possibility that it could be Tim Howard's baby."

There was no evidence that Howard ever knew Shannon thought she might be pregnant with his child. The autopsy failed to show any evidence of pregnancy. Nonetheless, the majority finds no problem with allowing the evidence to be admitted to show why Howard might have killed Shannon. This is mere speculation. There is no evidence showing that Howard possessed any knowledge of this and thereby could have killed her for this reason. It is rank speculation.

This court has declared for over seventy years that inferences may not be drawn from inferences, because that would "carry the deduction into the realm of speculation and conjecture." *Moran v. State*, 179 Ark. 3, 7, 13 S.W. 828 (1929). *See also, Yancey, supra.* Here, two inferences are required. We must first infer that Howard knew Shannon believed she was pregnant by Howard, and then infer he killed her because of that knowledge. Such a deduction is not allowable under the rules of evidence. *Yancey, supra.*

Nor could the evidence withstand an analysis under relevance. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Ark. R. Evid. 401. *McDole, supra.* The fact that is of consequence is who murdered Shannon. The evidence is that Granger knew Shannon thought Howard

might have gotten her pregnant. If the evidence was that Granger told Howard that Shannon thought she was pregnant with his child, then the evidence might make it more rather than less probable that Howard killed Shannon because he thought she was pregnant with his child. It would be evidence of motive. There is no evidence Howard was aware of Shannon's belief. Without some evidence showing Howard possessed knowledge that Shannon believed she was pregnant by him, the evidence is not relevant and simply has no probative value to the fact of consequence.

Even if relevance is ignored for the sake of argument, the probative value of the evidence is very weak when compared to the prejudicial impact. Ark. R. Evid. 403. The evidence at most raises an inference that if Howard knew Shannon believed she might be pregnant by him, it could be a motive to kill her. On the other hand, Howard, an African-American, was tried for the capital murder of a white woman. Then, by Granger's testimony, the jury is told that he might have gotten her pregnant as well. The obvious potential prejudice is so apparent it needs no discussion. Additionally, there is prejudice in the likely result that the jury may well have believed Howard may also have killed the fetus. And yet despite all this, the majority finds no error at all in denying the motion to suppress.

Closing Argument in the Penalty Phase

In arguing for the death penalty, the prosecutor entered the realm of fantasy, and according to the majority, that is not reversible error. It is hard to imagine a more sickening image than the one painted by the State's attorney in closing argument when he invited the jury to visualize a helpless mother, bound, and compelled to watch as her infant son is hanged by an extension cord before her very eyes. If this were true, it would be helpful to the jury in deciding punishment, but unfortunately, it is the product of the fantasy of the State's attorney. The majority holds that this was "plausible," or, in other words, it was not impossible that it might have occurred. Plausibility is not the standard. It is every plausible inference that may be argued, not every possible course of events. While there is no question Trevor was strangled, there

are no facts which would support any inference that he was hanged, or that he was hanged before his mother's eyes.

The closing argument was based upon pure fiction. There is no basis in the record. A prosecutor acts in a *quasi*-judicial capacity, and it is the prosecutor's duty to seek a fair and impartial trial. *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999). As the United State Supreme Court noted in *Berger v. United States*, 295 U.S. 78 (1935), the prosecutor is not the representative of an ordinary party, but of a sovereignty whose obligation is to govern impartially. This court's holding in *Holder v. State*, 58 Ark. 473, 25 S.W. 279 (1894), has been cited often, last in *Leaks, supra.*, wherein this court stated:

> Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose.

Leak, supra, 339 Ark. at 358.

The majority holds that the argument "Shannon Day saw her child hanging from an extension cord before she died" is a fair inference from the evidence. I must ask from what evidence this inference arises? The child was not even found in the same room as Shannon's body. There was no evidence to show what occurred in that home. There was only evidence that the child was strangled, not that he was hanged. And there was no evidence to show whether Shannon was assaulted first, or whether the child was assaulted first, or, for that matter, where within the home the assaults occurred. The State's attorney was not going beyond the record to argue evidence that he thought should have been admitted. Instead, he testified to fictional facts. This is a serious problem that calls the very legitimacy of the trial into question.

The State's attorney did not argue facts or inferences from facts in the case. He introduced facts by way of argument. By so doing, the State's attorney deprived Howard of his right of cross-examination of the witness, the State's attorney. LaFave, *Criminal Procedure* § 24.7(e), at 555 (1999). This was not evidence. It was pure speculation and conjecture. The jury heard it and considered it in deciding on the death penalty. The sentence is subject to attack on the basis that death was imposed in an arbitrary and capricious manner. In *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999), we stated that we recognized that there must be adequate power in the judiciary to check the arbitrary and capricious imposition of a death sentence, noting that in *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), we held that those safeguards existed in Arkansas and stated:

> The Arkansas judiciary is vested with broad powers to check the arbitrary, capricious, wanton or freakish imposition of the death sentence by a jury. Those powers exist at both trial and appellate levels.

Robbins, 339 Ark. *at* 348. This court can not say that the death penalty was imposed based upon the evidence in this case. We have a duty to guard against precisely what occurred in this case.

No objection was made. That is of no moment. We anticipated this very situation in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), when we stated:

> A third exception is a mere possibility, for it has not yet occurred in any case. That relates to the trial court's duty to intervene, without an objection, and correct a serious error either by an admonition to the jury or by ordering a mistrial. We implied in *Wilson v. State*, 126 Ark. 354, 190 S.W. 441 (1916), that no objection is necessary if the trial court fails to control a prosecutor's closing argument and allows him to go too far: "Appellant can not predicate error upon the failure of the court to make a ruling that he did not at the time ask the court to make, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury not to consider the same. *See Kansas City So. Ry. Co. v. Murphy*, 74 Ark. 256 [85 S.W. 428 (1905)]; *Harding v. State*, 94 Ark. 65 [126 S.W. 90 (1910)]."

This case presents precisely this situation. The argument was beyond flagrant. Howard's right to a fair and impartial trial was fatally compromised. This case should be reversed and remanded on this basis for resentencing.

I also think it worthy of note that by our *per curiam* dated July 9, 2001, Ark. R. App. P.—Crim. is being amended for cases where the death penalty is imposed on or after August 1, 2001. Thereby, the issues to be reviewed by this court are expanded to include:

> iv) whether the trial court failed in its obligation to intervene without objection to correct a serious error by admonition or declaring a mistrial;
>
> * * *
>
> vii) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

The Handcuffs

Finally, I must dissent on the majority's holding that admission of the handcuffs was not an abuse of discretion. The handcuffs found on Brian and Shannon Day's bodies were simply metal handcuffs. The pair of handcuffs Jennifer Qualls testified that she saw in the possession of Howard were fur covered and intended for a sexual purpose. Based upon information from Quall, the State went to the store where Howard was believed to have acquired his and purchased a pair thought to be similar. The purchased pair had fur on them.

The State moved to admit these purchased hand cuffs and they were admitted over objection. There was no evidence linking Howard to the handcuffs found on Brian and Shannon. There was no evidence Howard possessed two pair. The handcuffs on Shannon and Brian had neither fur nor any glue residue. In short there was no similarity beyond the fact all three pairs of handcuffs were handcuffs of one form or another.

Because handcuffs were found on Shannon and Brian, an argument may be made that Howard having handcuffs in his posssession prior the murders is relevant as having some tendency to make it more likely Howard was connected to their murders. Ark. R. Evid. 401. However, under Ark. R. Evid. 403, the court must weigh the probative value against the prejudicial harm. Here the likelihood the handcuffs on the victims came from Howard is lessened by the fact they are so dissimilar to those Qualls testified to. Further, the pair Qualls testified to were not the ones admitted, but rather a pair purchased that were thought to be similar. This lessens the relevance and heightens possible prejudice even more. In the end, the probative value is slight and the potential harm is great. Under Rule 403 the

handcuffs should have been excluded. On this basis, this case should be reversed and remanded for a new trial.

The majority's states the law on admission of evidence and then simply states a conclusion that there was no abuse of discretion in admitting the handcuffs. There is no analysis of why the handcuffs were or were not properly admitted.

For the foregoing reasons, I respectfully dissent.

SUPPLEMENTAL DISSENTING OPINION ON DENIAL OF REHEARING

June 27, 2002

JIM HANNAH, Justice, dissenting. The petition for rehearing should be granted. The majority has stated and relied upon the wrong standard of review in this case. The majority states that under the standard applied, "Only evidence supporting the verdict will be considered." This statement is overbroad. Rather, under the requirements of the Fourteenth Amendment to the United States Constitution, *all* the evidence is reviewed in a light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307 (1979), *see also, Lewis v. Jeffers*, 497 U.S. 764 (1990). We have said as much earlier in *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979), wherein this court stated:

> In pointing out the pertinent testimony on the question of sufficiency of the evidence, we will view the evidence in the light most favorable to the state, considering only that testimony that lends support to the jury verdict and disregarding any conflicting testimony which could have been rejected by the jury on the basis of credibility.

Chaviers v. State, 267 Ark. *at* 13. Here the standard was correctly stated. *All* evidence must be considered in the light most favorable to the state; however, testimony that could have been rejected by the jury on the basis of credibility may be disregarded. This is consistent with the well known principle that the court will generally defer to the jury on issues of credibility. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). *See also, Schlup v. Delo*, 513 U.S. 298 (1995). Consistent with these rules, all evidence in favor of the appellant may not be

simply disregarded. Thus, this court has ignored evidence on review that must be considered.

The injury that results from this improper standard is seen quite clearly in this case based solely upon circumstantial evidence. The majority states in error that this case includes direct evidence. As discussed in my dissent, there is no merit to this assertion. The majority asserts as well that the determination of whether the circumstantial evidence is consistent with guilt and inconsistent with any other reasonable conclusion is a question of fact for the fact-finder to determine. This is again overbroad and ignores an analysis that should have been undertaken by the trial court and ignores an analysis that should have been undertaken by this court on appeal.

The trial court may not simply default to the jury. This court may not simply assert the issue is one for the jury and ignore whether the trial court should have submitted the issue to the jury. In *Jackson, supra*, the United States Supreme Court stated that:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. *at* 317. More is required than simply a "trial ritual." *Jackson v. Virginia*, 443 U.S. *at* 316-317. It is only when circumstantial evidence does more than arouse suspicion, and is properly connected, that it becomes an issue to be submitted to the jury. *Sanders v. State*, 340 Ark. 163, 8 S.W.3d 520 (2000); *Chaviers, supra. See also, Harshaw v. State*, 275 Ark. 481, 631 S.W.2d 300 (1982). An analysis is required to determine whether the jury was left to speculation and conjecture in arriving at its conclusion. *Chaviers, supra.* Only then is the question one that may be submitted to the jury. In *Ross v. State*, 346 Ark. 225, 230, 57 S.W.3d 152 (2001), this court stated, "Upon review, this court must determine whether the jury resorted to speculation and conjecture in reaching its verdict." This was not done. Due process was not satisfied.

The majority attempts to meet the requirement that the circumstances be so connected and cogent as to show guilt to a moral certainty with the statement that "the most incriminating evidence against Howard was his inappropriate and unexplainable behavior both before and after the discovery of Brian, Shannon and Trevor

Day." How inappropriate and unexplainable behavior rises above mere suspicion and conjecture is difficult for me to understand.

I also feel compelled to note that the reference to "inappropriate and unexplainable behavior" might be interpreted to mean that this court is stating that if Howard had an explanation for his behavior, he should have provided it. While it is not clear, this might be argued to mean that this court is indicating he should have waived his Fifth Amendment rights against self-incrimination and provided testimony to explain his conduct. Clearly, this would not be proper. The jury is instructed that a defendant has an absolute right not to testify. The jury is further instructed that the fact a defendant chooses not to testify is not evidence of guilt or innocence, and under no circumstances shall the jury consider whether the defendant testified. AMCI Crim. 111. Yet it appears this is what is being considered by this court.

Based upon the arguments stated herein, and based on the arguments contained in my dissent, I would grant the petition for rehearing.

BROWN and THORNTON, JJ., join.

CORBIN, J., not participating.

Ramona MOIX-McNUTT *v.* Robert J. BROWN

01-283 74 S.W.3d 612

Supreme Court of Arkansas
Opinion delivered May 9, 2002

McNutt Law Firm, by: *Mona J. McNutt*, for appellant.

Cross, Gunter, Witherspoon and Galchus, P.C., by: *M. Stephen Bingham*, for appellee.

TOM GLAZE, Justice. This case involves the application of the statute of limitations in legal malpractice cases. We take jurisdiction under Ark. Sup. Ct. R. 1-2(a)(5), as the appeal involves the discipline of attorneys-at-law.

Ramona Moix-McNutt originally hired the law firm of Crockett and Brown, PLLC,[1] in December of 1996 to represent her and her husband in a real estate transaction, and on January 2, 1997, Crockett and Brown filed a Chapter 13 Bankruptcy petition for Moix-McNutt. After a hearing in June of 1997, the bankruptcy court found that Moix-McNutt did not have enough income to meet the statutory requirements for a Chapter 13 bankruptcy. On July 17, 1997, the bankruptcy court ordered Moix-McNutt and her husband, Mark McNutt, to enter Chapter 11 bankruptcy or to consolidate and join in one Chapter 11 bankruptcy petition within twenty days; otherwise, Moix-McNutt's Chapter 13 bankruptcy case would be involuntarily converted to a Chapter 7 bankruptcy proceeding without notice or hearing at some future time.

On July 25, 1997, Brown filed a notice of appeal from the July 17 order, and on August 5, 1997, Brown filed a motion requesting a stay of the July 17 order pending the appeal. The bankruptcy court held a hearing on September 5, 1997, at which time the motion for stay pending appeal was denied. Brown did not file a motion to convert Moix-McNutt's Chapter 13 petition to a Chapter 11 petition or join Mark McNutt in the proceedings. On December 3, 1997, the bankruptcy court filed an order that involuntarily converted Moix-McNutt's Chapter 13 petition into

[1] The law firm of Crockett and Brown, PLLC, has apparently since dissolved, and Moix-McNutt names only Robert J. Brown as the appellee; therefore, any references to Moix-McNutt's attorneys will simply be to Brown.

a Chapter 7 proceeding, noting that Moix-McNutt was clearly ineligible for Chapter 13.

On August 14, 2000, Moix-McNutt filed this malpractice action against Brown. In her complaint, she alleged that, as a result of Brown's "incompetent legal advice," she suffered an involuntary conversion of her bankruptcy petition to a Chapter 7 proceeding, which resulted in a loss of an enormous sum of money. She further asserted that Brown knew or should have known that the conversion would take place if he took no further action following the bankruptcy court's July 17, 1997, order directing Moix-McNutt to convert her petition to a Chapter 11 petition.

Brown filed a motion to dismiss Moix-McNutt's complaint, asserting that the three-year statute of limitations for bringing legal malpractice actions had expired. After a hearing on November 2, 2000, the trial court granted Brown's motion. From that order, Moix-McNutt brings this appeal, arguing that her cause of action did not accrue until the bankruptcy court's December 3, 1997, order. Moix-McNutt contends that she was not harmed or did not suffer any loss until this December 3 bankruptcy court order that converted her Chapter 13 petition into a Chapter 7 proceeding. It was this involuntary conversion, she asserts, that was the last essential element to her cause of action. Thus, because the statute of limitations commenced from the December 3, 1997, date, she claims the filing of her malpractice action on August 14, 2000, was well within the three-year statute of limitations.

Arkansas Code Annotated section 16-56-105 (1987) provides a three-year statute of limitations for malpractice actions against attorneys. *See also O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997) (three-year statute of limitations applies to all tort actions not otherwise limited by law). For over one hundred years, Arkansas has followed the "occurrence rule" with respect to the commencement of the statute of limitations in legal malpractice cases. *See White v. Reagan*, 32 Ark. 821 (1877). This rule provides that the statute of limitations applicable to a malpractice action begins to run, in the absence of concealment of the wrong, when the negligence occurs, and not when it is discovered. *See*

Ragar v. Brown, 332 Ark. 214, 964 S.W.2d 372 (1998) (where this court listed three common approaches used to determine when a cause of action for malpractice accrues: 1) the occurrence rule; 2) the "damage rule" or "date of injury rule," with a variation called the "discovery rule"; and 3) the "termination-of-employment rule," also named the "continuing representation rule"; the *Ragar* court, however, adhered to the occurrence rule); *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992); *Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425 (1991).

Notwithstanding this court's consistent refusal to retreat from the occurrence rule, Moix-McNutt continues, as mentioned above, to argue that the last essential element to her cause of action did not fall into place until the bankruptcy court's December 3, 1997, order involuntarily converting her bankruptcy proceeding to Chapter 7. She asserts that, but for the bankruptcy court's entry of that order, which forced her to enter a Chapter 7 bankruptcy and culminated in the liquidation of her assets, she would have had no complaint against anyone.

To accept this argument, however, Arkansas would have to abandon the occurrence rule and adopt the so-called "date of injury" rule; this latter rule provides that the statute of limitations begins to run, not from the occurrence of the negligent act, but rather from the time injury results from the negligent act. *See Chapman, supra.* This court has held time and time again that "if such a marked change is to be made in the interpretation of statutes that have long been the law, it should be done prospectively by the legislature and not retrospectively by the courts." *Goldsby, supra*; *Flemens v. Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996); *Morris v. McLemore*, 313 Ark. 53, 852 S.W.2d 135 (1993) (holding that a cardinal rule in dealing with a statutory provision is to give it a consistent and uniform interpretation, and when a statute has been consistently construed in one way for many years, such construction ought not be changed).

A fundamental flaw in Moix-McNutt's argument is that she has failed to allege the date of any wrongdoing by Brown after July 17, 1997, when the bankruptcy court ordered her to convert her petition from Chapter 13 to Chapter 11. Although

she argues that Brown continued his negligent actions in the days after that order was entered, and failed to advise her of the repercussions she would face if she ignored the bankruptcy court's order, she does not specifically plead the dates on which she alleges that Brown gave her negligent advice. In *Ragar v. Brown, supra*, this court held that such a failure caused the pleading to be deficient on its face. The trial court correctly recognized that all of the allegedly wrongful acts by Brown had been completed as of July 17, 1997,[2] and Moix-McNutt has not pointed out to this court any evidence to the contrary. Although she argues that "common sense" says that one cannot have a cause of action until one has actually suffered a loss or damages arising out of the negligent act, this is precisely the argument that this court has rejected over and over again. *See Ford's, Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989).

In conclusion, Arkansas has utilized the "occurrence rule" since 1877, and "[t]his court has expressly declined to retroactively change the legal malpractice occurrence rule to any of the other approaches. The General Assembly's silence for over 100 years indicates tacit approval of this court's statutory interpretation." *Ragar*, 332 Ark. at 223. While Moix-McNutt may disagree with the application of the rule, "*stare decisis* mandates this outcome." *Id.* at 224.

Because the three-year statute of limitations barred Moix-McNutt's malpractice action against Brown, the trial court did not err in granting Brown's motion to dismiss. We affirm.

IMBER, J., not participating.

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[2] To the extent that Moix-McNutt argues that Brown's conduct constituted malpractice, we note that the trial court decided the case solely on the basis of the statute of limitations; therefore, that is the only issue we address in this opinion.

Blake BAILEY *v.* STATE of Arkansas

CR 01-1097 74 S.W.3d 622

Supreme Court of Arkansas
Opinion delivered May 9, 2002

[redacted]

Terry Goodwin Jones, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Blake Bailey appeals the order of the Craighead County Circuit Court, Juvenile Division, ordering him to pay restitution in the amount of $6,785.60, after his probation was revoked. For reversal, Appellant argues that where the trial court initially reserved the issue of restitution for ninety days, it erred in later reopening the issue and requiring Appellant to pay an increased amount of restitution. This is an issue of first impression; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We reverse and dismiss the order of the trial court.

The record reflects that on April 26, 2000, Appellant, a minor, pled guilty to the charge of residential burglary and theft of property. As a result of his guilty plea, the trial court placed Appellant on probation for twelve months. The trial court also ordered Appellant to pay restitution in an amount to be determined within ninety days from the date of the adjudication hearing. Although the record before us reveals no subsequent order by the trial court setting restitution at a fixed dollar amount, both parties aver that Appellant was ordered to pay $500.00 in restitution, an amount that represented the victims' insurance deductible.

Thereafter, the State filed a petition seeking to revoke Appellant's probation based on an allegation of possession of a controlled substance. The State also moved to resentence him and make restitution correct for the first time. Appellant pled guilty to the possession charge, and on January 17, 2001, the trial court revoked his probation on the basis of the possession charge. Ini-

tially, the trial court sentenced Appellant to serve ninety days in a juvenile detention facility, with thirty days to be served and sixty days deferred.

Thereafter, on March 28, 2001, the trial court held a subsequent hearing to address the issue of restitution. At this hearing, Appellant argued that the trial court lacked authority to revise the amount of restitution after the original ninety-day time period had elapsed. In support of his argument, Appellant relied on Ark. R. Civ. P. 60, which provides that a trial court has ninety days to modify or vacate a judgment, with the exception of correcting any clerical errors. Appellant asserted that this rule had been extended to criminal cases via *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001). The State countered that once the petition to revoke was filed, it had the effect of reopening the original case and the trial court had the authority to impose any order that he could have originally entered.

After considering the arguments of counsel, the trial court ruled from the bench that Appellant's failure to pay any of the restitution originally ordered was grounds for revoking his probation. The trial court then entered an amended order of revocation requiring payment of restitution in the amount of $6,785.60. Although the trial court acknowledged that Appellant had previously been sentenced to serve ninety days as a result of his probation being revoked, it found that the added restitution did not violate double-jeopardy principles, as some of the ninety-day sentence was deferred. From that order, comes the instant appeal.

As an initial matter, we address Appellant's right to appeal the trial court's order of punishment, given that he pled guilty to the allegation contained in the State's petition. Generally, there is no right to an appeal from a plea of guilty. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). Pursuant to Ark. R. Crim. P. 24.3, an appeal from a guilty plea or a plea of *nolo contendere* may be allowed under certain circumstances, none of which are applicable here. This limited right of appeal from a guilty plea also pertains to appeals from juvenile court, as the rules of criminal procedure are applicable to juvenile-delinquency proceedings. *L.H. v. State*, 333 Ark. 613, 973 S.W.2d 477 (1998);

Mason v. State, 323 Ark. 361, 914 S.W.2d 751 (1996). *See also* Ark. Code Ann. § 9-27-325(f) (Repl. 2002). Where, however, an appeal from a plea of guilty raises only an issue of sentencing, rather than requiring a review of the plea itself, this court will entertain such an appeal. *Id.*; *Hill*, 318 Ark. 408, 887 S.W.2d 275. Accordingly, the issue raised by Appellant is properly before this court.

For reversal, Appellant argues that the trial court erred in reopening the issue of restitution based on his failure to pay any of the amount originally ordered where the ninety days reserved for the issue had passed. In support of his argument, Appellant relies on *Dawson*, 343 Ark. 683, 692, 38 S.W.3d 319, 324 (quoting *Lord v. Mazzanti*, 339 Ark. 25, 29, 2 S.W.3d 76, 79 (1999)), wherein this court held that after ninety days a circuit court could not change its judgment in order "to make it speak what it did not speak, but ought to have spoken." The State counters that the present matter is distinguishable from *Dawson* in that the modification was not made *sua sponte* by the court, but rather was made in the context of a probation-revocation hearing, and thus, the issue is governed by Ark. Code Ann. § 9-27-339 (Repl. 1998). The State further argues that section 9-27-339(e)(3) grants a trial court the authority to make any disposition that could have been made at the time probation was imposed.

Even though it is not raised by either party, we must first address the issue of whether the trial court had jurisdiction to amend the revocation order and impose an additional punishment on Appellant. This court has held that the issue of a circuit court's loss of jurisdiction to modify a sentence is one that can be raised by this court on its own motion. *Bagwell v. State*, 346 Ark. 18, 53 S.W.3d 520 (2001); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989). In a similar vein, this court treats allegations of void or illegal sentences similar to problems of subject-matter jurisdiction, in that we review such allegations whether or not an objection was made in the trial court. *Walker v. State*, 330 Ark. 652, 955 S.W.2d 905 (1997); *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992). A sentence is void when the trial court lacks the authority to impose it. *Id.* Thus, we must determine whether the trial court possessed the authority to enter the amended order.

We agree with the State that section 9-27-339 governs issues of probation revocation in juvenile court. A revocation hearing is held once the State files a petition seeking to revoke a juvenile's probation. *See* section 9-27-339(d). Section 9-27-339(e) provides that upon finding by a preponderance of the evidence that a juvenile violated his terms of probation, a trial court may:

> (1) Extend probation;
>
> (2) Impose additional conditions of probation;
>
> (3) Make any disposition that could have been made at the time probation was imposed; *or*
>
> (4)(A) Commit the juvenile to a juvenile detention facility for an indeterminate period not to exceed ninety (90) days. [Emphasis added.]

Thus, the State's assertion that under section 9-27-339(e)(3) the trial court was authorized to make any disposition that it could have made when Appellant was placed on probation is correct. The State ignores, however, a very important aspect of this statutory scheme, namely the fact that the options provided for in section 9-27-339(e) are listed in the disjunctive, as indicated by the General Assembly's use of the particle "or."

In discussing the use of the particle "or" in statutes, this court has stated that, "[i]n its ordinary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that'; it is a connective that *marks an alternative*." *McCoy v. Walker*, 317 Ark. 86, 89-90, 876 S.W.2d 252, 254 (1994) (quoting *Beasley v. Parnell*, 177 Ark. 912, 918, 9 S.W.2d 10, 12 (1928)); *see also Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993). Moreover, in holding that a statute provided three alternative venues for fraud, this court reasoned that "the General Assembly followed the recognized rule of grammar that a list of items followed by commas and ending with the word 'or' between the final two items shall be read in the disjunctive." *Quinney v. Pittman*, 320 Ark. 177, 183, 895 S.W.2d 538, 541 (1995). Thus, under the rationale of these cases, this court must regard the measures set forth in section 9-27-339(e) as alternatives available to the trial court when revoking a juvenile's probation.

In the instant case, the trial court revoked Appellant's probation on January 17 for possession of a controlled substance and sentenced him to serve ninety days. Over two months later, the trial court held a second hearing, stemming from this same petition to revoke, and found that Appellant's failure to pay restitution was grounds for revocation and entered an amended revocation order increasing the amount of restitution owed by Appellant. Under section 9-27-339, however, the trial court lacked the authority to commit Appellant to a juvenile detention facility and then later make any disposition that he could have imposed at the time Appellant was placed on probation.

Our conclusion is further supported by this court's decision in *Avery v. State*, 311 Ark. 391, 844 S.W.2d 364 (1993). There, a juvenile was placed on one-year's probation for burglary, and the State later filed a petition to revoke his probation. A hearing was held and the trial court found that the juvenile had violated his probation, but did not revoke that probation, choosing instead to extend the term and conditions of probation. The trial court then ordered the juvenile to appear at a review hearing. The State did not file another petition to revoke probation, but at the review hearing, the trial court revoked the juvenile's probation and ordered him to pay a fine. On appeal, the juvenile argued that the trial court disposed of the petition when it denied the State's request for revocation and extended probation, and that it could not make a different disposition several months later. This court agreed with the juvenile and reversed the trial court's order, stating:

> The trial court was authorized by the above-quoted statute to deny the petition to revoke and extend probation under subsection (1) above, as it did in this case, but it was not authorized to take that action and then, three months later, change its mind and grant the petition to revoke under subsection (3) above. After the first disposition denying revocation, the statute requires the prosecutor to file another petition for revocation and give notice to the delinquent that revocation is again being considered before probation can be revoked. If we were to construe the statute to

> authorize the procedure used in this case, it might well run afoul of the prohibition against double jeopardy, for it was settled by the Supreme Court in *Breed v. Jones*, 421 U.S. 519 (1975), that jeopardy does attach within the meaning of the Fifth Amendment, as applicable to the states under the Fourteenth Amendment, in an adjudicatory delinquency proceeding in juvenile court.

Id. at 394, 844 S.W.2d at 366.

Here, the trial court's initial order revoking Appellant's probation due to possession of a controlled substance and sentencing him to ninety days' detention constituted a disposition of the matter under section 9-27-339. The trial court's subsequent order revoking Appellant's probation and ordering him to pay restitution of $6,785.60 constituted a second disposition of the same petition. In sum, we disagree with the trial court's determination that jeopardy did not attach once the trial court revoked Appellant's probation and sentenced him to confinement in a juvenile detention facility simply because some of his ninety-day sentence was deferred. Thus, the trial court was without jurisdiction to enter an amended order revoking Appellant's probation and setting restitution at $6,785.60. Accordingly, we reverse the order of the trial court and dismiss this matter.

IMBER, J., not participating.

Deatria Donyell HAMILTON *v.* STATE of Arkansas

CR 01-391 74 S.W.3d 615

Supreme Court of Arkansas
Opinion delivered May 9, 2002

[redacted]

[redacted]

Katherine S. Streett, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Deatria Donyell Hamilton appeals a judgment in which he was convicted of two counts of capital murder and sentenced to two terms of life imprisonment without parole. Hamilton argues five points on appeal, all of which involve alleged trial court error: (1) excusing for cause *venire* persons who opposed the death penalty under the facts of the case; (2) sustaining the State's objection and requiring defense counsel to read additional portions of a witness's statement during cross-examination by defense counsel; (3) admitting into evidence an inaccurate diagram of the crime scene thereby misleading the jury; (4) admitting into evidence a videotape of the crime scene, which contained inflammatory footage of the homicide victims; and (5) denying his motion for declaration of a mistrial after the State's witnesses made two references to his prior arrest and penitentiary sentence. We find no reversible error and affirm the judgment.

During the early morning hours of December 23, 1999, Carolyn and Starla Ellison discovered the bodies of James Ellison, their husband and father respectively, and Carlos Meeks, at Ellison's place of business, Leaders Barber Shop, in El Dorado. When the police officers arrived, they discovered that Mr. Meeks, who was still in the barber's chair and wearing a barber's apron, had suffered a bullet wound underneath his right eye and one to his right hand. Mr. Ellison's body was found lying on the floor behind the chair, and it was later determined that he too was shot in the head. Jewelry which Mr. Ellison wore was missing. Both men were dead. Police officers further discovered a bank bag on a table near the chair, which contained several one dollar bills, and

bloody footprints leading outside of the shop and southward toward the nearby railroad tracks.

At Hamilton's trial, Jerome Powell admitted to shooting both Mr. Ellison and Mr. Meeks and described the events of the evening in question. Powell had previously pled guilty to capital murder and had agreed to testify against Hamilton and Kirun Mendenhall in exchange for a sentence of life without parole. He testified that while at the home of friends named the Mendenhalls, he met Hamilton, and the two, with others, proceeded to drink gin and smoke marijuana that evening. At about midnight, Hamilton, Powell, and Kirun Mendenhall were at Leaders Barber Shop, where they decided to "get some money." Powell testified that Hamilton told him that Mr. Ellison made large amounts of money, which he kept in a bag, and that he also kept a gun. The three entered the store with robbery in mind. Hamilton spoke with Mr. Ellison and then nodded to Powell, which was the signal for Powell to pull his gun. Powell did so and turned around. He testified that the gun accidentally went off, shooting Mr. Meeks through his hand and face. Mr. Ellison then crouched downward, according to Powell, as if going for a gun, and Powell shot him and he fell to the floor. Mendenhall fled the shop, and Hamilton grabbed a briefcase and looked in Mr. Ellison's front pocket before leaving. All three men then met at the railroad tracks and began running toward the Mendenhall house. On the way, they stopped by an abandoned house, opened the briefcase, and removed a blue pouch which contained money. At some point, they split the money three ways, with each receiving approximately fifty dollars. Next, they burned the briefcase and continued to the Mendenhall house. After reaching the house, Powell and Hamilton discovered specks of blood on their clothing and decided to burn their clothes in the backyard. On December 28, 1999, Powell was arrested for the murders, and during a search of his home, Mr. Ellison's missing jewelry and a pistol were found in the wheel well of a vehicle on his property. Hamilton was subsequently arrested and gave a statement as had Powell.

A five day trial was held, and Hamilton was convicted and sentenced as already set out in this opinion.

I. Voir Dire.

Hamilton first contends that the trial court erred in excluding *venire* persons who stated that they could not impose the death penalty for his participation when the actual shooter, Powell, was only to receive a sentence of life without parole. He maintains that the trial court expanded the scope of permissible death qualification for potential jurors, thus denying him due process of law.

The State responds that because Hamilton cannot demonstrate prejudice, his assertion is without merit. Specifically, the State contends that because Hamilton did not receive the death sentence, any argument he might now raise as to the death-qualified composition of his jury is moot. We agree. Hamilton received a sentence of life without parole—not death. Because he did not receive a death sentence, he lacks standing to raise errors having to do with the death penalty. *See, e.g.*, *Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991) (citing *Ward v. State*, 298 Ark. 448, 770 S.W.2d 109 (1989)). We affirm on this point.

II. Out-of-Court Statement.

Hamilton next claims that the trial court erred in allowing the prosecutor to interrupt his counsel's questioning of State witness Jerome Powell, when his counsel was attempting to impeach Powell with a prior inconsistent statement. He submits that there is no requirement that "any part of the prior statement other than that which the attorney believes to be inconsistent" must be read for impeachment purposes. He further contends that had the prosecutor wished to correct an impression left by the impeachment, he could have taken the matter up on redirect examination. It was clear error, he concludes, for the trial court to require defense counsel to read additional portions of the prior statement into the record which had the effect of heightening the prosecutor's credibility in the jury's eyes.

The State answers that Hamilton did not object to the State's request to have the prior inconsistent statement read in its entirety; thus, the issue is not preserved for our review. Indeed, the State underscores that defense counsel agreed to comply with

the prosecutor's request. The State is correct in that this issue is not preserved for appeal. The contemporaneous-objection rule requires a party's objection at the trial level in order to preserve an argument for appeal. *See Bader v. State*, 344 Ark. 241, 40 S.W.3d 738 (2001). The purpose of the contemporaneous-objection rule is to give the trial court a fair opportunity to consider an allegation of error and to correct it, if the allegation is meritorious. *See Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002). Here, there was no ruling by the trial court because Hamilton's counsel failed to object to the prosecutor's requests. In fact, defense counsel acquiesced to each request by the prosecutor.

We are precluded from addressing this argument on appeal.

III. Diagram.

Hamilton also claims that over his objection, the prosecutor was allowed to introduce a diagram which misrepresented the dimensions of the crime scene. He admits that the jury was cautioned by the trial court on this but asserts that it was only cautioned as to the diagram's failure to be drawn to scale and not as to the misleading placement of evidence and the positioning of the two bodies. Specifically, he takes issue with the positioning of one of the bodies in relationship to the walls of the shop and the bloody footprints. He argues that the interior of the barber shop was considerably smaller than that depicted by the diagram and that the close quarters lessened the likelihood that Hamilton could move about as described by Powell. Prejudice results, he claims, from the fact that the only direct evidence of what occurred inside the barber shop came from Jerome Powell, a witness with questionable credibility.

This court has held that the admissibility of demonstrative evidence is a matter falling within the wide discretion of the trial court. *See Garrison v. State*, 319 Ark. 617, 893 S.W.2d 763 (1995). We have said: "[M]aps, drawings, and diagrams illustrating the scenes of a transaction and the relative location of objects, if shown to be reasonably accurate and correct, are admissible in evidence, in order to enable the court or jury to understand and apply the established facts to the particular case." *Howell*

v. Baskins, 213 Ark. 665, 671, 212 S.W.2d 353, 356 (1948) (quoting 20 AM. JUR. *Evidence* § 739). Where exactness was not claimed, nor was there any contention that distances indicated were sufficiently at variance with actuality, there is no creation of prejudice. *See Pinson v. State*, 210 Ark. 56, 194 S.W.2d 190 (1946).

In the case before us, Hamilton objected to the diagram of the interior of the barber shop, but it appears that he received the relief he desired as demonstrated by the following colloquy:

THE COURT:	However, I'll overrule the objection to State's Exhibit 2. Do you want a cautionary instruction?
DEFENSE COUNSEL:	Yes.
THE COURT:	[What] would you like me to say?
DEFENSE COUNSEL:	To indicate to the jury that these drawings are not—that the drawing does not necessarily represent where the items are in relation to each other.
THE COURT:	I think that's a question of scale.
DEFENSE COUNSEL:	Your Honor, I don't think—that isn't the question of scale. Scale has to do with—it's reduced so that it's—you can determine.
THE COURT:	Obviously it is not to scale nor is it measure proportionate [sic].
PROSECUTOR:	No objection to that.
THE COURT:	What?
PROSECUTOR:	No objection to that.
THE COURT:	Okay.

(Back within hearing of the jury)

THE COURT: The two schematic diagrams that were prepared at this witness's direction [sic]. These drawings are not to scale, which means they are not proportionate. And so you need to understand that, as they talk about it that the distances, distances do not necessarily reflect the proportions within that barber shop. Okay?

Detective White testified that the diagram was not to scale, but that it would assist the jury in understanding "exactly the location where the various items were found[.]" Defense counsel, on cross-examination, thoroughly discussed the diagram and the crime scene itself with the witness. The diagram clearly was of assistance to the jury in understanding the testimony regarding the crime scene. *See, e.g., Bly v. State*, 267 Ark. 613, 593 S.W.2d 450 (1980). It also had neutral evidentiary value, as it "simply identified locations at the crime scene and imported no implication of guilt" on Hamilton's part. *See e.g., Jones v. State*, 318 Ark. 704, 889 S.W.2d 706 (1994). There was no abuse of discretion by the trial court in admitting the diagram into evidence.

IV. Videotape.

For his next point, Hamilton argues that during the course of the trial, the prosecutor sought to admit a videotape of the crime scene made the day of the murders. He objected on the basis that the videotape's inflammatory nature was highly prejudicial and was not outweighed by its probative value, given the introduction of numerous crime scene photographs already admitted into evidence. He maintains that as the question for the jury was what role, if any, he played in the underlying felony and robbery, the videotape was not a necessary part of the State's case.

We addressed the standard for reviewing the admission of an allegedly gruesome videotape in *Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997), There, we said:

> A videotape is admissible if it is relevant, helpful to the jury, and not prejudicial. *Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993). Generally, the same considerations and requirements for

> admissibility that apply to photographs also apply to videotapes. *Williams v. State*, 316 Ark. 694, 874 S.W.2d 369 (1994). The admissibility of such evidence is in the sound discretion of the trial judge, whose discretion will not be set aside absent an abuse of that discretion. *Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991).

Jefferson, 328 Ark. at 30, 941 S.W.2d at 408.

In the case before us, Hamilton urges that the still photographs were sufficient to apprise the jury of the crime scene and further that the videotape was cumulative and unnecessary and, thus, constituted prejudicial error. We have held, however, that videotapes can give the jury a different perspective of the crime scene. *See Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998); *Jefferson v. State, supra*; *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997). In doing so, a videotape can be helpful to a jury's understanding of the case. *See Jefferson v. State, supra.*

Certainly, the crime scene was bloody and gruesome, but whether the prosecutor overstepped his bounds in the submission of cumulative depictions is a matter that lies within the trial court's discretion. *See Jefferson v. State, supra*; *Camargo v. State, supra.* We hold there was no abuse of discretion on this point.

V. Prior Arrest and Sentence.

For his final point, Hamilton asserts that at two different places in the trial, mention was made of his prior arrest and incarceration. He specifically points to the testimony of Detective White, who responded during cross-examination by defense counsel that Hamilton's prints were retrieved from a file at the El Dorado police station, and the prosecutor's direct examination of Office Morgan, who testified that he had known Hamilton "a couple of years ago before he had went to the penitentiary." Hamilton underscores that at both junctures, he moved for a mistrial, and both times, it was denied. Appellant concludes that it was an abuse of discretion for the trial court to deny the motions.

This court has held that any reference to a defendant's prior convictions during the guilt phase of a bifurcated criminal trial always results in some prejudice. *See Stanley v. State*, 317 Ark. 32,

875 S.W.2d 493 (1994). However, in this regard the trial court is granted a wide latitude of discretion in granting or denying a motion for mistrial, and the decision of the trial court will not be reversed except for an abuse of that discretion or manifest prejudice to the complaining party. *See Bennett v. State*, 284 Ark. 87, 679 S.W.2d 202 (1984). This court generally adheres to the rule that a cautionary instruction or admonishment to the jury can make harmless any prejudice that might occur from an inadvertent reference to a prior conviction. *See Strawhacker v. State*, 304 Ark. 726, 804 S.W.2d 720 (1991). An important factor in the trial court's analysis and ours as well is whether the prosecutor deliberately induced a prejudicial response. *See id.*

Here, Detective White's reference to the fingerprints was not induced by the prosecutor, and the trial court offered to give a cautionary instruction on the matter. Accordingly, we agree with the State that it was not an abuse of discretion for the trial court to deny the motion for declaration of a mistrial. Moreover we likewise agree that the trial court did not abuse its discretion regarding Office Morgan's statement. Although some prejudice is typically present where mention of an appellant's prior incarceration has been made, this court has held that an admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. *See Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998). That is precisely the situation in the case at hand. Following Office Morgan's statement and Hamilton's objection, the trial court decided to reserve judgment on the motion and gave the following cautionary instruction:

> Ladies and gentlemen, we are at a point, we're going to break for the day. But before we do that I'm going to instruct you that you are to disregard the last statement made by this witness. And you are not to consider it in any way.

The following day, when court reconvened, Hamilton argued that a mistrial was warranted due to the cumulative effect of the statements by Detective White and Office Morgan. The trial court disagreed and decided instead to poll and admonish each jury member individually, after defense counsel submitted

the following admonition upon request and without objection by the State:

> THE COURT: Yesterday during the trial the last witness testified that Mr. Hamilton had served time in the penitentiary. Now that you've heard that testimony I have to ask you whether or not you can be certain that you will not consider that testimony in any way when determining the defendant's guilt or innocence. If you cannot be absolutely certain that you will not consider this testimony in any way it is important that you tell us at this time.

No juror responded that he or she would consider the tainted statements.

We affirm the trial court on this point.

VI. Motion

After this case was submitted to this court for decision, Hamilton filed a *pro se* motion to add a point to his direct appeal. We deny the motion. First, the motion comes too late for our consideration. Moreover, an appellant is entitled as a matter of right to representation by counsel on the direct appeal of a felony conviction. Hamilton is represented by counsel in this appeal. An appellant is not entitled, however, to accept appointment of counsel and also to submit a *pro se* brief. *See Franklin v. State*, 327 Ark. 537, 939 S.W.2d 836 (1997) (*per curiam*).

VII. Rule 4-3(h) Review

The record has been reviewed pursuant to S.Ct. R. 4-3(h), and no reversible error has been found.

Affirmed. Motion denied.

IMBER, J. not participating.

Romey Luther MILES *v.* STATE of Arkansas

CR 00-635 75 S.W.3d 677

Supreme Court of Arkansas
Opinion delivered May 9, 2002

[redacted]

Edgar R. Thompson, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. The appellant, Romey Luther Miles, was convicted by a jury of aggravated robbery and kidnapping. He was sentenced as a habitual offender to life imprisonment for aggravated robbery and 480 months for kidnapping, with the sentences to run consecutively. On appeal, Mr. Miles contends that the trial court erred in (1) denying his motion to dismiss on speedy-trial grounds, (2) ruling that he had waived his *Miranda* rights, and (3) excluding the proferred testimony of a witness on grounds that the testimony was irrelevant. Our jurisdiction is proper pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error, and thus affirm.

The charges filed against Mr. Miles were the result of a robbery at the Cobb Cotton Gin in Keo on September 3, 1997. On that date, Samuel Cobb, Kenneth Cole, and Don Compton were present in the office of the gin when three black men armed with pistols entered the office. The robbers struck two of the men, threatened to kill all three of the men, and repeatedly told the victims not to look at them. The assailants restrained the men with duct tape and took their wallets and watches. One of the victims had approximately $700.00 in his wallet. In addition, approximately $700.00 was stolen from the vault in the gin. During the robbery, another man arrived at the gin to repair an air conditioning unit. He was likewise threatened and bound. All the victims were left alive, and, after the robbers left the scene, Mr. Compton managed to get free and call police.

An informant told police that a subject named Romey had committed the robbery. Mr. Cobb and Mr. Cole identified Mr. Miles from a photo line-up. They testified that the robbers were not wearing face coverings when they initially entered the gin's office and that they saw Mr. Miles' face before he covered it with a net mask. The victims also testified that one of the assailants was about forty years of age, around 6' 2" or 6' 3" in height, and weighed about 250 pounds; whereas, the other two robbers were younger and smaller. The evidence showed that Mr. Miles was

almost forty years old, 6' 4" in height, and weighed 260-270 pounds.

An arrest warrant was issued, and Mr. Miles turned himself in to the Prairie County Sheriff's office on October 4, 1997. Later that day, Lieutenant Franklin Darrell Sturdivant and Detective John Andolina from the Lonoke County Sheriff's Office took Mr. Miles into their custody. He was arrested, handcuffed, and transported to the Lonoke County Jail. After Lt. Sturdivant verbally advised him of his *Miranda* rights in the patrol car, Mr. Miles indicated he did not want to make a statement at that time. By Lt. Sturdivant's account, he stopped the police car only one time during the trip back to Lonoke at a store in Hickory Plains so that Det. Andolina could retrieve his vehicle. He stated that Mr. Miles did not get out of the car at Hickory Plains. Once they arrived in Lonoke, Lt. Sturdivant read a rights form to Mr. Miles, and then he signed the form. According to the officer, the only statement Mr. Miles made at that time was that Tremell Hood and Carlton Berry were not involved. He admitted that one family member was involved and promised to divulge that name after he spoke to the prosecutor.

On the following Tuesday, October 7, 1997, Mr. Miles indicated to police that he wanted to make a statement. Lt. Sturdivant administered another rights form to Mr. Miles, upon which Mr. Miles initialed each of the statements and signed his name. Lt. Sturdivant testified that Mr. Miles did not ask for an attorney and never attempted to stop the questioning. Only Lt. Sturdivant and Mr. Miles were present during the statement. Mr. Miles was handcuffed and sitting across the table from the lieutenant. Lt. Sturdivant further testified that he did not coerce Mr. Miles or use physical force. During the statement, Mr. Miles admitted to his involvement in the Keo robbery.

According to Mr. Miles's testimony at trial, Lt. Sturdivant and Det. Andolina had a "bad attitude" when they picked him up on October 4. He testified:

> they stopped between Des Arc and Hickory Plains and they asked me about the robbery and I told them I didn't know nothing about the robbery so they got mad and pulled over on the side of

> the road, snatched me out the back of the car, handcuffed, and kicked me and whatever and then along come a car was coming by so they slowed down and they seen it was—something was going on. So one of them snatched me by the thumb, snatched me up by the thumb . . . then they throwed me in the car.

Mr. Miles also claimed that the officers read him his rights, but then told him they were not going to give him a lawyer and they would beat him up again if he did not give a statement. He went on to testify that the confession statement which he gave to police three days after the alleged beating was not true and correct, and he indicated that he only gave the statement out of fear. In addition, he testified that he requested and received medical attention for an injury to his thumb while in jail.

Henry Patterson testified that Mr. Miles arrived at his home in Tucker around 2:00 p.m. on the day of the Keo gin robbery. Two other men who appeared to be about seventeen to twenty years old were with Mr. Miles. According to Mr. Patterson, a friend's nephew informed the group that the police were looking for three men driving a black car who had committed a robbery. At that point, Mr. Miles asked Mr. Patterson if he could get to Pine Bluff on back roads, and the three men left. Mr. Patterson stated that Mr. Miles had a white hair net in his possession at the time.

Clayburn Harris was also at Mr. Patterson's home on the day of the robbery. He testified that one of the young men with Mr. Miles gave him a black .380 semi-automatic gun and further stated that the gun was wrapped in a white "Tyson" hair net. Mr. Harris told police that he sold the gun to Gregory Evans. Officer Eugene Butler with the Jefferson County Sheriff's Department later recovered the gun from Mr. Evans.

I. Speedy Trial

For his first point on appeal, Mr. Miles contends that the trial court erred in denying his motion to dismiss. On January 11, 1999, Mr. Miles filed a motion to dismiss the charges against him on speedy-trial grounds. He admits that a docket entry made by the court on March 9, 1998, charges the time from March 19,

1998, through April 9, 1998, to the defendant. However, he contends that there is nothing in the record to charge any time to either him or to the State except for the twenty-two days from March 19 through April 9. Mr. Miles acknowledges that the trial court excluded some "good cause time" for the State, but he argues that the court's explanation was not adequate.

[redacted] Arkansas Rules of Criminal Procedure 28.1 and 28.2(a) (2001) require the State to try a defendant within twelve months, excluding any periods of delay authorized by Arkansas Rule of Criminal Procedure 28.3 (2001). *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999). The twelve-month period for bringing an accused to trial begins to run on the date the information is filed, or the date of arrest, whichever occurs first. *Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998). *See* Ark. R. Crim. P. 28.2(a)(2001). The record in this case indicates that Mr. Miles was arrested on October 4, 1997. The original information was filed on October 20, 1997. Thus, the time for bringing Mr. Miles to trial began to run on October 4, 1997. Mr. Miles' jury trial began 474 days later on January 21, 1999. Once it is shown that a trial was held after the speedy-trial period set out in Rule 28.1 has expired, the State has the burden of showing that any delay was the result of the defendant's conduct or was otherwise legally justified. *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999); *McConaughy v. State*, 301 Ark. 446, 784 S.W.2d 768 (1990). Here, the State has the burden of showing that at least 109 days may be properly excluded in order for Mr. Miles to have been timely brought to trial.

Arkansas Rule of Criminal Procedure 28.3 provides which specific time periods shall be excluded in computing the time for trial. Such excludable periods must be set forth by the court in a written order or docket entry,[1] but it shall not be necessary for the

[1] Mr. Miles argues that the motion to dismiss should be decided by this court as the docket existed on the date the trial court considered the matter, and points out that a copy of the docket as it existed on that date is attached to his original motion in the record. No authority is cited to support this argument. In any event, compliance with such a request would not change the outcome of the case.

court to make the determination until the defendant has moved to enforce his right to a speedy trial. Ark. R. Crim. P. 28.3 (2001).

The only case cited by Mr. Miles under his speedy-trial argument is *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991). Mr. Miles argues that, in both *Hicks* and the instant case, "the motion was made prior to trial and no order was entered showing the circumstances of any continuance." The *Hicks* case, however, is inapposite. In that case, a crowded trial docket caused the continuance. Delays attributable to congested court dockets are dealt with specifically in Ark. R. Crim. P. 28.3(b).[2] There is no suggestion that any period of delay in this case was due to a congested trial docket.

As discussed above, the first period of time excludable for speedy-trial purposes is the period of delay resulting from a continuance granted at the defendant's request. The period of delay resulting from a continuance granted at the request of the defendant or his counsel is excluded in computing the time for speedy trial. Ark. R. Crim. P. 28.3(c) (2001). The excludable time runs from the date the continuance is granted until a subsequent date contained in the order or docket entry granting the continuance. Ark. R. Crim. P. 28.3(c). In this case, the docket entry reflects that a continuance was granted at the request of the defendant on March 9, 1998. The entry specifically states that the motion is granted and that "time from 3-19-98, through 4-9-98, [is] charged against the defendant." Mr. Miles acknowledges that the twenty-two days from March 19 through April 9 are properly charged against him. The trial court, in making its calculation of time for speedy-trial purposes, counted only those twenty-two days as specified in the docket. However, the State alleges that the time charged against Mr. Miles began to accumulate on March 9, the date the continuance was granted. Under Rule 28.3(c), the State is correct, and the time charged against Mr. Miles should run

[2] Rule 28.3(b) requires the trial court to make certain findings in a written order or docket entry at the time the continuance is granted. The trial court must explain with particularity the reasons the trial docket does not permit trial on the date originally scheduled. Ark. R. Crim. P. 28.3(b)(1). The trial court must also determine that the delay will not prejudice the defendant, and it must schedule the trial on the next available date permitted by the trial docket. Ark. R. Crim. P. 28.3(b)(2)–(b)(3).

from March 9, the date the continuance was granted, until April 9, the subsequent date specified in the docket entry. The excludable period thus totals thirty days rather than twenty-two days as the trial court ruled. This exclusion leaves seventy-nine days which must still be properly excludable in order for this court to affirm the trial court's denial of Mr. Miles' motion to dismiss on speedy-trial grounds.

On March 27, 1998, the State moved for a continuance on the basis that the State Crime Laboratory had not completed testing on hair samples taken from Mr. Miles and a co-defendant. The motion asserted that the evidence was material and that the State exercised due diligence in obtaining the hair samples and test results.[3] Pursuant to Ark. R. Crim. P. 28.3(d)(1) (2001), a continuance granted at the request of the prosecuting attorney shall be excluded in computing the time for trial where the continuance is granted because of the unavailability of evidence material to the State's case when due diligence has been exercised to obtain such evidence and there are reasonable grounds to believe it will be available at a later date. Ark. R. Crim. P. 28.3(d)(1). At the time the State filed its motion for continuance on March 27, 1998, the docket sheet reflects that trial was set for April 9, 1998. The court subsequently entered an order for continuance on June 15, 1998, and made the order effective "nunc pro tunc." The order states as follows:

> On the 27th day of March, 1998, this matter comes to be heard and the same is presented upon the Motion for Continuance for the Plaintiff, State of Arkansas, and from the matters and representations to the Court, the Court finds that the Motion should be granted. It is so ordered.

A *nunc pro tunc* order may be entered to make the court's record speak the truth or to show that which actually occurred. *Hansberry v. State*, 318 Ark. 326, 885 S.W.2d 296 (1994). Based upon the trial court's entry of the order nunc pro tunc, that is "now for then," it is clear that the State's motion for continuance was effectively granted on March 27, 1998.

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[3] On appeal, Mr. Miles does not challenge the State's assertion in the motion that it exercised due diligence.

The State argues that the period from March 27 through June 15 should be excluded from the speedy-trial calculation because of the overlap between the continuance granted to Mr. Miles and the continuance granted to the State. The trial court agreed that the time from March 27 to June 15 was excludable. Under Rule 28.3(d)(1), the period of excludable delay is to be calculated from the date the continuance is granted until the subsequent date contained in the order or docket entry granting the continuance. Ark. R. Crim. P. 28.3(d)(1) (2001). In this case, neither the order granting the State's continuance nor any docket entry specifically contains a subsequent trial setting. However, this court has previously held that we will uphold excluded periods without a written order or docket entry when the record clearly demonstrates that the delays were attributable to the accused or legally justified and where the reasons were memorialized in the proceedings at the time of the occurrence. *Chenowith v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000) (citing *Goston v. State*, 326 Ark. 106, 930 S.W.2d 332 (1996)); *Osborn v. State*, 340 Ark. 444, 11 S.W.3d 528 (2000). Here, the State's March 27 motion requested that the court continue the trial scheduled at that time for April 9, 1998, and reset a new trial date at the court's convenience. Then, at a pretrial hearing on June 8, 1998, the following colloquy occurred:

> COURT: What about trial settings? It looks like there was a motion for a continuance. So we have a trial setting?
>
> PROSECUTOR: No, sir, I don't believe we do.
>
> DEFENSE: Your Honor, I don't believe it was set. I believe it was set and I think there was a joint motion for continuance at that time, which the court granted, and I don't believe it was reset. So I would ask for it to be reset at this time.
>
> . . . .
>
> COURT: Then we have a trial setting on September the 17th, 9:00 o'clock in the morning.

This colloquy indicates that, as a result of the State's motion for continuance, the court set a new trial date of September 17, 1998. The State's motion for continuance was made under Ark. R. Crim. P. 28.3(d)(1) such that the additional time resulting from

the continuance is legally justified and should be excluded in computing the time for trial. Thus, we hold that the period of time from March 27 through September 17 should have been excluded in accordance with Ark. R. Crim. P. 28.3(d)(1). As thirteen of those days have already been properly charged to the defendant, the 160 days from April 10 through September 17 should have been properly excluded in counting the time for speedy-trial purposes. The proper exclusion of 190 days means that Mr. Miles was tried well within the allotted twelve-month time period. As a result, it is not necessary for us to further discuss any other potentially excludable time periods.

II. Waiver of Miranda *Rights*

[redacted] For his second point on appeal, Mr. Miles argues that he never waived his rights under *Miranda*. Mr. Miles acknowledges that he was offered several "Statement of Rights" forms which "very carefully recite[d] each of a number of rights and describe[d] to the defendant what those rights are." He admits that he initialed each one of the rights and signed his name to the forms. The forms advised him of his rights, including the right to remain silent and the right to have an attorney present. Mr. Miles nonetheless argues that knowing what a right is does not equate to a waiver of that right, and, thus, he did not knowingly and intelligently waive any of those rights. Confessions made in police custody are presumed involuntary and the burden is on the State to prove such confessions were voluntary and that any waiver of *Miranda* rights was knowingly and intelligently made. *Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000); *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999). This proof must be by a preponderance of the evidence. *Id.*

Lt. Sturdivant testified that he approached Mr. Miles on October 7, 1997, to inform him that someone from the prosecutor's office was going to make an effort to speak with him. According to Lt. Sturdivant, Mr. Miles then began making a statement to him without anyone from the prosecutor's office present. Lt. Sturdivant stopped Mr. Miles and again read him a Statement of Rights form. Mr. Miles initialed each statement on the form, signed the form, and then proceeded to give a recorded statement

to Lt. Sturdivant. The last sentence of the form signed by Mr. Miles read: "[Y]ou may waive the right to advice of counsel and your right to remain silent, and you may answer questions or make a statement without consulting a lawyer if you so desire." The response to that statement is "yes," and is initialed "RM." The trial court ruled that Mr. Miles' written response of "yes" and his initials beside the last sentence on the form constituted a waiver of his rights.

Mr. Miles seems to argue that an accused can only waive his rights by expressly doing so in writing. However, Mr. Miles offers no authority to support such a proposition, and we know of none. In fact, this court has expressly held that a form containing an express waiver provision is not a prerequisite to a finding of a knowing and intelligent waiver. *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999) (citing *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997)). An accused may impliedly waive his right to remain silent merely by answering questions. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). In this case, Mr. Miles indicated that he wanted to make a statement, Lt. Sturdivant read him his *Miranda* rights, he signed a statement-of-rights form, and he proceeded to make a statement. It is undisputed that Mr. Miles was informed of his rights and that he understood them. We cannot say the trial court was clearly erroneous in ruling that Mr. Miles knowingly and intelligently waived his *Miranda* rights.

III. Proffered Testimony of Witness

Finally, Mr. Miles argues that he should have been allowed to call a witness to corroborate his assertion that he was beaten by Lt. Sturdivant and Det. Andolina on the side of the road between Des Arc and Lonoke. Irma Brodis was to testify that she had seen a police car stopped along the road between Des Arc and Lonoke with a black man in the back. The trial court refused to allow the testimony, ruling that it was irrelevant because Ms. Brodis could not testify that the man she saw was Mr. Miles. Mr. Miles proffered the testimony of Ms. Brodis.

In the proffer, Ms. Brodis stated that she and her sister were driving on the highway between Des Arc and Cabot when they

saw a police car stopped on the side of the road. They saw a black man in the back seat of the car and two officers standing on the side of the road. Ms. Brodis could not identify the officers, and she testified that she did not see any contact between the man in custody and the officers. In addition, she did not know the day on which she saw the car, though she knew it was in 1997. She stated that the man in the back seat of the car looked like Mr. Miles, but admitted that she was driving by at fifty-five miles per hour and could not positively identify the man in the back of the car.

Mr. Miles contends on appeal that Ms. Brodis's testimony should have been allowed as it was relevant to corroborate his claim that the officers beat him along the side of the road. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401 (2001). A trial court's ruling on relevancy is entitled to great weight and will not be reversed absent an abuse of discretion. *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997).

This court cannot say the trial court abused its discretion in ruling that the testimony of Ms. Brodis was irrelevant and inadmissible. Ms. Brodis did not know the date on which she saw the police car, she could not identify the officers she saw, and she could not positively identify the man in the back of the car as Mr. Miles. In addition, Ms. Brodis could not testify to seeing any contact between the officers and Mr. Miles. Thus, we affirm the trial court's ruling.

III. Arkansas Supreme Court Rule 4-3(h)

The transcript of the record in this case has been reviewed in accordance with our Rule 4-3(h) which requires, in cases in which there is a sentence to life imprisonment or death, that we review all prejudicial errors in accordance with Ark. Code Ann. § 16-91-113(a). None have been found.

Affirmed.

Kathleen A. CLAYBORN and Meranda F. Clayborn, *A Minor*
v. BANKERS STANDARD INSURANCE COMPANY

01-1225 75 S.W.3d 174

Supreme Court of Arkansas
Opinion delivered May 9, 2002

[Petition for rehearing denied June 20, 2002*]

* IMBER, J., not participating.

Rush, Rush & Cook, by: *David L. Rush*, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *E. Diane Graham* and *Rebecca D. Hattabaugh*, for appellee.

RAY THORNTON, Justice. Appellant, Kathleen A. Clayborn, as mother and next friend of Meranda F. Clayborn, a minor, appeals the September 14, 2001, order of the Johnson County Circuit Court, granting appellee Bankers Standard Insurance Company's ("Bankers") motion to dismiss and certifying the case for appeal pursuant to Ark. R. Civ. P. 54(b). Appellant's sole point on appeal is that the trial court erred in granting Bankers's motion to dismiss on the grounds that the

direct-action statute, which is codified at Ark. Code Ann. § 23-79-210 (Repl. 1999), was not available to her and that Ark. Code Ann. § 16-120-103 (Supp. 2001) precludes a direct action against Bankers, the liability carrier for Forrester-Davis Development Center, Inc. ("Forrester-Davis"), an Arkansas nonprofit corporation. We affirm.

Linda Whitson was an employee of Forrester-Davis. On July 6, 2000, Ms. Whitson drove a 1997 Dodge 3500 van owned by Forrester-Davis to appellant's residence to pick up two of appellant's children in order to transport them to Forrester-Davis's facility. Appellant brought two of her children out of the house and placed them in the van and secured them. Ms. Whitson then placed the van in reverse in order to back it up. Meanwhile, appellant's third child, Meranda, who was approximately twenty-one months old, had moved to the rear of the van. Meranda was run over by Ms. Whitson, causing serious injuries to the child.

On March 16, 2001, appellant filed a direct-action complaint against Bankers, the insurer of Forrester-Davis, seeking damages for various acts of alleged negligence of Forrester-Davis's employee, Ms. Whitson. On June 1, 2001, appellant filed her first amended complaint, alleging an additional act of negligence of Ms. Whitson and additional theories for the imposition of damages. On June 14, 2001, Bankers filed a motion to dismiss appellant's complaint pursuant to Ark. R. Civ. P. 12(b)(6) for failure to state facts upon which relief may be granted and further urging that Bankers is not a proper party to the suit. On June 28, 2001, appellant filed her second amended complaint, in which she named Forrester-Davis and Ms. Whitson as additional defendants. Bankers, Forrester-Davis, and Ms. Whitson each filed answers to the second amended complaint, and Bankers renewed its motion to dismiss. On September 10, 2001, appellant moved for a voluntary dismissal without prejudice of her claims against Ms. Whitson and Forrester-Davis, pursuant to Ark. R. Civ. P. 41. On September 11, 2001, the trial court issued an order granting appellant's motion for a nonsuit. Thereafter, on September 14, 2001, the trial court issued a final judgment (1) granting Bankers's motion to dismiss on the grounds that a direct cause of action against Bankers is not allowed under Ark. Code Ann. § 23-79-210 because Ark.

Code Ann. § 16-120-103 does not grant immunity from suit in tort to Forrester-Davis or its employees, but provides immunity only to persons serving on the board of directors, and (2) certifying the case for appeal pursuant to Ark. R. Civ. P. 54(b). It is from this order that appellant brings this appeal.

■ We have outlined our standard of review of motions to dismiss under Ark. R. Civ. P. 12(b)(6) on numerous occasions. In reviewing the trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Martin v. Equitable Life Assurance Soc'y*, 344 Ark. 177, 40 S.W.3d 733 (2001). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.* Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.*; Ark. R. Civ. P. 8(a). We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 966 S.W.2d 894 (1998).

■ ■ This case also presents us with a matter of statutory interpretation. We outlined our well-settled rules of statutory construction in *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 69 S.W.3d 393 (2002), where we stated:

> We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). In this respect, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001); *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Raley v. Wagner*, 346 Ark. 234, 57 S.W.3d 683 (2001); *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997). When the language of a statute is plain and unambiguous, there is no need to

> resort to rules of statutory construction. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Stephens, supra* (citing *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994)). Finally, the ultimate rule of statutory construction is to give effect to the intent of the General Assembly. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999); *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

Faulkner, supra.

With this standard of review in mind, we now turn to the point on appeal. Appellant argues that the trial court erred in granting appellee's motion to dismiss on the grounds that the direct-action statute, which is codified at Ark. Code Ann. § 23-79-210, was not available to her.

The direct-action statute is codified at Ark. Code Ann. § 23-79-210 and provides in pertinent part:

> *23-79-210. Direct cause of action against liability insurer where insured not subject to tort suit.*
>
> (a)(1) *When liability insurance is carried by any cooperative non-profit corporation, association, or organization,* or by any municipality, agency, or subdivision of a municipality, or of the state, or by any improvement district or school district, or by any other organization or association of any kind or character and *not subject to suit for tort,* and if any person, firm, or corporation suffers injury or damage to person or property on account of the negligence or wrongful conduct of the organization, association, municipality or subdivision, its servants, agents, or employees acting within the scope of their employment or agency, then the person, firm, or corporation so injured or damaged shall have a direct cause of action against the insurer with which the liability insurance is carried to the extent of the amounts provided for in the insurance policy as would ordinarily be paid under the terms of the policy.
>
> (2) The insurer shall be directly liable to the injured person, firm, or corporation for damages to the extent of the coverage in

> the liability insurance policy, and the plaintiff may proceed directly against the insurer regardless of the fact that the actual tortfeasor may not be sued under the laws of the state.

Ark. Code Ann. § 23-79-210(a) (emphasis added).

The tort liability immunity statute is codified at Ark. Code Ann. §§ 16-120-101—16-120-401 (Supp. 2001). Ark. Code Ann. § 16-120-101 provides:

> The General Assembly has determined that nonprofit corporations serve important functions in providing services and assistance to persons in the state and that, in order for these nonprofit corporations to function effectively, persons serving on the board of directors should not be subject to vicarious liability for the negligence of corporate employees or other directors. The General Assembly has further determined that potential exposure to vicarious liability has a detrimental effect on the participation of persons as directors of nonprofit corporations and that providing immunity to directors of those corporations for certain types of liability will be in the best interest of the state and that the same immunity should be extended to members of governing bodies of governmental entities.

Id.

Ark. Code Ann. § 16-120-103 provides in pertinent part:

> (a) The immunity provided by this chapter shall not extend to acts or omissions of directors of nonprofit corporations or members of boards, commissions, agencies, authorities, or other governing bodies of any governmental entity which constitute ordinary or gross negligence personal to the director or member or to intentional torts committed by a director or member.
>
> * * *
>
> (c) *Nothing in this chapter shall be construed to limit the liability of a nonprofit corporate entity itself for damages resulting from any negligent act or omission of any employee of the nonprofit corporation.*

Id. (emphasis added).

Appellant argues that Ark. Code Ann. § 23-79-210 is applicable to the facts of the present case because the following elements set forth in *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925

S.W.2d 395 (1996) are satisfied: (1) liability insurance must be carried by a nonprofit corporation; (2) a person must suffer injury or damage on account of negligence or wrongful conduct; and (3) the damage or injury must be on account of the negligence or wrongful conduct of "servants, agents, or employees" of the nonprofit corporation acting within the scope of their agency or employment. *See id.* We disagree.

In *Rogers*, we did not include the element "and not subject to suit in tort" among the elements that must be established for Ark. Code Ann. § 23-79-210 to apply. However, we note that in *Rogers*, we were not faced with the issue of whether a nonprofit corporation is subject to suit for tort, as we are now. We have more recently construed Ark. Code Ann. § 23-79-210 in *Smith v. Rogers Group, Inc.*, 348 Ark. 241, 72 S.W.3d 450 (2002). We concluded in *Smith, supra*, that Ark. Code Ann. § 23-79-210 only provides for direct actions against an insurer in the event that the organization at fault is immune from *suit* in tort. *Id.* We also noted the distinction between immunity from suit and immunity from liability. We stated that the immunity from suit is the entitlement not to stand trial, while immunity from liability is a mere defense to a suit. *Smith, supra* (citing *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987)).

Applying this construction of the statute to the facts of the present case, we conclude that Ark. Code Ann. § 23-79-210 is not applicable to the circumstances of this case because there is nothing in the pleadings to show that Forrester-Davis is a nonprofit corporation that is immune from *suit* in tort. Because no showing is made of such alleged immunity, appellant is precluded from bringing a direct action against Forrester-Davis's insurer, Bankers. It is not controverted that Forrester-Davis is a nonprofit corporation, but no authority has been cited to us, and we know of none, that holds that all nonprofit corporations, by virtue of their status as nonprofit corporations, are immune from *suit* for tort. We are not aware of any case law holding that nonprofit corporations are *ipso facto* immune from suit. To the contrary, our statutes provide that nonprofit corporations generally have the power to sue and be sued. Ark. Code Ann. § 4-33-302

(Repl. 2001) of the Arkansas Nonprofit Corporation Act provides in pertinent part:

> *4-33-302. General powers.*
>
> Unless its articles of incorporation provide otherwise, *every corporation* has perpetual duration and succession in its corporate name and *has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including, without limitation, power:*
>
> (1) *to sue and be sued, complain and defend in its corporate names*[.]

Id. (emphasis added). In addition, Ark. Code Ann. § 16-120-103 provides that the tort liability immunity statute shall not be construed to limit the liability of the nonprofit corporate entity itself for damages as a result of the torts of its employees. *See* Ark. Code Ann. § 16-120-103. Had the Legislature intended to provide nonprofit corporations immunity from both suit and liability, as it provided to various governmental entities in Ark. Code Ann. § 21-9-301 (Supp. 2001),[1] it could have done so, but it did not. Finally, appellant did not plead facts to suggest that Forrester-Davis is a nonprofit corporation that would be immune from suit.

Appellant also argues that Forrester-Davis is a charitable organization and is therefore not subject to suit for tort, and thus, she should be permitted to bring a direct action against Bankers pursuant to Ark. Code Ann. § 23-79-210. However, we note that no allegations of fact were made in the pleadings that Forrester-Davis is or claimed to be a charitable organization. Our standard of review of this case is of the trial court's grant of Bankers's

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[1] Ark. Code Ann. § 21-9-301 provides:

> It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be *immune from liability and from suit* for damages except to the extent that they may be covered by liability insurance. No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

Id. (emphasis added).

motion to dismiss, and, thus, our review is limited to the facts alleged in the pleadings. Because there was no allegation in the pleadings that Forrester-Davis is a charitable organization, we conclude that the trial court did not err when it determined that Ark. Code Ann. § 23-79-210 is inapplicable to the facts of the present case.

However, we note that appellant's argument that Forrester-Davis is not subject to suit for tort because it is a charitable organization is meritless for another reason. We have never said that charitable organizations are altogether immune from *suit.* While we affirmed the trial court's dismissal of a case on the ground that the charitable organization was immune from *liability* in *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999), no argument was raised in that case that a charitable organization is not subject to *suit* for tort, as was argued in the present case. We have repeatedly stated that the property of a charity cannot be sold under *execution* issued on a judgment rendered for the nonfeasance, misfeasance, or malfeasance of its agents or trustees. *See, e.g., Fordyce & McKee v. Woman's Christian Nat'l Library Ass'n*, 79 Ark. 550, 96 S.W. 155 (1906) (emphasis added). We have also recognized that the charitable-immunity doctrine as promulgated in *Fordyce* and its progeny has become a rule of property. *See Williams v. Jefferson Hosp. Ass'n*, 246 Ark. 1231, 442 S.W.2d 243 (1969) (citing *Helton v. Sisters of Mercy*, 234 Ark. 76, 351 S.W.2d 129 (1961); *Cabbiness v. City of North Little Rock*, 228 Ark. 356, 307 S.W.2d 529 (1957); *Fordyce, supra*). In addition, we stated in *Crossett Health Center v. Croswell*, 221 Ark. 874, 256 S.W.2d 548 (1953), "Judge Rose, [in *Fordyce*], commented on the statutory authority for suit, drawing a distinction between the right to sue and the power to execute in satisfaction of the judgment." *Croswell, supra* (citing *Fordyce, supra*). Our analysis indicates that a charitable organization may have suit brought against it and may have a judgment entered against it, but such judgment may not be executed against the property of the charity. We conclude that even if facts had been pled to allege that Forrester-Davis

is a charitable organization, we would nevertheless affirm the trial court's finding that Ark. Code Ann. § 23-79-210 does not apply because we have never held that charitable organizations are completely immune from suit, but rather, we have only held that they are immune from execution against their property.

Affirmed.

IMBER, J., not participating.

Crystal LUEBBERS, Teresa Ballard, Kenisha Bryant, and Cheryl King *v.* ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.

01-1182 74 S.W.3d 608

Supreme Court of Arkansas
Opinion delivered May 9, 2002
[Petition for rehearing denied June 13, 2002*]

* GLAZE, J., not partipating.

The Nixon Law Firm, by: *David G. Nixon* and *Paige E. Young*, for appellants.

Bowman and Brooke LLP, by: *Robert M. Buell* and *Charles K. Seyfarth*; *Wright, Lindsey & Jennings LLP*, by: *Claire Shows Hancock*, for appellee Advance America, Cash Advance Ctrs. of Ark., Inc.

Morgan & Turner, by: *Todd Turner*, for appellee Phyllis Garrett.

JIM HANNAH, Justice. Appellants Crystal Luebbers[1], Teresa Ballard, Kenisha Bryant, and Cheryl King appeal the Clark County Circuit Court's order requiring them to post a $750,000 bond to stay the execution of a court-approved settlement between members of a class, to which appellants belong, and Appellee Advance America Cash Advance Centers of Arkansas, Inc. (Advance America).

This limited appeal is part of a larger class-action lawsuit between a class of approximately 19,000 members and Advance America, a check-cashing company. Appellants here are class members of the plaintiff class. Appellee Phyllis Garrett is a designated representative of the class. On July 18, 2001, the circuit court approved a settlement agreement between Advance America and the class through its representatives. Appellants disapproved of this settlement agreement, and their disapproval has spawned several appeals.

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[1] Although Crystal Luebbers is named as an appellant in this action, the trial court granted her motion to withdraw as a party of record in this matter on December 5, 2001.

Appellants first filed a motion to intervene as separate parties in the class action, after the settlement was struck. The circuit court denied this motion. The appellants filed their first notice of appeal from this denial on August 10, 2001. This appeal was docketed as CA 01-1218. Appellants lodged a partial record in connection with this appeal.

Also on August 10, 2001, appellants filed a second notice of appeal,. appealing the circuit court's order approving the settlement agreement. This appeal was docketed as CA 01-1190. On November 2, 2001, appellants lodged a complete record of proceedings with this court for this second appeal.

In response to the two notices of appeal filed on August 10, 2001, the class representatives filed a motion for appellants to post a supersedeas bond. The circuit court ordered a hearing on the matter for September 5, 2001, and on September 11, 2001, the circuit court granted the motion to post bond and ordered the appellants to post the bond in the amount of $750,000. On September 20, 2001, appellants filed a third notice of appeal seeking appellate review of the bond requirement. This appeal is docketed as CA 01-1182. Appellants lodged a partial record for this third appeal. This is the subject of this current appeal before the court.

On October 3, 2001, the class representatives filed a motion to strike the September 20, 2001, notice of appeal in CA 01-1182, which dealt with the appeal of the order to post a supersedeas bond. On November 2, 2001, the class representatives filed a motion to show cause why the appellants here should not be held in contempt for failing to comply with the circuit court's order to post bond. The motion to strike and the contempt issue were set for hearing in the trial court on December 10, 2001. On December 5, 2001, the December 10, 2001, hearing was temporarily stayed by this court pending our decision on the appellants' petition for writ of prohibition requesting this court to prohibit the trial court from striking their notice of appeal from the settlement-approval order. We granted the appellants' petition for writ of prohibition on December 13, 2001.

On November 13, 2001, the appellants filed a petition for writ of prohibition or for certiorari to bar the circuit court from

requiring a supersedeas bond. This petition was docketed as 01-1251. Three days later, on November 16, 2001, the appellants filed a second petition for writ of prohibition to bar the circuit court from striking their notice of appeal. This petition was docketed as 01-1268. On December 13, 2001, this court denied the appellants's petition for writ of certiorari to bar the circuit court from requiring a supersedeas bond, holding that because the circuit court's order to post the bond was entered prior to the filing of the appeals, the circuit court still maintained jurisdiction to enter such order. As such, this court determined that the record on its face did not indicate that the trial court was "wholly without jurisdiction," and a writ of certiorari was improper. This decision, however, did not reach the merits at to whether the circuit court could require appellants to post such a bond, the issue that is before us now. Also on December 13, 2001, this court granted the appellants's petition for writ of prohibition to prohibit the circuit court from dismissing their appeal from the circuit court's order approving the settlement. We determined that dismissal of an appeal is not a proper matter for the trial court, and the circuit court no longer had jurisdiction to act on the motion to dismiss because the records had been filed in the appeals.

Appellants now ask us to determine whether the trial court erred in granting the class representative's motion to require appellants to post a supersedeas bond for a stay pending their appeal of the underlying orders approving the class-action settlement and denying appellants's motion to intervene.

On appeal, the appellants make three arguments. First, they argue that the trial court did not have the authority under Arkansas Rule of Civil Procedure 62(d) and Arkansas Rule of Appellate Procedure—Civil 8 to order them to post a supersedeas bond when they had not requested a stay pending appeal of the trial court's order approving the settlement between the class and Advance America. They note that we have no cases directly on point, but several federal courts have addressed this exact issue under Federal Rule of Civil Procedure 62(d) and have held that the trial court cannot require the posting of a bond when no stay has been requested. Second, appellants argue that the trial court cannot maintain a contempt action against them for failure to

comply with the court's order to post the bond because the bond requirement may only follow the request of a stay, and no party has requested a stay in this action. Therefore, failure to comply with the posting order also cannot be reached. Third, appellants argue that if this court determines that the trial court acted within its authority to require the bond, the trial court abused its discretion in this case in ordering them to post a bond for $750,000. The appellants assert that they do not have the means to post that much for a bond, as evidenced by the fact that they were part of a class of people who had to get payday advances from Advance America, resulting in this action in the first place. They argue that requiring a bond here would, in effect, be a denial of due process to people who cannot afford to appeal if the bond is required.

Advance America argues in response first that the trial court had the authority to order the appellants to post the supersedeas bond because the trial court retained jurisdiction since the record had not yet been lodged in the underlying appeal. It also asserts that these same arguments were made in the appellants's petition for writ of prohibition, and that this court denied the arguments then. Second, Advance America asserts that the trial court can hold appellants in contempt for failing to comply with an order of the court. Absent a supersedeas, a trial court retains jurisdiction to enforce its orders, and no supersedeas was filed here. Third, Advance America argues that the trial court did not err in requiring the appellants to post a bond because courts determine on a case-by-case basis the extent to which a judgment is in jeopardy and require sufficient security to protect that judgment. Fourth, Advance America argues that the appellants's appeal is premature because an order to post bond is not a final appealable order from which an appeal may be had. The trial court is still considering the matter after it held a show-cause hearing on January 14, 2002, and there is no indication as to whether the court will require, through a contempt order, the bond to be posted. Finally, Advance America argues that the appellants lack standing here because they have not been aggrieved by the order because they have not posted the bond to date. The class representative, too, filed a brief, arguing essentially the same matters as did Advance America in its points on appeal.

In looking at the merits of this issue, we determine that appellants do not have standing to appeal this issue because they are not parties who may take independent action in the underlying class action. Rather, they are class-member objectors at this juncture. Their motion to intervene was denied by the trial court, and unless this court reverses that order in that upcoming appeal, appellants will not be independent parties to this class action.

[redacted] We are cognizant of the fact that in the class action, they are members of the plaintiff class. However, the general rule is that class members lack standing to appeal a decision approved by the class representatives. *Haberman v. Lisle*, 317 Ark. 600, 884 S.W.2d 262 (1994) (citing *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992)[2]). However, in *Haberman* we stated:

> We point out, though, that an unsatisfied class member is not without alternatives. An unsatisfied class member's options are to move to intervene as of right, collaterally attack the settlement approval by filing a separate suit challenging the adequacy of the class representation, or he may opt out. *See Croyden*, 969 F.2d 675, 678. The rationale of the class action is to render manageable litigation involving numerous class members who would otherwise all have access to court via individual lawsuits. As was emphasized in *Croyden*, if each dissatisfied class member could appeal individually, litigation would be uncontrollable, and the purpose of class actions would be defeated.

Haberman, 318 Ark. at 180. Here, appellants did not opt out, nor did they file a lawsuit to challenge the adequacy of the class representation. Therefore, their only recourse was to attempt to intervene, which they have tried to do. The trial court, however, denied this motion, and appellants have appealed that decision,

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[2] The Eighth Circuit Court of Appeals in *Croyden, supra*, determined that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal if they have not done so. *Croyden* relies in part on *Marino v. Ortiz*, 484 U.S. 301 (1988), in which the Supreme Court held that settlement objectors who were not class members, but who would have been affected by the settlement, could not appeal from the settlement order because they had not intervened and, thus, were not parties to the action. *Croyden* and *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), in particular, have extended *Marino's* holding to apply to unnamed class members who have yet to successfully intervene, such as the appellants here.

which they may do. *See Cupples Farms Partner v. Forrest City Prod. Credit*, 310 Ark. 597, 839 S.W.2d 187 (1992). However, until their intervention issue is decided, the appellants are not independent parties to this action, other than as class-member objectors who have no right to independently appeal the class settlement. Therefore, it follows that the appellants are not "parties" to the class-action proceeding and, as such, cannot appeal a ruling by the trial court on an order to post a bond. Because we dismiss this appeal due to the appellants's lack of standing, we do not reach any other issues in this appeal.

Appeal dismissed.

GLAZE, J., not participating.

Carl Gene McGHEE *v.* STATE of Arkansas

CR 02-353 74 S.W.3d 627

Supreme Court of Arkansas
Opinion delivered May 9, 2002

Scott Adams, for appellant.

No response.

PER CURIAM. On May 6, 1999, movant Carl Gene McGhee was convicted of various drug offenses. On May 25, 1999, his attorney retained for his appeal, Scott Adams,

filed a notice of appeal. Three extensions of time were then granted for filing the record, with the ultimate deadline for filing the record being September 30, 1999. McGhee's record was tendered for filing on October 4, 1999. The Supreme Court clerk refused to file the record because it was late. No motion for rule on clerk was filed on McGhee's behalf. On December 20, 1999, the record was returned to McGhee's counsel, Scott Adams. Nothing further apparently was done on the matter.

On April 11, 2002, McGhee with new counsel filed a motion for Belated Appeal or motion for Rule on Clerk and tendered a record for his appeal for a second time. His new counsel argues on McGhee's behalf that though the record was not timely filed under Ark. R. App. P.—Crim. 2(e), this court should allow a belated appeal or lodging of the late record because McGhee was unaware his record had not been timely filed. McGhee files an affidavit in support of his contention.

We remand this matter to the trial court to determine why the record was not timely filed and why a motion for rule on clerk was not pursued. We are further interested in learning why nothing has been done on this appeal by counsel, Scott Adams, for two and a half years. When we receive the trial court's findings, we will decide the motion pending before us.

OAKWOOD HOMES CORPORATION; Oakwood Mobile Homes, Inc.; Oakwood Acceptance Corporation; Schult Mobile Homes; American Bankers Insurance Group; Assurant Group; and Fortis Incorporated *v.* Joseph and Sheila WOODALL; Cecil, Kevin, and Dixie Abbott; John and Joetta Tatum; Terry and Deborah Burkholder; and Joseph Combs

02-349 74 S.W.3d 626

Supreme Court of Arkansas
Opinion delivered May 9, 2002

Wright, Lindsey & Jennings LLP, by: *Roger D. Rowe* and *Stephen R. Lancaster*, for appellants Oakwood Homes Corporation; Oakwood Mobile Homes, Inc.; Oakwood Acceptance Corporation; and Schult Mobile Homes.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Byron Freeland* and *Derrick W. Smith*, for appellants American Bankers Insurance Company of Florida; Amerian Bankers Insurance Group; Assurant Group; and Fortis Incorporated.

Cauley Geller Bowman & Coates, LLP, by: *Steven E. Cauley*, *Curtis L. Bowman*, and *Gina M. Cothern*; *Curtis Rickard*; *Niblock Law Firm*, by: *George H. Niblock* and *Raymond L. Niblock*, for appellees.

PER CURIAM. Pending before this court are two motions to stay trial court proceedings pending appeal. At issue

in the underlying litigation is class certification of a group of mobile home buyers. One motion is filed by appellants Oakwood Homes Corporation, Oakwood Mobile Homes, Inc., Oakwood Acceptance Corporation, and Schult Mobile Homes ("Oakwood"). The second motion is filed by appellants American Bankers Insurance Group, Assurant Group, and Fortis Incorporated ("American Bankers"). Both Oakwood Homes and American Bankers contend that because their appeals concern whether the trial court erred in refusing to compel arbitration agreements of potential class members, that issue needs to be resolved on appeal before appellees Joseph and Sheila Woodall and others can pursue class certification and discovery on the merits of their lawsuit.

This court is well aware of the policy favoring arbitration in this state and the right to an interlocutory appeal under the Arkansas Arbitration Act. *See* Ark. Code Ann. § 16-108-219(a)(1) (1987); Ark. Rule App. P.—Civil 2(a)(12). We are also cognizant of Ark. Code Ann. § 16-108-202(d), which reads:

> (d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section, or, if the issue is severable, the stay may be with respect thereto only. When the application is made in the action or proceeding, the action for arbitration shall include the stay.

This court has stayed trial court proceedings in the past when an appeal is pending on the failure to compel arbitration. *See, e.g., The Money Place, LLC v. Barnes*, 01-1361, Motion for Stay of Trial Court Proceedings Pending Interlocutory Appeal, granted. (April 4, 2002). However, we are advised that this case may involve disparate classes in that certain potential class members may not have entered into arbitration agreements and certain potential members may not have purchased insurance from American Bankers. The question has also been raised as to whether a supersedeas bond required under Ark. R. Civ. P. 8 is required pending this interlocutory appeal? The motions to stay trial proceedings pending the arbitration appeal apparently were not presented to the trial court for resolution.

We conclude that this is a matter for the trial court to address. Accordingly, we remand for the trial court to determine whether a stay of trial court proceedings should be granted, and if so, whether a supersedeas bond is required.

Remanded.

Roberta BREWER and Howard D. Baltz *v.* Lee FERGUS, Phillip Smith, and Sharon Priest

02-402 79 S.W.3d 831

Supreme Court of Arkansas
Opinion delivered May 10, 2002

Everett & Hunter, by: *Mike Everett*; and *Gerald Pearson*, for appellant.

Quattlebaum, Groom, Tull & Burrow, PLLC, by: *Leon Holmes* and *E.B. Chiles IV*, for appellee Lee Fergus.

Howell, Trice, Hope & Files, P.A., by: *William H. Trice*, for appellee Phillip Smith.

Mark Pryor, Att'y Gen., by: *Tim Humphries*, Gen'l Cnsl. and *Dennis R. Hansen*, Deputy Att'y Gen., for appellee Sharon Priest.

JIM HANNAH, Justice. This appeal involves an issue of constitutional interpretation; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(1). We affirm the trial court.

Appellants argue that the trial court erred in denying their petition for a writ of mandamus prohibiting the Secretary of State from certifying Lee Fergus as a candidate for circuit judge, Division #2, Second Judicial Circuit, and Phil Smith as a candidate for

circuit judge, Division #2, Third Judicial Circuit. We affirm the trial court's holding that a person appointed to fill a vacancy in one division of a judicial circuit is not attempting to succeed himself or herself in violation of Arkansas Constitutional Amendment 29, § 2, when he or she subsequently runs for the office of circuit judge in a different division of the same judicial circuit.

Facts

As a consequence of legislation creating new judgeships in the Second and Third Judicial Circuits, Fergus was appointed to be the circuit court judge, Division #10, Second Judicial Circuit, and Smith was appointed to be the circuit court judge, Division #3, for the Third Judicial Circuit by the Governor of the State of Arkansas pursuant to Amendment 29, § 1, of the Arkansas Constitution. Both appointments were made on July 1, 2001, and were to last until someone is duly elected and begins serving as circuit judge for those respective divisions on January 1, 2003.

Fergus has filed to run for the office of circuit court judge in Division #2 of the Second Judicial Circuit, and Smith has filed for the office of circuit court judge in Division #2 of the Third Judicial Circuit. Separate actions for mandamus and declaratory judgment were filed against Fergus and Smith; however, the actions were joined and now come to this court in a single appeal.

Issue

We examine whether Amendment 29, § 2, prohibits a person from running for the office of circuit court judge in one division of a judicial circuit when he or she was appointed to, and filled, a vacancy in another division in the same judicial circuit under Amendment 29, § 1.

Standard of Review

[redacted] We are called upon to interpret our constitution. On appeal, our task is to read the laws as they are written, and interpret them in accordance with established principles of constitutional construction. The fundamental rule is that the words of

the constitution should ordinarily be given their obvious and natural meaning. *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). *See also, Knowlton v. Ward*, 318 Ark. 867, 889 S.W.2d 721 (1994); *Kervin v. Hill, County Judge*, 226 Ark. 708, 292 S.W.2d 559 (1956). We review issues of construction *de novo*; it is for this court to decide what a constitutional provision means. *Hodges, supra*. We are not bound by the decision of the trial court; however, in the absence of a showing that the trial court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal. *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998).

In this case, we are interpreting a constitutional amendment. We have said that in so doing, it is helpful to determine what changes the amendment was intended to make in the existing law. *Glover v. Henry*, 231 Ark. 111, 328 S.W.2d 382 (1959). *See also, Bradley v. Hall*, 220 Ark. 925, 251 S.W.2d 470 (1952).

Of Amendment 29, this court has previously stated:

> Amendment 29 provides that the governor shall fill vacancies in the office of United States senator and in all elective state, district, circuit, county, and township offices except lieutenant governor, member of the legislature, and member of Congress. It is significant that these provisions made no substantial change in the law as it already existed, for the governor had the power to fill vacancies in the office of United States senator (Pope's Dig., 11807) and in the designated elective offices (Const., Art. 6, 23) with the exception of the lieutenant governor (Amendment 6, 5), member of the legislature (Const., Art. 5, 6), and member of Congress (Pope's Dig., 4676). Thus the purpose of Amendment 29 was not to create a new appointive power in the chief executive; it was to reaffirm the existing law as a basis for the operation of the other provisions in the amendment.

Glover, 231 Ark. *at* 115.

Succession in the Same Office

Fergus is running for the elective office of circuit judge, Division #2 of the Second Judicial Circuit, presently completing

an appointment to fill a vacancy in Division #10 of the same circuit. Smith is running for the elective office of circuit judge, Division #2 of the Third Judicial Circuit, presently completing an appointment to fill a vacancy in Division #3 of the same circuit. The question is whether a change in division within a circuit constitutes a separate elective office under Amendment 29.

Section 1 of Amendment 29 provides that vacancies in elective offices, excepting some offices not relevant to this discussion, are to be filled by appointment by the Governor. *See, Glover, supra.* At issue is Section 2 of Amendment 29, wherein it is provided:

> The Governor, Lieutenant Governor and Acting Governor shall be ineligible for appointment to fill any vacancies occurring or any office or position created, and resignation shall not remove such ineligibility. Husbands and wives of such officers, and relatives of such officers, or of their husbands and wives within the fourth degree of consanguinity or affinity, shall likewise be ineligible. No person appointed under Section 1 shall be eligible for appointment or election to succeed himself.

Our analysis must focus on the sentence, "No person appointed under Section 1 shall be eligible for appointment or election to succeed himself." We note first that typically the word "shall" is interpreted by this court to mean mandatory compliance. *Ramirez v. White County Circuit Court,* 343 Ark. 372, 38 S.W.3d 298 (2001).

Appellants argue that the apparent purpose of Amendment 29, in the case of a circuit judge, is to deny the appointed judge the advantage of incumbency in a following election. Appellant argues further that a circuit judge who is appointed to fill a vacancy in one division, and who then runs for the office of circuit judge of another division in the same judicial circuit, is in effect running for the same elective office because he or she would enjoy the advantages of incumbency in that the voters would be the same as they would have been had he or she run for the exact same division to which he or she was appointed. Appellants' argument is understandable, but skips essential steps in constitutional analysis. We may not simply analyze the issue based upon rules of interpretation without first determining whether we may resort to those rules.

The rules of statutory construction apply to interpretation of constitutional amendments. *MacDonald v. Bowen*, 250 Ark. 1049, 468 S.W.2d 765 (1971); *Bailey v. Abington*, 201 Ark. 1072, 148 S.W.2d 176 (1941). The words of the constitution should ordinarily be given their obvious and natural meaning. *Hodges, supra. See also, Knowlton, supra*; *Kervin, supra.* In *Frank v. Barker*, 341 Ark. 577, 582, 20 S.W.3d 293 (2000), this court stated:

> As we interpret a provision of the Arkansas Constitution, we have said that when the language of a provision is plain and unambiguous, each word must be given its obvious and common meaning, and neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998).

Constitutional and statutory provisions are considered in the same manner. *Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 686 S.W.2d 391 (1985). Where the meaning of the words is clear and unambiguous, we do not resort to the rules of statutory or, in this case, constitutional interpretation. *R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001). No interpretation is needed and, therefore, no aids of interpretation are used. *Ragland, supra. See also, Ellison v. Oliver*, 147 Ark. 252, 227 S.W. 586 (1921).

Appellants invite us to consider the intent in putting Amendment 29 before the voters. This court has stated that in interpreting constitutional provisions, it may be helpful to determine what changes the constitutional amendment was intended to make. *Glover, supra.* We have stated further that in interpreting a constitutional amendment, it may be helpful to consider the history of the times and conditions existing at the time of adoption. *Bryant v. English*, 311 Ark. 187, 843 S.W.2d 308 (1992). Legislative interpretation may even be considered, but that is only where there is doubt or ambiguity. *Mears v. Hall*, 263 Ark. 827, 569 S.W.2d 91 (1978).

The sentence at issue is clear and easily understood. No person appointed to fill a vacancy in an elective office may succeed himself into that same elective office when the election takes place to fill that office. Circuit Judge of Division #2 of the Second Circuit is an elective office, as is Circuit Judge of Division #2 of the Third Circuit. When the voters go to the polls they will

cast votes for the specific judge they wish to occupy each division. They will not, for example, vote for two of some number of candidates for circuit judge of a given circuit. In other words, the office of a division judge within a circuit is an elected office, not a office assigned once a person is elected as circuit judge of the circuit. The position of Division #2 of the Second Circuit, for example, is an elected office. Therefore, neither Fergus nor Smith is succeeding himself in the position to which he was appointed in 2001, because neither is running for the division in which they were appointed to serve. The office of circuit judge refers to a single elective office. This is implicit in *State v. Green and Rock*, 206 Ark. 361, 175 S.W.2d 575 (1943), where this court discusses that Section 1 of Amendment 29 to the constitution provides the manner of filling vacancies which may occur in certain offices, including the office of circuit judge. In *Green and Rock*, this court notes that in Section 1 of Amendment 29, it is provided that the Governor shall fill such vacancy by appointment. The reference is to a specific single vacancy of a circuit judge.[1] *See also*, *State v. Martin*, 60 Ark. 343, 30 S.W. 421 (1895) (wherein this court discussed that the constitution did not limit each judicial circuit to one judge). It is relatively obvious that if candidates Fergus and Smith prevail in the upcoming election, they will be succeeding the prior sitting judges in Division #2 of their respective circuits, and will not be succeeding themselves, as others will occupy their former positions.

We hold that a person who runs as a candidate for circuit judge in a division of a judicial circuit, who was appointed in the previous term to serve out a vacancy in another division of the same judicial circuit, is not succeeding himself or herself in violation of Amendment 29, § 2, if elected.

The mandate in this case shall issue immediately.

Affirmed.

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[1] To construe Amendment 29 otherwise would mean that no vacancy in the office of circuit court judge would occur until all sitting circuit court judges in a multiple judge judicial circuit had vacated their offices for whatever reason.

STATE of Arkansas *v.* Wendi Carol WILLIAMS

CR 01-1195 75 S.W.3d 684

Supreme Court of Arkansas
Opinion delivered May 16, 2002

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellant.

Christian & Byars, by: *Eddie Christian, Jr.*, for appellee.

W. H. "DUB" ARNOLD, Chief Justice. This is a State appeal from the dismissal, based upon double jeopardy, of a state theft charge under Ark. Code Ann. § 5-36-103(a) against appellee, Wendi Carol Williams. The State maintains this Court has jurisdiction pursuant to Ark. R. App. P.—Crim. 3 to entertain this appeal. We disagree and dismiss the appeal.

The circuit court dismissed the appellee's state theft charge under Ark. Code Ann. § 5-1-114(1) (Repl. 1997) because the appellee had pled guilty to federal bank fraud based on the same conduct. The circuit court found that the two crimes did not protect against substantially different harm or evil. The State appeals.

On June 5, 2000, the State filed an information charging the appellee with theft by deception, alleging that she knowingly obtained property with a value of more than $2500 from City National Bank by deception and with the purpose to deprive the owner of the property. Additionally, on August 16, 2000, a one-count indictment was filed in the United States District Court for the Western District of Arkansas in case number CR20041-001 pursuant to 18 U.S.C. § 1344. The federal court indictment alleged the following:

> Beginning on or about April 1, 2000, and continuing on or through June 14, 2000, in the Western District of Arkansas, WENDI CAROL WILLIAMS, Defendant herein, knowingly executed and attempted to execute a scheme and artifice to

> defraud the City National Bank, a federally insured institution, and to obtain monies, funds, and credit under the control of City National Bank, by means of false and fraudulent pretenses, representation and promises.

The federal court indictment and the state court information were both based upon the exact same criminal conduct of appellee, that being that appellee utilized a fraudulent loan application in order to obtain a $17,500.00 loan from City National Bank of Fort Smith, Arkansas.

Appellee subsequently entered a plea of guilty to the one-count indictment filed in federal court. As a result, the appellee was sentenced on July 31, 2001, and ordered to serve twelve months' imprisonment. She was further ordered to pay restitution to City National Bank in the sum and amount of $21,499.56; this sum was derived from the $17,500.00 loan proceeds plus interest.

When appellee failed to appear on the state charge in June of 2001, a bench warrant was issued for her arrest. On August 3, 2001, her counsel filed a motion to dismiss the charge, relying on Ark. Code Ann. § 5-1-114, on the basis that she had earlier pled guilty to a federal crime based on the same conduct. The State filed a response on August 7, 2001, arguing, among other things, that the exception found in Ark. Code Ann. § 5-1-114(1)(A) applied. That same date, the State also filed an amended information charging the appellee with theft of property, but making the same theft-by-deception allegation made in the original information.

The circuit court held a hearing on the appellee's motion to dismiss on August 15, 2001. Among other things, the State argued that the federal statute is meant to protect banks against fraud schemes, while the state statute protects anyone against the actual theft of property, without respect to an underlying fraudulent scheme. The circuit court granted the appellee's motion to dismiss by an order filed August 17, 2001, finding that the federal and state charges were not substantially different and that the state crime did not prevent a substantially different harm or evil than the federal crime. The State filed a notice of appeal on September 1, 2001. For its only point on appeal, the State asserts that the

circuit court erred as a matter of law by finding that state theft does not prevent a substantially different harm or evil than federal bank fraud.

We must first raise the question of whether this appeal is properly before this Court. Specifically, we must determine whether the correct and uniform administration of justice requires us to review this appeal. Ark. R. App. P.—Crim. 3(c). *State v. Ashley*, 347 Ark. 523, 66 S.W.3d 563 (2002); *State v. Guthrie*, 341 Ark. 624, 19 S.W.3d 10 (2000). In criminal cases, we accept appeals by the State in limited circumstances. *State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000). This Court has held our review of a State appeal is not limited to cases that would establish precedent. *State v. Gray*, 330 Ark. 364, 955 S.W.2d 502 (1997). Moreover, there is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the State. The former is a matter of right, whereas the latter is not derived from the Constitution, nor is it a matter of right, but is granted pursuant to Rule 3. *State v. Ashley, supra; State v. Guthrie, supra; State v. McCormack; supra.* We accept appeals by the State when our holding would be important to the correct and uniform administration of the criminal law. Rule 3(c). As a matter of practice, this court has only taken appeals which are narrow in scope and involve the interpretation of law. *State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995). Where an appeal does not present an issue of interpretation of the criminal rules with *widespread ramifications*, this Court has held that such an appeal does not involve the correct and uniform administration of the law. *State v. Harris*, 315 Ark. 595, 868 S.W.2d 488 (1994).

Appeals are not allowed merely to demonstrate the fact that the trial court erred. *State v. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997); *State v. Spear and Boyce*, 123 Ark. 449, 185 S.W. 788 (1916). Thus, where the resolution of the issue on appeal turns on the facts unique to the case, the appeal is not one requiring interpretation of our criminal rules with widespread ramification, and the matter is not appealable by the State. *State v. Ashley, supra; State v. Guthrie, supra; State v. Howard*, 341 Ark. 640,

19 S.W.3d 4 (2000); *State v. Gray*, 330 Ark. 364, 955 S.W.2d 502 (1997); *State v. Edwards*, 310 Ark. 516, 838 S.W.2d 356 (1992) ("Here, the State questions the trial court's application of our rule to the facts at hand and not its interpretation, so the appeal must be dismissed."). This Court will not even accept mixed questions of law and fact on appeal by the State. *State v. Gray, supra*; *State v. Edwards, supra*; *State v. Hart*, 329 Ark. 582, 952 S.W.2d 138 (1997) ("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."). Likewise, where an appeal raises the issue of application, not interpretation, of a statutory provision, it does not involve the correct and uniform administration of the criminal law and is not appealable by the State. *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995); *State v. Mazur*, 312 Ark. 121, 847 S.W.2d 715 (1993).

Here, the State's argument is based entirely on the *application* of the law to the facts and in no way raises an issue of statutory interpretation and, therefore, does not require interpretation of criminal statutes with widespread ramifications. Accordingly, this Court does not accept this appeal by the State under Ark. R. App. P.—Crim. 3(c). The trial court's order to dismiss was within its discretion; therefore, we do not accept this appeal because it does not involve the correct and uniform administration of the law, only the application of the law.

Appeal dismissed.

GLAZE, CORBIN, and IMBER, JJ., dissent.

TOM GLAZE, Justice, dissenting. I dissent. This court has taken similar appeals to resolve the statutory interpretation of law regarding former-jeopardy claims. *See State v. Thompson*, 343 Ark. 135, 139, 34 S.W.3d 33, 35 (2000); *State v. McMullen*, 302 Ark. 252, 253, 789 S.W.2d 715, 716 (1990). Here, no factual issues exist. Appellee Wendi Williams had pled guilty to a federal crime under 18 U.S.C.A. § 1344 (2000). Based on the same conduct underlying the federal crime, the State charged

Williams committed theft of property under state law, Ark. Code Ann. § 5-1-144(1)(A)(1) (Repl. 1997), which provides as follows:

> When conduct constitutes an offense within the concurrent jurisdiction of this state of the United States or another state or territory thereof, a prosecution in any such other jurisdiction is an affirmative defense to a subsequent prosecution in this state under the following circumstances:
>
> (1) The first prosecution resulted in an acquittal or in a conviction as set out in § 5-1-112, and the subsequent prosecution is based on the same conduct unless:
>
> (A) The offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other, *and the law defining each of the offenses is intended to prevent a substantially different harm or evil*[.]

(Emphasis added.)

The sole legal issue to be decided in this appeal is whether the trial court misinterpreted § 5-1-114(1)(A) in deciding that the state theft law is not intended to prevent a substantially different harm or evil than the federal bank-fraud statute. It is difficult for me to understand why we decline to reach this legal issue now, because no doubt, this same issue is likely to be raised again until the issue is resolved. As noted above, we have done so in similar appeals in the past, and I know of no good reason not to do so in this case.

CORBIN and IMBER, JJ., join this dissent.

Bobbye Farrar BONDS *v.* Barry CARTER

01-943 75 S.W.3d 192

Supreme Court of Arkansas
Opinion delivered May 16, 2002

Tim A. Womack, P.A., by: *Tim A. Womack*, for appellant.

Bell Law Firm, P.A., by: *Ronny J. Bell* and *Karen D. Talbot*, for appellee.

TOM GLAZE, Justice. This is a quiet-title action brought by appellant Bobbye Bonds to determine the ownership of a certain tract of land in Columbia County. Eddie Smith formerly owned all of the land in question. On June 19, 1980, Smith conveyed a timber deed to appellee Barry Carter, granting Carter "all the merchantable pine and hardwood timber standing, growing and being on" a parcel of land in Columbia County; Carter paid $1,000 in consideration for the right to cut and remove timber from the described land for 100 years. On January 15, 1981, Smith conveyed a warranty deed to Bobbye Bonds, covering the same parcel of land, and reserving to himself all the oil, gas, and mineral interests thereon. Bonds originally filed a petition to set aside the timber deed in 1982, but the case was abandoned after Eddie Smith died.

Nearly twenty years later, on February 18, 2000, Bonds sued to quiet title in her land, alleging that, under Ark. Code Ann.

§ 18-11-102 (1987), she had acquired title to the land by paying taxes on the "wild and unimproved" property every year since 1981. Further, Bonds alleged that Carter's timber deed was void *ab initio* for inadequate consideration, for violating the rule against perpetuities, and for unconscionability under the Uniform Commercial Code. Carter answered, pleading, among other things, that Bonds's action was barred by the statute of limitations. Both parties then moved for summary judgment. In her motion, Bonds argued that, since Carter did not dispute that the land in question was wild and unimproved, she had acquired title to the property through adverse possession because she had paid taxes on it for more than fifteen years. Carter's motion agreed that the facts were undisputed, but asserted that his timber deed was superior to Bonds's warranty deed, and further, that Bonds's action was barred by the statute of limitations. Carter also pointed out that his validly recorded timber deed served to put Bonds on constructive notice of a superior interest in the land, and that she purchased the property subject to the timber deed.

The trial court held a hearing on the motions for summary judgment on September 13, 2000, and the hearing resulted in a court order finding that the 1980 timber deed was valid and that, while Bonds was vested with the fee simple title in the property, the issue was whether or not that vested interest interest was subject to the previously granted timber deed. Initially, the court denied both motions for summary judgment at that time; however, the court later dismissed all claims challenging the validity of the timber deed. The court also found that § 18-11-102 had no bearing on the controversy between the parties and did not affect the validity of the timber deed.

On appeal, Bonds raises two points for reversal: 1) the trial court erred in not finding Carter's severed timber estate on wild and unimproved property was adversely possessed when Bonds obtained the underlying fee to the property and paid all taxes on it from 1981 through 1998; and 2) the 100-year timber deed is an ongoing unconscionable contract, presenting public policy concerns that the trial court should have addressed to invalidate the instrument, and the court erred in dismissing the action due to statute of limitations considerations.

For her first point on appeal, Bonds argues that a recorded, severed timber estate on wild and unimproved land is adversely possessed when the owner of the underlying fee pays all taxes assessed on the land (both real and personal property) from 1981 to 1998. She contends that, under § 18-11-102, her payment of taxes vests title in her. That statute provides as follows:

> Unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he has color of title thereto, but no person shall be entitled to invoke the benefit of this section unless he, and those under whom he claims, shall have paid the taxes for at least seven (7) years in succession.

Bonds further relies on *Jones v. Barger*, 67 Ark. App. 337, 1 S.W.3d 31 (1999), wherein the court of appeals held that one claiming title to land by having paid taxes on that land for seven years need not have actually adversely possessed the land in question. In *Jones*, both parties had received warranty deeds to the same parcel of land, and the court was faced with determining whose title was superior. The court of appeals held that, under § 18-11-102, the Joneses had paid taxes on unimproved and unenclosed land, under color of title, for at least seven years. *Jones*, 67 Ark. App. at 341. Because that statute did not require "actual adverse possession," the court of appeals concluded that the Joneses had met the statutory requirements and were thus entitled to have the title to the land vested in them. *Id.* at 346.

[redacted] The facts of the instant case are distinguishable from those in *Jones*. *Jones* involved two parties claiming the same title to the same estate in the land; here, on the other hand, we are presented with a situation in which one party has the underlying surface rights, and the other possesses the timber rights, which have been severed from the surface. Arkansas's taxation statutes make it clear that timber rights are separate and distinct from the land itself. Ark. Code Ann. § 26-26-1109 (Repl. 1997), dealing with taxation of timber rights, provides in pertinent part as follows:

> (a)(1) *When the timber rights in any land shall, by conveyance or otherwise, be held by one (1) or more persons*, firms, or corporations,

> *and the fee simple in the land by one (1) or more other persons*, firms, or corporations, *it shall be the duty of the assessor*, when advised of the fact, either by personal notice or by recording of the deeds in the office of the recorder of the county, *to assess the timber rights in the lands separate from the soil.*
>
> (2) In such case, a sale of the timber rights for nonpayment of taxes shall not affect the title to the soil itself, nor shall a sale of the latter for nonpayment of taxes affect the title to the timber rights.

(Emphasis added.) In sum, this statute provides that timber rights held by one person are to be assessed separately from the fee simple rights of another in the land, because the timber rights are separate from another's rights in the soil.

Further, when a purchaser of land records his deed, it serves to put any subsequent purchaser on notice of the earlier deed. In this respect, Ark. Code Ann. § 14-15-404 (Repl. 1998) states the following:

> (a) *Every deed, bond, or instrument of writing affecting the title*, in law or equity, *to any real or personal property*, within this state which is, or may be, required by law to be acknowledged or proved and recorded *shall be constructive notice to all persons from the time the instrument is filed for record in the office of the recorder of the proper county.*

(Emphasis added.) Here, Carter recorded his timber deed six months before Bonds ever received the warranty deed from Smith. Thus, Bonds was on constructive notice of Carter's deed.

The question remains, however, as to whether or not Bonds could adversely possess Carter's timber interest, when she was on notice of the fact that those interests had been severed and recorded prior to her taking the warranty deed to the remainder of the land. As Carter points out, there is no case law in Arkansas dealing with the question of adverse possession of timber rights. There is case law, though, setting out what must happen before one can adversely possess mineral rights. While mineral and timber rights differ in many respects, both are severable from the land on which they are found.

[redacted] In *Claybrooke v. Barnes*, 180 Ark. 678, 22 S.W.2d 390 (1929), Laura Barnes contended that she held title to certain mineral rights through adverse possession. The mineral rights had been excepted from a deed to the surface rights dated November 17, 1911, but no such exception was contained in subsequent quitclaim deeds to the property. Barnes, who was a subsequent grantee to the surface estate, eventually claimed she held title to the mineral rights as well, although she had never exploited the mineral rights until she attempted to execute a mineral lease on the land in 1918. In reversing the trial court's decision finding that Barnes adversely possessed the property, this court held as follows:

> Where there has been a severance of the legal interest in the minerals from the ownership of the land, it has been held as to solid minerals, and the same rule has been applied to oil and gas, that adverse possession of the land is not adverse possession of the mineral estate and does not defeat the separate interest in it. [Citation omitted.] In *Scott v. Laws*, 185 Ky. 440, 215 S.W. 81, 13 A.L.R. 369, the court said that, since there was a severance of the mineral estate from the surface estate, the owner of the minerals did not lose his right or his possession by any length of nonuser, nor did the owner of the surface acquire title by the statute of limitations to the minerals by his exclusive and continued occupancy and enjoyment of the surface mere.
>
> This rule was approved by this court in *Bodcaw Lumber Co. v. Goode*, [160 Ark. 48, 254 S.W. 345 (1923)], and the court said: "The rule of those authorities is that the title to minerals beneath the surface is not lost by nonuse nor by adverse occupancy of the owner of the surface under the same claim of title, and that the statute can only be set in motion by an adverse use of the mineral rights, persisted in and continued for the statutory period."
>
> *So it may be taken as settled that the two estates when once separated, remain independent, and title to the mineral rights can never be acquired by merely holding and claiming the land, even though title be asserted in the minerals all the time. The only way the statute of limitation can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by opening mines and operating the same. It is only when such possession has continued for the statutory period that title to the mineral estate by adverse possession is acquired.*

Id. at 682 (emphasis added). Other cases have held similarly. *See, e.g., Taylor v. Scott*, 285 Ark. 102, 685 S.W.2d 60 (1985) (when a mineral ownership has been severed by deed from the surface ownership, adverse possession of the surface is ineffective against the owner of the minerals unless the possessor actually invades the minerals by opening mines or drilling wells and continues that action for the necessary period).

Bonds's argument in her reply brief that mineral rights and timber rights are not analogous is not well taken,[1] especially in light of her concession in her opening brief that timber rights are a *profit à prendre*. Timber rights are indeed a *profit à prendre, see Black's Law Dictionary* 1483 (6th ed. 1990). Further, a *profit à prendre* is defined as a "right to take from the soil, such as by logging, mining, drilling, etc." *Id.* at 1211. The right of *profit à prendre* is a "right to make some use of the soil of another, such as the right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes right to use such of the surface as is necessary and convenient for exercise of the profit." *Id.* In sum, while we do not conclude that timber and mineral rights are necessarily identical in nature, both rights involve the right to remove the subject goods from the surface itself; neither right profits its owner until it is exercised by removing the goods from the land. Title to such rights is separate and apart from title to the surface.

In conclusion, we hold that Bonds's reliance on *Jones v. Barger, supra*, is misplaced, and § 18-11-102 is likewise inapplicable, because one cannot adversely possess timber rights merely by paying taxes on the land. In order to establish adverse possession, the possession must be actual, open, continuous, hos-

[1] The arguments raised by the dissent, regarding the purported distinctions between timber and mineral rights, go far beyond the arguments presented by the parties in their briefs. Our analogy between timber and mineral rights extends only so far as our taxing statutes, Ark. Code Ann. § 26-26-1109 and -1110, tax these interests separate and apart from the underlying surface estate. Further, to the extent the dissent relies on the validity or conscionability of the one-hundred-year term of the timber deed, we hold *infra* that the trial court correctly concluded that the issue of the validity of the timber deed was barred by the statute of limitations.

tile, exclusive, and be accompanied by an intent to hold adversely and in derogation of, and not in conformity with, the right of the true owner. *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000); *Staggs v. Story*, 220 Ark. 823, 250 S.W.2d 125 (1952). Further, to adversely possess property on which another holds a superior right to timber growing thereon, there must be actual adverse possession for seven consecutive years before the commencement of the suit. *Collins v. Bluff City Lumber Co.*, 86 Ark. 202, 205, 110 S.W. 806 (1908). If the owner of the surface holds the land upon which the timber is growing, it is presumed, unless the contrary appears, that he or she holds in subordination to the rights of the owner of the timber deed, such possession being consistent with the right to the timber; mere possession is not sufficient to bar recovery. *Id.* Here, Bonds did nothing to actively assert her interest in the timber growing on the land until she filed this suit. This was insufficient to claim an adverse interest in the property, and the trial court did not err in finding in favor of Carter on this issue.

In her second point on appeal, Bonds argues that the trial court erred in concluding that the statute of limitations barred her challenge to the validity of the timber deed. In this respect, she contends that public policy considerations concerning the inherent "unconscionability" of the 100-year timber deed somehow trumped the seven-year statute of limitations for bringing actions to recover lands. *See* Ark. Code Ann. § 18-61-101 (1987). She also avers that the Uniform Commercial Code provides authority for setting aside unconscionable contracts, and cites *Davis v. Kolb*, 263 Ark. 158, 563 S.W.2d 438 (1978), wherein this court set aside a timber deed for unconscionability. However, *Davis* did not involve any question of the applicable statute of limitations, or such statute's effect in barring the underlying suit.

In *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999), this court had the following to say about the interplay between public policy and statutes of limitations:

> Any statute of limitation will eventually operate to bar a remedy, and *the time within which a claim should be asserted is a matter of public policy, the determination of which lies almost exclusively in the legislative domain, and the decision of the General Assembly in*

> *that regard will not be interfered with by the courts in the absence of palpable error in the exercise of the legislative judgment.* [Citations omitted.]

Id. at 103 (emphasis added).

Bonds simply offers no convincing authority to support her argument that public policy concerns should override the applicable seven-year statute of limitations, nor does she make any argument whatsoever that the legislature made a "palpable error" in determining the statute of limitations for bringing suits to recover land. This court has repeatedly held that we do not consider assignments of error that are unsupported by convincing authority. *Hurst v. Holland*, 347 Ark. 235, 61 S.W.3d 180 (2001); *Public Defender Comm. v. Greene County*, 343 Ark. 49, 32 S.W.3d 470 (2000); *Federal Fin. Co. v. Noe*, 335 Ark. 78, 983 S.W.2d 107 (1998).

For the foregoing reasons, the order of the chancery court is affirmed.

ARNOLD, C.J., CORBIN and HANNAH, JJ., concur; THORNTON, J., dissents.

JIM HANNAH, Justice, concurring. I concur with the majority's decision. First, I agree with the dissent's analysis that there is a difference between a timber deed, which is more akin to the sale of a crop, and a deed granting mineral rights, which is a separate estate in the minerals beneath the surface. Common sense dictates that while a mineral estate and a surface estate can coexist due to their different positions on and under the land, a surface estate and a timber deed or contract relate to the same locale — the property above ground. The respective rights of mineral and surface owners are well settled. The owner of the minerals has an implied right to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and to remove its products. *Diamond Shamrock Corp. v. Phillips*, 256 Ark. 886, 511 S.W.2d 160 (1974). His use of the surface, however, must be reasonable. *Id.* The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner. *See id.* (citing *Getty Oil Co. v. Jones*, 470

S.W.2d 618 (Tex. 1971)). However, with regard to a timber interest and a surface estate, until the timber is harvested, use of the surface by the surface owner is basically suspended pending the expiration of the contractual term over the timber. For example, a surface owner cannot build a house in a grove of contractually conveyed timber without either cutting down the timber and injuring the timber owner's interest, or waiting to the detriment of his interest until the timber is harvested. If a timber estate were perpetual, as can be a mineral estate, the surface owner could conceivably be forever barred from developing his land for fear of damaging the timber owner's interests.

Although I agree with the dissent on this point, I must concur in affirming this case because I think Ms. Bonds did not assert the proper claim below to challenge the timber contract at issue here. Certainly, as the dissent notes, the document in this case is a contract for the sale of "all the merchantable pine and hardwood timber standing, growing and being on. . . [the land]." The contract is to be performed within one hundred years. To challenge this contract, Ms. Bonds argued that the timber contract was void *ab initio* because she alleged that Mr. Carter defrauded Mr. Smith by taking advantage of Mr. Smith's alcoholism to obtain the contract, that a timber contract with a term of one hundred years to perform is against public policy for improper restraint of property, and that the timber contract and description had been materially altered after Mr. Smith signed the contract. These, however, appear to be the claims Ms. Bond asserted in her original lawsuit in 1982, in which she nonsuited her claims pursuant to Ark. R. Civ. P. 41(b) and then never refiled. The trial court noted that the action was dismissed for want of prosecution on January 15, 1986. While I believe that these particular claims are barred by the statute of limitations, I do not think that a dismissal of this current action would bar Ms. Bonds from bringing a different action such as a challenge to the reasonableness of Mr. Carter's failure to remove "all the merchantable pine and hardwood timber standing, growing and being on. . . [the land]" that was present in 1981 when the contract was made, or to compel Mr. Carter to remove the only the "merchantable" timber in existence in 1981 and to enjoin him from removing any other timber that matured

and became "merchantable" after the moment the contract was created. The statute of limitations perhaps has not run on these or other causes of action to properly enforce the contract pursuant to our case law and consistent with public-policy considerations. Accordingly, I concur and would affirm the chancery court.

ARNOLD, C.J. and CORBIN, J., join.

RAY THORNTON, Justice, dissenting. Because I believe that there is a difference between a timber deed and a deed granting mineral rights, and because I think that Arkansas Code Annotated § 18-11-102 *et seq.* (1987) applies to timber land, I must respectfully dissent.

The majority opinion is premised upon the notion that a timber deed is analogous to a mineral-rights deed. Based on this assumption, the majority concludes that Ms. Bonds may not follow the procedure outlined in Ark. Code Ann. § 18-11-102 *et seq.* to acquire any rights to the timber identified in Mr. Carter's timber deed. This assumption is misplaced. We have held that:

> there is a broad distinction between a sale of timber and mineral rights, for the use of the former necessarily creates a burden upon the owner of the surface which is not consistent with use by the latter, whereas the use of the surface for mining purposes is only incidental and does not necessarily impair to a serious extent the enjoyment of the surface rights.

Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923).

Because there is a "broad distinction" between a timber deed and a mineral-rights deed, I do not think that we can look to our previous case law involving mineral rights to determine whether Ark. Code Ann. § 18-11-102 *et seq.* may be used to quiet title in land that is subject to a contract for sale of merchantable timber. It appears that the question whether a property owner may perfect his title to land that is the subject of a timber deed by payment of taxes for a period of numerous consecutive years pursuant to Ark. Code Ann. § 18-11-102 *et seq.* is now being raised for the first time, although we have previously decided that the applicable provisions of the statutes will support the perfection of a clear title notwithstanding a record title held by the original owner of the

property. *See Wimberly v. Norman*, 221 Ark. 319, 253 S.W.2d 222 (1952); *see also Jones v. Barger*, 67 Ark. App. 337, 1 S.W.3d 31 (1999).

This issue of first impression requires us to review a chancellor's interpretation of a statutory provision. As we have stated on numerous occasions, we consider chancery cases *de novo* on the record. *Bharodia v. Pledger*, 340 Ark. 546, 11 S.W.3d 540 (2000). In *City of Lowell v. M & N Mobile Home Park*, 323 Ark. 332, 916 S.W.2d 95 (1996) we elaborated on this standard of review. Specifically, we explained:

> In appellate review of ordinary equity cases there are two different components of the chancellor's ruling that are considered. The appellate court will not set aside a chancellor's finding of fact unless it is clearly erroneous. This deference is granted because of the regard the appellate court has for the chancellor's opportunity to judge the credibility of the witnesses. However, a chancellor's conclusion of law is not entitled to the same deference. If a chancellor erroneously applies the law and the appellant suffers prejudice, the erroneous ruling is reversed. Manifestly, a chancellor does not have better opportunity to apply the law than does the appellate court.

Id. (internal citations omitted).

In our review of the chancellor's conclusions of law, we must also remain mindful of our standard of review for matters of statutory construction. We review issues of statutory construction *de novo*; it is for this court to decide what a statute means. *Hodges v. Huckabee*, 338 Ark. 454 , 995 S.W.2d 341 (1999). We are not bound by the decision of the trial court. *Id.*

I turn now for a *de novo* review of the chancellor's interpretation of Ark Code Ann. § 18-11-102 *et seq.* On appeal, Ms. Bonds contends that timber resources are different than mineral estates and that the statutory provisions of Ark. Code Ann. § 18-11-102 *et seq.* anticipate gaining ownership of land by prolonged payment of taxes on land in which a timber deed was once granted. Specifically, she argues:

> It is disingenuous and counterintuitive in Arkansas to suggest that land or real property—especially in a wild and unimproved or

> unimproved and unenclosed state for any seven year of fifteen year or more period does not also connote growing timber. For adverse claimants to possess land with timber is reasonable. Appellee distinguishes appropriately 'mineral estates' and 'interests' and the necessity that they be opened to be adversely possessed in Arkansas. However, minerals are dormant assets of the land, beneath the surface estate. They are not wasted if left undisturbed and their true economic significance (for taxation purposes and otherwise) arises at severance. Further, unopened mineral estates rarely bind surface alienability or use.
>
> But control of the timber estate-in this case putatively for one hundred years-controls all practical surface usage and alienability of the land for a century. The timber resources, unlike unopened mineral estates, are visible, growing, and currently dominating the land's use and value.

I agree wholeheartedly with Ms. Bonds. The conveyance by warranty deed of title to a mineral estate is not analogous to a present contract for sale of a crop, namely the merchantable timber, that is growing on the surface of the land. For example, in *Bodcaw*, we quoted the language used in a warranty deed that reserved mineral rights. The document stated:

> Reserving to the grantor, *its successors and assigns*, all of the gas, oil and minerals and mineral rights in and under said land. . .*if same shall be necessary for, or desired by it, its successors or assigns* — such pipe lines for oil and gas and such telephone and telegraph lines and such right of way, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for damages caused thereby.

Id. (Emphasis added.) *Bodcaw* reflects a carving out of the mineral interest from the surface rights. That case holds that such mineral interest can be distinguished from the ownership of the title to the surface estate. The title to minerals can be retained in perpetuity while the surface owner enjoys his estate in perpetuity. *Id.* In *Bodcaw*, we also held that the separate title to the enjoyment of the minerals "is retained in perpetuity" and that:

> the statute of limitations does not run against these rights unless there is an actual adverse holding which constitutes an invasion of these particular mineral rights. Such is the unanimous view in all

> the authorities which hold that there is a right of separation and separate conveyance.

Id. In *Bodcaw*, we drew a distinction between a sale of merchantable timber as contrasted with a retention of an interest in minerals in perpetuity. We also pointed out that unlike a reservation of title to minerals in perpetuity, a mere lease for the purpose of exploring for gas, and the production of the same, would allow an abandonment of the leasehold rights unless work began within a reasonable time. *Id.* (*citing Mansfield Gas Co. v. Alexander*, 97 Ark. 167, 133 S.W. 837 (1911)). There is a similar distinction between a present sale of merchantable timber and a lease of the surface for the purpose of growing timber in the future.

In contrast to the retention of rights to minerals in perpetuity, we held in *Liston v. Chapman & Dewey Lumber Co.*, 77 Ark. 116, 91 S.W. 27 (1905) that a timber deed to merchantable timber relates only to the purchase of merchantable timber standing upon the property at the time of the conveyance, and that the holder of the timber deed only has the right to remove such merchantable timber together with the right to enter upon the land for a reasonable time to harvest his personal property. In *Liston*, we defined the term "merchantable" to mean "such timber as would bring the ordinary market price at the time the deed was executed." *Id.*

In the case now before us, it is clear that there was no conveyance of title or lease of the surface for the purpose of growing timber. The timber deed before us was entered on June 18, 1980, and provides:

> This contract and agreement made and entered into by and between Eddie Smith parties of the first part and Barry Carter parties of the second part. . . The parties of the first part have this day and by this act and in these presents grant, bargain, sell, convey, set over, transfer, and deliver unto said party of the second part, with full guarantee of title and with complete transfer and subrogation of all rights and actions of warranty against all former proprietors, the following described property towit: *all the merchantable pine and hardwood timber standing, growing and being on. . .*[the land].

There is no language purporting to convey any interest to Mr. Carter's heirs and assigns. The sale conveys only a present interest in a growing crop, and does not grant a lease for a term of years. Eddie Smith contracted for the sale of "merchantable pine and hardwood timber" then standing on the land, and agreed that Mr. Carter may cut and remove the property he has purchased within one hundred years.

Faced with an unlimited time for removing timber in *Liston, supra*, we held that the trial court was correct in finding that "all of the timber less than eighteen inches in diameter at the stump was not merchantable in the month of April 1898, and [therefore] is the property of plaintiffs [landowners]." In *Liston*, we held that "defendant had a right to enter upon the land and remove the timber and to cut and remove all timber not less than eighteen inches at the stump." *Id.* We further held that after five years "a reasonable time had not expired for cutting and removing the timber." Finally, we observed that the "timber under eighteen inches at the stump, of the kinds named, was not merchantable" and was retained by the seller. *Id.*

In the case now before us, there was no language in the timber deed to create any estate for growing timber. Under the principles we established in *Liston*, it is clear that Ms. Bonds retained full ownership of the land together with all growing timber that was not conveyed as merchantable pine and hardwood timber on the 18th of June 1980.

In response to Mr. Carter's motion for summary judgment, Ms. Bonds presented to the trial court an affidavit that stated that a timber deed does not convey an interest in the land. The affidavit by Teddy Reynolds addressed the distinction between the timber deed found in this case and a conveyance of an interest in the underlying real estate. Mr. Reynolds's affidavit was not controverted. In his affidavit, Mr. Reynolds testified that:

> The deed is for all the merchantable pine and hardwood timber standing, growing, and being on the property. 'Merchantable' is a term of art in the timber industry that has the same meaning today as it did in 1980.

* * *

> Further, a timber deed designates a transaction regarding timber to be harvested and is distinguished from a lease of surface rights for growing timber. The two concepts are not at all interchangeable and the terms are not used interchangeably in the industry.
>
> * * *
>
> Whether for one or one hundred years, the Smith/Carter 'timber deed' sets its term only for felling, cutting, and removing the merchantable timber, not for leasing the surface rights to grow timber.
>
> * * *
>
> So, it seems to me that Mr. Carter only bought from Mr. Smith the timber that was upon the property and merchantable as of June 18, 1980. There is no reference or even slight hint of a lease of surface rights for timber production in this instrument.

It is clear that this issue was presented to the chancellor and that this issue was brought forward for our review. In deciding a case of first impression of the application of Ark. Code Ann. § 18-11-102 *et seq.* to a contract for sale of merchantable timber, we must perform a *de novo* review of the record, and make our own interpretation of the statute.

In so doing, I believe that an analysis of the public policy behind collecting taxes leads to the conclusion that the failure of Mr. Carter to assess or pay taxes on standing timber, as provided by Ark. Code Ann. § 26-26-1109 (Repl. 1997), resulted in Ms. Bonds's payment of taxes upon both the land and the timber for more than twenty years. This triggers the application of Ark. Code Ann. § 18-11-102 *et seq.* Here the only person paying taxes on the land and the timber was Ms. Bonds. The legislative intent was to collect taxes upon both the land and the timber. All of the taxes were paid by Ms. Bonds. Arkansas Code Annotated § 18-11-102 *et seq.* provides that title may be quieted in the person paying such taxes for the required statutory period.

Arkansas Code Annotated § 18-11-102 *et seq.* allows a person to take possession of "unimproved and unenclosed land" or "wild and unimproved land" when he pays the "taxes thereon" for *at least* seven years. *Id.* We have defined "unimproved and unen-

closed land " to mean land that is in a "state of nature," "wild," or "not cleared." *Fenton v. Collum*, 104 Ark. 624, 150 S.W. 140 (1912).

In summary, from our cases interpreting deeds of minerals, it is well established that an estate in perpetuity is created by a conveyance of minerals, and that this estate is independent of rights to ownership of the surface. For that reason, adverse possession of the surface does not impair the separate ownership of the mineral estate. That principle does not apply to the timber deed in this case because no leasehold or other interest in the land was ever created. Mr. Carter simply purchased merchantable pine and hardwood timber on the date of the contract. The conveyance of merchantable timber carries with the purchase the right to enter upon the land for a reasonable time for the purpose of removing what has been purchased. Provision of a limited time for cutting and removing the merchantable timber does not establish an estate in the land, and is subject to the provisions of Ark. Code Ann. § 18-11-102 *et seq.* whereby a clear title to the land is acquired by the payment of taxes for a period of seven or fifteen years. In order to avoid the operation of those statutory provisions, Mr. Carter had an opportunity to separately assess and pay property taxes upon his merchantable timber until he harvested his crop. This was not done. There was no separate assessment or payment of taxes upon the timber. The taxes on the merchantable timber as well as all other taxes on the land were paid by Ms. Bonds each year for more than twenty years. Payment of the taxes on unimproved land according to Ark. Code Ann. § 18-11-102 *et seq.* clears title to such land against claims of other interests in the property except for severed mineral estates. This is the law even when the contesting holder of title claims an interest based on record title or other claims of title to the land. The operation of these statutes clearly extinguishes any contractual right to enter upon the land to harvest merchantable timber purchased more than twenty years earlier.

In the case now before us, the land in dispute was approximately forty-nine acres of timberland. In his response to request for admissions, Mr. Carter admitted that this land was wild and unimproved. It is undisputed that Ms. Bonds paid the taxes on

this land from 1981 to 1998. The instrument conveying all merchantable pine and hardwood timber did not include anything more than a sale of merchantable timber in existence at the time of the sale. Based on the language of Ark. Code Ann. § 18-11-102 *et seq.*, Ms. Bonds acquired possession to any timber Mr. Carter failed to remove during the running of the statutes. Accordingly, I would hold that the chancellor's statutory interpretation was clearly erroneous.

Elizabeth STROM *v.* STATE of Arkansas

CR 01-933 74 S.W.3d 233

Supreme Court of Arkansas
Opinion delivered May 16, 2002

Wilson & Associates, P.L.L.C., by: *Patrick J. Benca*, for appellant.

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

TOM GLAZE, Justice. On February 15, 2000, a Pulaski County jury convicted appellant Elizabeth Strom of manufacturing a controlled substance and possession of drug paraphernalia and sentenced her to a total of fifteen years in prison. The judgment and commitment order was entered on February 28, 2000, and Strom filed a *pro se* petition for postconviction relief

on May 10, 2000. The trial court denied that petition on July 20, 2000.

On April 12, 2001, Strom filed a motion to vacate or set aside her conviction and sentence pursuant to Ark. R. Crim. P. 37; in this motion, she alleged, among other things, that her trial attorney, Stuart Vess, refused to file an appeal from her February 2000 conviction and sentence.[1] On August 28, 2001, Strom filed her motion for belated appeal in this court, in which she argued that she should be entitled to an appeal because Vess did not file a notice of appeal after her conviction in February of 2000. In an affidavit attached to the motion for belated appeal, Strom averred that she told Vess that she wanted him to file a notice of appeal on her behalf, but Vess refused to file a notice of appeal because he believed it to be futile and because Strom could not afford his fee for representation on appeal.

In a *per curiam* order issued on September 27, 2001, this court remanded the matter to the trial court for a hearing to settle the record in order to determine whether Strom had requested Vess to file a notice of appeal and whether Vess had complied with Ark. R. App. P.—Crim. 16. *Strom v. State*, 346 Ark. 160, 55 S.W.3d 297 (2001). After a hearing on October 24, 2001, the trial court entered an order concluding that Strom did not inform Vess of her desire to appeal, and that Vess complied with Rule 16.

After the trial court entered that order, Strom filed a motion with this court to set aside the trial court's findings on October 26, 2001; we denied the motion on November 15, 2001. On November 16, 2001, Strom filed a notice of appeal from the trial court's October 24 order. Strom then resubmitted her motion to file a belated appeal on February 13, 2002; the motion was denied on February 21, 2002. On March 7, 2002, Strom filed a motion for clarification, asking our court to explain why it agreed with the trial court that Vess had fully complied with Rule 16. This time, the court granted the motion and set a briefing schedule. Strom filed her brief on March 28, 2002, and on appeal, she

[1] The partial transcript that accompanied Strom's subsequent motion for belated appeal did not reflect that any further action was taken on that motion.

argues that the trial court erred in concluding that Vess complied with Rule 16.

[redacted] When a case is remanded to the trial court for a factual determination regarding a motion for belated appeal, and the merits of that motion rest on the credibility of the witnesses, this court recognizes that it is the lower court's task to assess the credibility of the witnesses. *See Frazier v. State*, 339 Ark. 173, 3 S.W.3d 334 (2001). This court, however, does not attempt to weigh the evidence or assess the credibility of the witnesses; that lies within the province of the trier of fact. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). We are bound by the fact-finder's determination on the credibility of witnesses. *Id.* Likewise, we have long held that the trier of fact is free to believe all or part of a witness's testimony. *Id.* We do not reverse a trial court's findings of fact unless they are clearly erroneous. *See, e.g.*, *Womack v. Foster*, 340 Ark. 124, 8 S.W.3d 854 (2000); *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996); Ark. R. Civ. P. 52(a).

[redacted] Rule 16 of the Arkansas Rules of Appellate Procedure—Criminal provides, in pertinent part, the following:

> Trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

(Emphasis added.) This court has held, however, that a defendant may waive the right to appeal by his or her failure to inform counsel of the desire to appeal within the thirty days allowed for filing a timely notice of appeal under Rule 4(a) of the Rules of Appellate Procedure. *Langston v. State*, 341 Ark. 739, 19 S.W.2d 619 (2000); *Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997); *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988).

At the October 24 hearing, Vess testified that Strom informed him that she did not wish to appeal her February 2000 conviction; rather, she said she wanted to try to get the other charges that she had, including a revocation of probation, to run concurrent to the February conviction. Vess commented that Strom received a sentence that was less than the one the prosecu-

tor had offered her, and she seemed relieved about it. Vess further stated that he talked with Strom over the phone about another charge that was coming up on April 3, 2000, and she did not mention at that time that she wanted to appeal the February conviction. She indicated during that conversation that she wanted the April 3 charges run concurrently to the other time she was already serving. Strom pled guilty to the charges on April 3, and her penitentiary time was run concurrently to the other time; at the time, Vess testified that she never mentioned that she wanted to appeal the earlier case.

Vess also noted that he had sent Strom a letter about the April 3 charges, and confirmed their conversation wherein she said that she did not want to appeal. The letter read as follows:

> *As per our telephone conversation, we will not be appealing your jury trial conviction.* As I talked to you, the prosecutor is agreeable to running the charges in Seventh Division Circuit concurrent with the sentence you received in the jury trial. Also with regard to your theft charge, the prosecutor will be nol prossing that. I'll see you on April 3rd at 2 o'clock to do your guilty plea for concurrent time. Good luck to you, Stuart Vess. [Emphasis added.]

After Strom's appearance on April 3, when she pled guilty and received concurrent time, the next time Vess heard from Strom was after the court of appeals reversed the conviction of her husband and co-defendant in case number 99-3836, Mike Porter. Porter's case was reversed and dismissed on January 24, 2001. *Porter v. State*, CACR00-627 (Ark. App. Jan. 24, 2001). Porter called Vess about Strom after Porter's conviction was reversed, and at that time, Vess told Porter that it was too late, but Vess said that if Porter could get authorization from Strom for Vess to release her file, he would do so. Porter got Strom's authorization, and Vess released her file to him. The last time Vess had contact with Strom, however, was on April 3, 2000.

When asked about an allegation in Strom's affidavit that Vess refused to file her appeal because he believed it to be futile and because she could not afford his fee on appeal, Vess replied that he had never quoted her a fee, and that her allegations were not true. He stated that he did not file an appeal in her case because he did

not think she would win on appeal, and he advised her of that. He also advised her that he thought they could get the charges run concurrently, and when he asked her if she wanted to do that, she said, "yes."

Strom also testified at the hearing, and contradicted most of what Vess had stated. However, she did concede that Vess's letter, in which he stated that they would not be appealing her conviction "confirmed [her] conversation with him." At the end of the hearing, the trial court opined that Strom did not tell Vess that she wanted to appeal, and that the issue of her appeal never came up until after Porter's case had been reversed. The judge stated that he "just simply [didn't] believe this lady. . . . I believe Mr. Vess and based upon that, I don't think Mr. Vess had a duty to withdraw; I don't think he had a duty to do anything other than what he did[.]"

Strom acknowledges that the trial court, as fact-finder, makes credibility determinations. *See Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). However, citing *Lewis v. State*, 279 Ark. 143, 649 S.W.2d 188 (1983), Strom argues that her trial counsel, Vess, failed to advise her of her right to appointed counsel on appeal. In *Lewis*, this court held that, where counsel knew his client wanted to appeal but failed to take action to see that his client understood that an indigent could ask the trial court to appoint an attorney to perfect the appeal at public expense, counsel was obligated to file a notice of appeal or obtain permission from the trial court to withdraw.

In the present case, as opposed to *Lewis*, Vess testified that it was his understanding, based on his conversations with Strom, that she did not want to appeal. The trial court believed Vess's testimony to this effect, and the court's conclusion is adequately supported by the transcript of those proceedings. Although there was conflicting testimony, the trial court concluded that Vess was credible and Strom was not. This court defers to the trial court's superior position to ascertain witnesses' credibility, *see Frazier, supra*, and the trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Atkinson v. State*,

347 Ark. 336, 64 S.W.3d 259 (2002); *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001).

Further, in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the United States Supreme Court rejected the notion of a bright-line rule requiring trial counsel to "always consult with the defendant regarding an appeal"; rather, the Court held that it would apply the standard of *Strickland v. Washington*, 466 U.S. 688 (1984), to determine whether or not counsel rendered a deficient performance with respect to filing a notice of appeal. In other words, the Court stated that counsel's performance would be judged by determining whether or not the representation fell below an objective standard of reasonableness, and whether or not the performance prejudiced the defendant. *Flores-Ortega*, 528 U.S. at 477. The Court expanded on this notion as follows:

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning — advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. [Citation omitted.]

Id. at 478.

From Vess's testimony at the October hearing, it is clear that the trial court believed that Vess had sufficiently consulted with Strom about her appeal and about the remainder of the proceedings against her. The question, as framed in *Flores-Ortega*, is whether or not "counsel ma[d]e objectively reasonable choices." *Id.* at 479. Here, given Strom's indication to Vess that she wanted to plead guilty to the other charges against her, and Vess's credible testimony that she never mentioned that she wanted to appeal the February 2000 conviction, we agree with the

trial court that Vess acted reasonably under the circumstances and did not render ineffective assistance of counsel.

We note that the State has raised two procedural arguments against Strom's appeal. First, citing *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (2000), the State asserts that law of the case bars this appeal, because this court has twice rejected her petition for a belated appeal. In *Camargo*, we held that the law-of-the-case doctrine prevents an issue that was raised in a prior appellate proceeding from being raised in a subsequent appellate proceeding "unless the evidence materially varies between the two[.]" Here, though, the "subsequent" proceedings — our present review of the trial court's factual findings — differ from the prior appellate proceedings, because this is the first time we have had the opportunity to examine the determinations of facts made by the trial court following our remand.

Additionally, the State contends that there is no final, appealable order from the circuit court. However, as just noted, the trial court made findings upon directions from this court, so that we could consider and review an unresolved factual question. The State attempts to analogize this court's current remand to the appointment of a special master to make findings of fact, but this analogy only supports the conclusion that there is an appealable order. When this court appoints a master, he or she enters findings of fact, and this court then reviews them, rejecting any findings that are clearly erroneous, and renders a decision. *See, e.g.*, *Osborne v. Powers*, 322 Ark. 229, 908 S.W.2d 340 (1995). This is precisely what we are asked to do in this matter, and we conclude that the trial court's findings were not clearly erroneous.

We affirm the trial court and deny Strom's motion for belated appeal.

IMBER, J., not participating.

Lloyd C. JONES *v.* STATE of Arkansas

CR 01-1095 74 S.W.3d 663

Supreme Court of Arkansas
Opinion delivered May 16, 2002

Bowden Law Firm, P.A., by: *David O. Bowden*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Lloyd C. Jones appeals the judgment of the Sebastian County Circuit Court, Greenwood District, convicting him of the rape of his estranged wife and sentencing him to ten years' imprisonment. Jones raises four points for reversal, one of which is an issue that this court has not heretofore considered: Whether Arkansas law prohibits the rape of one spouse by another by means of forcible compulsion. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We find no merit to Jones's arguments, and we affirm.

I. Sufficiency of the Evidence

For his first point on appeal, Jones argues that there was not sufficient evidence to convict him of rape, and that the trial court erred in denying his directed-verdict motion. We treat

a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Branscum v. State*, 345 Ark. 21, 43 S.W.3d 148 (2001); *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.* Before we review the evidence presented below, we must address the point of procedure raised by the State.

The State argues that this point is procedurally barred because Jones's directed-verdict motion below did not specify the proof allegedly missing from the prosecutor's case. We disagree. The record reflects that Jones's attorney moved for a directed verdict on the ground that the State had failed to prove that there was coercion or that the rape actually occurred. Counsel admitted that sexual activity, and even deviate sexual activity had occurred between the two, but that Jones's "point is consensual." We view counsel's argument as a challenge to the proof submitted on the issue of forcible compulsion, which is the argument he makes on appeal. As such, we will review the merits of this point.

Jones was charged with the offense of rape pursuant to Ark. Code Ann. § 5-14-103 (Repl. 1997). Particularly, the State charged that Jones engaged in sexual intercourse or deviate sexual activity with his estranged wife, Charis Jones, by forcible compulsion. "Forcible compulsion" is defined in Ark. Code Ann. § 5-14-101(2) (Repl. 1997) as "physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person." Charis testified that on the early morning of December 14, 2000, between 2:15 and 3:00 a.m., her husband Lloyd Jones broke into the trailer where Charis was living with her three children and a friend and her two children. According to Charis's testimony, she and Jones were separated at the time and had been since the week before Halloween 2000. On the date in question, she was asleep in her bed when she awoke to find Jones standing over her. Jones placed duct tape on her mouth and attempted to hand-

cuff her, but he was unable to get the handcuffs on her completely. Jones also held a box cutter blade to her neck and told her that if she screamed or called to her roommate, Amy Gothard, he would kill the children and her roommate.

At some point, Charis was able to get the duct tape off her mouth. Jones did not retape her mouth. Jones then asked her to "suck on his penis." Charis agreed to do so. Jones then instructed Charis to bend over, and he inserted his penis into her anus. When he had finished engaging in anal intercourse, Jones went into the bathroom and cleaned off his penis. He then told Charis that he wanted her to perform oral sex again. When he tired of that, Jones asked to have vaginal intercourse with Charis, and she complied.

When asked by the prosecutor why she complied with Jones's requests for sex, Charis stated that she was afraid of Jones. When asked if she had consented to the sexual acts at any time during the incident, Charis stated that she had not. She explained that she let Jones do those things and she did not call for help or attempt to get away from him, because she "was scared that he was going to hurt us." She explained further that her fear stemmed from the fact that "he sat there and said he was going to do harm to my children and to my friend and her kids." Charis also stated that after they had vaginal intercourse, Jones told her that he was going to come and live with her in the trailer, and that they were going to be a family again. Charis testified further that Jones told her "that if I wanted out of the marriage by divorce I wouldn't get it because the only way to get out of our marriage was like our wedding vows is through death and I would have to die."

This court has repeatedly held that the uncorroborated testimony of a rape victim is sufficient to sustain a conviction. *See, e.g., Russey v. State*, 336 Ark. 401, 985 S.W.2d 316 (1999); *Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998); *Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998). Accordingly, we could end our review of the evidence here. In this case, however, we have corroboration of the victim's testimony in the form of a custodial confession by Jones, which was played for the jury.

In his statement, Jones admitted that on the date in question, he broke into Charis's trailer, placed duct tape on her mouth, and threatened her with a box cutter. Although Jones claimed that the box cutter did not have a blade in it at the time, he admitted that he held the box cutter up to Charis's neck and told her that if she screamed, "[he] might harm her friend Amy." He admitted that Charis engaged in the sexual acts "out of fear and not because she wanted to." He also admitted that he had forced Charis to engage in similar sexual acts before, but he maintained that this was the only time that he had placed a knife to her throat. He admitted that he had a problem and he stated: "I would like for somebody to please help me get help, counseling, 'cause I want counseling 'cause I don't really understand why I am doing this, why I do this." This evidence certainly corroborates the victim's testimony that Jones forced her to engage in the sexual acts out of fear that he would harm her, her children, her friend, and her friend's children. Accordingly, we conclude that there was more than sufficient evidence to convict Jones of rape, and we affirm the trial court's denial of a directed verdict.

II. Rape Within the Marriage

For his second point for reversal, Jones raises an issue of first impression in this state, namely whether Arkansas law recognizes the crime of rape within a marriage. Jones contends that at common law in England, there was no crime of rape within a marriage. He asserts that this rule was based on the theory that consent to any and all sexual relations was deemed to have been given as part of the marriage contract. He asserts further that when the legislature enacted Ark. Code Ann. § 1-2-119 (Repl. 1996), it thereby adopted the common law of England. Thus, he argues that the legislature has never specifically recognized the crime of rape between spouses. The State argues, and Jones does not dispute, that this point is procedurally barred because it was not raised in the trial court. *See Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001); *Branscum*, 345 Ark. 21, 43 S.W.3d 148. Notwithstanding, we reject Jones's argument on this point.

In adopting our Criminal Code, the General Assembly specifically declared: "The provisions of this code shall govern any

prosecution for any offense defined by this code and committed after January 1, 1976." Ark. Code Ann. § 5-1-103(a) (Repl. 1997). Section 5-14-103(a)(1), which is part of the Criminal Code, provides that a person commits the crime of rape by engaging in sexual intercourse or deviate sexual activity with another person by forcible compulsion. Under this section, a perpetrator is "[a] person" and the victim is "another person." Thus, on its face, this section is neutral both as to gender and as to the relationship, if any, between the perpetrator and the victim. This section controls all prosecutions for the crime of rape involving forcible compulsion, including those instances of forcible rape between spouses. Because the statute controls, the common law of England is irrelevant. Accordingly, we affirm on this issue.

III. Admissibility of Explicit Photographs under the Rape-Shield Statute

For his third point on appeal, Jones argues that the trial court abused its discretion in denying the admission of several photographs that graphically depict the victim engaging in oral sex and various acts of masturbation. In his written motion, filed pursuant to Ark. Code Ann. § 16-42-101 (Repl. 1999), Jones claimed that the photographic evidence was crucial to refute the allegations against him that he forced the victim to engage in deviate sexual acts. The trial court conducted an *in camera* hearing on the admissibility of the photographs, during which Jones testified that the photographs were taken by him on two different dates in June 2000. Jones identified himself as the other person in some of the photographs. At the conclusion of the hearing, the deputy prosecutor argued that the photographs were not relevant to the issue of the victim's consent on the night of the rape. He argued that the photographs were not in any way connected to the events of this case. Jones's attorney, on the other hand, argued that the photographs were relevant to show that Jones and the victim, as husband and wife, had engaged in consensual anal and oral intercourse. The trial court took the matter under advisement.

The following day, the trial court entered a written order, finding that some of the photographs may be relevant to the issue of consent. The order provided that Jones would be allowed to

ask the victim whether she had engaged in anal and oral sex with Jones during their marriage. If the victim admitted that she had, even if she claimed that it had been without her consent, the photographs would not be admissible. However, if she denied the acts, the photographs may become admissible, subject to other objection by the State.

During the trial, the victim admitted that she and Jones had engaged in anal and oral intercourse during their marriage, but she claimed it had been without her consent. Defense counsel then attempted to impeach her testimony and sought to introduce the photographs. The trial court denied the request, but allowed defense counsel to ask her about one particular photograph depicting an act of anal manipulation with a dildo. The trial court ruled further that the photograph itself, which the judge described as "highly prejudicial" and "more inflammatory than necessary," would not be admissible unless the victim denied posing for the photograph. Initially, the victim admitted that such a photograph of her had been taken, but she claimed that it was taken without her consent, after she had just been awakened.

At that point, the jury was taken out of the courtroom to allow the parties to argue the admissibility of the photograph. The prosecutor asked the judge if he could have the opportunity to show the photographs to the victim, as she had not seen them in some time and may not have recalled what was depicted in the particular photograph referred to by defense counsel. The trial court allowed this and ruled that after she looked at them, he would allow defense counsel to ask the question again. Whereupon the jury was recalled, and defense counsel asked the victim: "Did you not on or around June of 2000 pose in the nude with your husband, having anal sex with a dildo?" The victim answered: "Yes." Defense counsel then asked her if it was consensual, and the victim said "No." At that point, defense counsel again attempted to introduce the photograph, arguing that it demonstrated consent. The trial court disagreed that the photograph necessarily showed consent and denied its admission. We find no error in the trial court's ruling.

The purpose of our rape-shield statute, section 16-42-101, 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. *State v. Babbs*, 334 Ark. 105, 971 S.W.2d 774 (1998); *Graydon v. State*, 329 Ark. 596, 953 S.W.2d 45 (1997). The rape-shield statute prohibits admission of evidence of a victim's prior sexual conduct, unless such evidence directly pertains to the act upon which the prosecution is based. *Sterling v. State*, 267 Ark. 208, 590 S.W.2d 254 (1979). Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act; there must be some additional evidence connecting such prior acts to the alleged consent in the present case before the prior acts become relevant. *Id. See also Babbs*, 334 Ark. 105, 971 S.W.2d 774; *State v. Sheard*, 315 Ark. 710, 870 S.W.2d 212 (1994). However, even such relevant evidence is not admissible unless the trial court, at an *in camera* hearing, makes a written determination that the probative value of the evidence outweighs its inflammatory or prejudicial nature. *Graydon*, 329 Ark. 596, 953 S.W.2d 45; *Bradley v. State*, 327 Ark. 6, 937 S.W.2d 628 (1997). The trial court is vested with a great deal of discretion in ruling whether the victim's prior sexual conduct is relevant, and we will not overturn the trial court's decision unless it constituted clear error or a manifest abuse of discretion. *See Babbs*, 334 Ark. 105, 971 S.W.2d 774; *Graydon*, 329 Ark. 596, 953 S.W.2d 45.

Here, the trial court found the evidence to be relevant to the issue of consent. The trial court reasoned that acts of deviate sexual activity might be foreign to many people, such that the jurors may be inclined to think that such conduct is never consensual. Thus, the trial court allowed defense counsel to ask the victim whether she had engaged in anal and oral intercourse with her husband and whether she had posed for photographs depicting such conduct. The trial court denied admission of the photographs themselves because they did not demonstrate necessarily consensual acts. The trial court also found that the photographs were more inflammatory, derogatory, and prejudicial than they

were probative. We cannot say that the trial court abused its discretion in ruling as it did.

IV. Admission of Taped Telephone Conversation

For his final point on appeal, Jones argues that the trial court erred in denying his motion to suppress statements he made during a taped telephone conversation with the victim and those he made to police after his arrest. He asserts that the telephone conversation should have been suppressed pursuant to the Supreme Court's holding in *Massiah v. United States*, 377 U.S. 201 (1964), and that the custodial statement should have been suppressed because it was the fruit of an illegal arrest. We find no error.

The record reflects that the victim reported the rape to Captain William Hollenbeck, of the Sebastian County Sheriff's Office, on the date that it happened. The following day, the victim went to the sheriff's office to give an interview. While there, Hollenbeck asked her to make a telephone call to Jones to see if he would corroborate her statement. The victim agreed to make the call from Hollenbeck's office. The entire conversation was tape recorded by Hollenbeck, but Jones was not aware of this. During the course of the conversation, the victim pressed Jones to tell her why he raped her the night before. She also tried to get him to admit that it was in fact rape. Jones denied raping her for most of the conversation, although he told her that he was sorry for what he did and that it was wrong. Finally, near the end of the conversation, Jones made the statement "I did it."

Following the telephone call, Hollenbeck went to Jones's trailer to arrest him for rape. Hollenbeck did not have an arrest warrant. He testified during the suppression hearing that he believed that he had probable cause to arrest Jones based on the victim's statement and the admissions made by Jones during the telephone conversation. When he arrived at the residence, Hollenbeck informed Jones that he wanted to talk to him about the charges made by his wife. Jones agreed to go to the sheriff's office for an interview. Hollenbeck then placed Jones in handcuffs and put him in the back of a patrol car, where he was transported to the sheriff's office. Hollenbeck stated that at that point, Jones was

not free to go and was in fact under arrest. Once they arrived at the sheriff's office, Jones was taken to an interview room, and Hollenbeck read him his *Miranda* rights from a statement-of-rights form. Jones acknowledged his rights and agreed to talk to Hollenbeck without an attorney present. Thereafter, Jones confessed to the crime on tape.

During the hearing below, Jones asked the trial court to suppress his custodial confession on the ground that it was obtained illegally following an arrest without a warrant. Jones argued that the police lacked reasonable or probable cause to arrest him for rape and that, accordingly, the police violated his rights by coming into his house to arrest him without a warrant or exigent circumstances. Jones argued that his custodial statement should be suppressed as fruit of the poisonous tree. However, Jones did not directly challenge the voluntariness of the custodial statement.[1]

The trial court denied Jones's motion to suppress, finding that the police had probable cause to arrest him without a warrant pursuant to Ark. R. Crim. P. 4.1. The trial court found further that the custodial confession was given voluntarily, after Jones had been fully advised of his *Miranda* rights. In reviewing a trial court's denial of a motion to suppress, we make an independent examination of the issue based on the totality of the circumstances, viewing the evidence in the light most favorable to the State. *Holmes v. State*, 347 Ark 530, 65 S.W.3d 860 (2002); *Stanton*, 344 Ark. 589, 42 S.W.3d 474. We will reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Id.*

Jones first argues that the trial court erred in denying suppression of the telephone conversation because it was obtained illegally in violation of *Massiah*, 377 U.S. 201. He contends further that, depending on the origin of the call and location of the parties at the time, the call may have been a violation of the Federal Communications Act. Neither of these arguments were made

[1] In his written motion to suppress, Jones alleged that the police had coerced his statement by feeding him candy that "had a peculiar taste to it." He claimed that five minutes later, he lost all memory of the events that followed, until he woke up in the jail's suicide cell. He did not pursue this argument at the suppression hearing, nor does he pursue it on appeal. Accordingly, we need not address it.

below. The record demonstrates that the written motion to suppress only challenged the admissibility of the custodial confession. Moreover, during the suppression hearing, defense counsel did not challenge the telephone conversation, under *Massiah* or any other basis. Counsel's only argument was that Jones had been arrested illegally and that his custodial statement was therefore fruit of the poisonous tree. Accordingly, we limit our review to the issue of the legality of Jones's arrest.

A police officer may arrest a person without warrant if the officer has reasonable cause to believe that the person committed a felony. *See* Rule 4.1(a)(i); *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001); *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997). Reasonable or probable cause exists where there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that a crime has been committed by the person suspected. *Id.* In assessing the existence of reasonable or probable cause, our review is liberal and is guided by the rule that probable cause to arrest without a warrant does not require the degree of proof sufficient to sustain a conviction. *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682 (1996). All presumptions are favorable to the trial court's ruling on the legality of the arrest, and the burden of demonstrating error rests on the appellant. *Id. See also Criddle v. State*, 338 Ark. 744, 1 S.W.3d 436 (1999).

Here, the trial court found that the police had reasonable or probable cause to arrest Jones for rape based on the victim's testimony that he had forcibly raped her using a dangerous weapon. The trial court found further support for Jones's arrest from the telephone conversation in which he made some admissions about the incident. Jones has failed to overcome the presumption in favor of the trial court's ruling that the arrest was legal. Because the arrest was legal, his custodial statement afterwards was not the fruit of the poisonous tree. Where the tree is not poisonous, neither is the fruit. *Criddle*, 338 Ark. 744, 1 S.W.3d 436. Accordingly, we must affirm the trial court's denial of the motion to suppress.

Affirmed.

IMBER, J., not participating.

Melba LAIRD, Max Laird, Individually and In Their Capacities as Respective Trustees for the Melba Laird Living Trust and Max Laird Living Trust As Maintained By Stephens, Inc. *v.* Sandra SHELNUT, Executrix of the Estate of Don McMann, *Deceased*

01-1155 74 S.W.3d 206

Supreme Court of Arkansas
Opinion delivered May 16, 2002

[Petition for rehearing denied June 27, 2002]

[redacted]

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

Baxter, Jenson, Young & Houston, by: *Ray Baxter*, for appellee.

DONALD L. CORBIN, Justice. Appellants Melba and Max Laird, individually and as respective trustees for the Melba Laird Living Trust and Max Laird Living Trust, appeal the order of the Saline County Chancery Court granting Appellee Sandra Shelnut's motion for summary judgment. On appeal, the Lairds argue that in deciding the issue of summary judgment, the chancellor improperly relied upon a transcript from another court proceeding, and that the proper record reflects genuine issues of material fact. The Lairds argue in the alternative that the chancellor erred in determining that $738,000 was to be held in a constructive trust. This appeal involves an issue of first impression; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We affirm.

The events leading up to the present action date back to the execution of reciprocal wills by Don and Dixie McMann on June 23, 1995. Dixie had contacted attorney John Lovell to discuss the drafting of their wills. Dixie explained that her husband had a problem and that she was sickly. Dixie also told Lovell that her son-in-law was Alfred Shelnut, a friend of Lovell's and Sandra's husband. Lovell went to the McManns' home to meet with the couple on three separate occasions. During the initial meeting, the McManns told Lovell that they wished to leave their entire estate to Sandra, Dixie's daughter. Don also told Lovell that "he had a greedy sister and a worthless husband and he did not want them to share in anything that he and his wife had earned or acquired." During the second meeting, Lovell, at the request of the McManns, explained the effects of the wills to Sandra.

Thereafter, Lovell drafted reciprocal wills on behalf of Don and Dixie. Don's will contained the following reciprocal language:

> FIFTH: I declare that this Will is executed contemporaneously with a Will of similar testamentary plan executed by my

> said wife, DIXIE MCMANN, and I declare that my said wife and I have agreed that we shall not alter, amend or change our Wills or do any act or suffer any omission which will have the effect of defeating the testamentary plan stated in our Wills, except by mutual agreement at the time when both of us are alive."

Dixie's will contained identical reciprocal language, but referenced Don as her spouse. The wills appointed Sandra Shelnut as executrix. The McManns' wills provided that upon the death of one of them, their estate would pass to the surviving spouse, until their death, and then the residue would pass to Sandra and Alfred Shelnut.

Dixie passed away on February 2, 1998. Four days prior to her death, Dixie, Don, and Sandra withdrew $900,000 from a joint account titled in all three parties' names, and split the proceeds evenly between Don and Sandra. Following Dixie's death, Don moved in with the Lairds. He added Melba, his sister and only surviving heir, to his investment account, as a joint owner with a right of survivorship. On July 14, 1998, Don executed a new will naming Melba executrix and sole heir.

Upon Don's death on June 5, 1999, Sandra attempted to probate the 1995 will with the Saline County Probate Court. Melba contested the will and sought to probate the 1998 will instead. In an order dated April 19, 2000, the probate court admitted the 1995 will to probate and appointed Sandra executrix. In an unpublished opinion, the court of appeals reversed that order and remanded the case on the ground that the probate court lacked subject-matter jurisdiction to enforce the contract to execute reciprocal wills. *See Laird v. Shelnut*, CA 00-1226 (Ark. App. Sept. 5, 2001).

While the probate matter was pending, Sandra, acting as executrix of the Estate of Don McMann, filed an action in Saline County Chancery Court requesting an injunction and temporary restraining order preventing the Lairds from accessing or using Don's stock account at Merrill Lynch, Pierce, Fenner & Smith. In her complaint filed on August 16, 1999, Sandra alleged that Don's actions of adding Melba to his stock account and drafting a new

will were prohibited under the language of the reciprocal wills drafted by him and Dixie in 1995. Melba responded that the terms of the 1998 will superseded the 1995 will and that the 1995 will was the product of fraud, coercion, and duress. Melba then filed a counterclaim alleging that Sandra initiated a scheme to defraud Don of his estate and a parcel of real property. Melba requested that the transfers from Don to Sandra prior to his death be set aside.[1]

Sandra subsequently filed two amended complaints. The first sought the imposition of a constructive trust over the assets removed from Don's estate. Next, Sandra filed an "Amended and Substituted Complaint" substituting the defendants as Melba and Max Laird, individually and in their official capacities as trustees, respectively, for the Melba Laird Living Trust and the Max Laird Living Trust. This complaint was filed on April 19, 2000, the same day that the probate court entered its order admitting the 1995 will to probate and appointing Sandra as executrix. Therein, Sandra alleged that during the pendency of the probate proceeding, it was discovered that funds from Don's estate that passed to Melba upon his death, had been transferred into the two living trusts. Sandra requested that the chancellor order the Lairds to return such monies, as well as any earnings resulting from the investment of those monies.

Sandra filed a motion for summary judgment on September 15, 2000, alleging that there were no contested issues of fact to be resolved. Sandra based this motion on the order of the probate court finding that Don executed a contractually binding reciprocal will in 1995, and alleged that because of the validity of that will, the transfers to the Lairds were invalid, and as such, they held the funds in constructive trust. A brief in support of the motion was also filed, and attached to the brief was a copy of Don's 1995 will and a certified copy of a transcript from a hearing in the probate matter. In response to the summary-judgment motion, the Lairds argued that there were questions of fact still at issue. The Lairds

[1] The trial court made no ruling on any of the matters raised in this counterclaim, nor does it appear that Appellants ever sought any such ruling. Moreover, Appellants have not raised any allegations regarding the counterclaim on appeal.

also argued that because Shelnut failed to attach any admissible evidence to the pleadings in the case, there was no basis for the chancery court to grant summary judgment.

Sandra specifically alleged in her motion for summary judgment that the amount held by the Lairds in constructive trust was $738,000. This amount was based on the testimony of Martin Northern in a hearing held on September 5, 2000. There, Northern, a stock broker and registered investment advisor, testified that he was able to trace $493,249.18 originally in Don's account to the Laird's living trust accounts. He further testified that the Lairds never contributed to the accounts and that they now contained $737,791.96 that formerly belonged to Don.

The chancellor entered an order on January 12, 2001, granting Sandra's motion for summary judgment. In that order, the chancellor stated that after considering the filings, including the forms of court orders and transcripts from the probate case, he found no unresolved questions of fact remaining. The chancellor specifically found that the Lairds held in constructive trust $738,000, which was Sandra's equitable property, and ordered that the funds not be disturbed, pending the outcome of the appeal in the probate proceeding.

The Lairds appealed to the Arkansas Court of Appeals. Relying on the decision in *Imbraguglio v. Great Atlantic & Pacific Tea Co., Inc.*, 358 Md. 194, 747 A.2d 662 (2000), the court of appeals determined that the probate transcript possessed all the indicia of reliability and was properly considered in granting summary judgment. It thus affirmed the decision of the chancellor. *See Laird v. Shelnut*, 75 Ark. App. 193, 55 S.W.3d 795 (2001). The Lairds petitioned for review of that decision on the basis that the court of appeals' opinion conflicted with our prior holdings and Ark. R. Civ. P. 56(c). When we grant review following a decision by the court of appeals, we review the case as though it had been originally filed in this court. *See Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001); *Regions Bank & Trust v. Stone County Skilled Nursing Facil., Inc.*, 345 Ark. 555, 49 S.W.3d 107 (2001). Thus, we review the trial court's judgment, not that of the court of appeals.

The Lairds raise two points for reversal: (1) the chancellor improperly considered the probate transcript, and that once the transcript is stricken from consideration, the proper record reflects genuine issues of material fact; and (2) the chancellor erred in ordering the Lairds to hold $738,000 in constructive trust for Shelnut. We disagree and affirm the decision of the chancellor.

We first turn to the Lairds' argument that the probate transcript was not part of the proper record below and thus should not have been considered by the chancellor. Rule 56 governs summary-judgment proceedings. Pursuant to Rule 56(c)(2), summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, 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." The Lairds aver that Rule 56 does not provide for the submission of a trial transcript; therefore, it was error for the chancellor to rely on it in granting summary judgment. Such a narrow interpretation of Rule 56 ignores the fact that a transcript of trial testimony is as reliable as a transcript of deposition testimony or an affidavit, both of which may be considered in summary-judgment proceedings.

Other jurisdictions have recognized this reliability factor and allowed the use of trial transcripts in summary-judgment proceedings. In *Farmers Union Oil Co. of Williston v. Harp*, 462 N.W.2d 152 (N.D. 1990), the North Dakota Supreme Court ruled that a trial transcript from a prior proceeding involving different parties was admissible for summary-judgment purposes. In reaching this conclusion, the court cited with approval the following language from a federal court decision: "[T]here is no sensible rationale which would preclude reliance on sworn testimony faithfully recorded during the conduct of a judicially supervised adversarial proceeding. All of the hallmarks of reliability attend upon such trial transcripts." *Id.* at 155 (quoting *United States v. O'Connell*, 890 F.2d 563, 567 (1st Cir. 1989)). The court in *Harp* further stated that affidavits are not subject to cross-examination and reasoned that the degree of reliability attending sworn testimony from a previous trial is as great as the degree of reliability attending affidavits. *Id.*

In *Imbraguglio*, 358 Md. 194, 747 A.2d 662, the case relied on by the Arkansas Court of Appeals, the Maryland Court of Appeals stated that a transcript of former testimony was as reliable as an affidavit filed in the summary-judgment context. In allowing for its use, the court noted that a transcript indicates matters the witness would testify to if called in the present case, and like an affiant, the witness gave the testimony under oath.

While the *Imbraguglio* court left open the issue whether a transcript involving different parties could be used, the Maryland Special Court of Appeals later addressed that issue in *Shipley v. Perlberg*, 140 Md. App. 257, 780 A.2d 396 (2001). There, the court held that the transcript of a deposition taken in an unrelated case was admissible in a summary-judgment proceeding involving different parties. In support of this conclusion, the Maryland court relied upon the policy issues underlying summary judgment, stating:

> The purpose of the rule is to dispose of cases if there is no genuine factual controversy. Its purpose is not to try the case or resolve factual disputes, but rather to determine whether there is a factual controversy requiring a trial. The purpose of cross-examination, on the other hand, is to elicit the truth, thereby resolving factual disputes. At the summary judgment stage of a case, it is not critical that the party opposing use of a deposition transcript have an opportunity to ferret out the truth of the facts asserted by its opponent through cross-examination. The summary-judgment rule contemplates that summary judgment may be predicated on an affidavit by a non-party affiant who has not been cross-examined. We do not see why this rule should be different for deposition testimony by a non-party.

Id. at 272-73, 780 A.2d at 404 (citations omitted).

The reasoning in *Shipley* negates the Lairds' argument that *Imbraguglio* is distinguishable from the case at hand, because the Lairds were not parties to the probate action. Moreover, their argument that they were not parties to the probate proceeding is misleading. Melba Laird contested the will that Sandra attempted to probate and offered up a subsequent will instead. She participated in the probate proceedings, including availing herself of the opportunity to cross-examine Lovell. The transcript relied on by

the chancellor was a complete transcript of Lovell's testimony on direct and cross-examination. In sum, we find no merit in the Lairds' argument that the transcript could not be used because this action involves different parties.

We are likewise unpersuaded by the Lairds' reliance on *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993), and *Godwin v. Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991), for the proposition that the transcript could not be considered because it was not attached to the motion for summary judgment, but rather to the supporting brief. *Pyle* and *Godwin* simply stand for the proposition that a trial court may not consider factual *allegations* raised in a party's trial brief or exhibits (emphasis added). Rule 56 does not require a party to attach supporting documents to the motion in order for those documents to become part of the record, and we will not extend our previous holdings to sanction such an absurd result. Having determined that the trial court properly relied on the probate transcript in reviewing the motion for summary judgment, we now turn to the record before us in order to determine if there are any genuine issues of material fact.

We have ceased referring to summary judgment as a "drastic" remedy and now simply regard it as one of the tools in a trial court's efficiency arsenal. *Bank of Arkansas v. Mana Corp.*, 346 Ark. 469, 58 S.W.3d 366 (2001). Summary judgment should only be granted, however, when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Id.*; *Elam*, 346 Ark. 291, 57 S.W.3d 165. The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Wright v. City of Monticello*, 345 Ark. 420, 47 S.W.3d 851 (2001); *Flentje*, 340 Ark. 563, 11 S.W.3d 531. This court views the evidence in a light most

favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Pfeifer v. City of Little Rock*, 346 Ark. 449, 57 S.W.3d 714 (2001). Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

Remaining mindful of this standard, we now turn to the Lairds' argument that genuine issues of material fact remain as to whether the reciprocal wills created an enforceable contract between Don and Dixie. Specifically, the Lairds alleged that Don's 1995 will was the product of fraud, coercion, and duress and was part of a scheme by Shelnut and her husband to defraud Don of his estate. In support of her motion for summary judgment, Shelnut submitted the sworn testimony of Lovell, the attorney that drafted the McManns' wills, regarding the facts and circumstances surrounding the drafting of the McManns' wills. Lovell testified that Dixie contacted him about drafting wills for her and her husband and that he met with them on three separate occasions. The McManns explained to Lovell that they wanted to draft wills that would leave their entire estate to Shelnut. According to Lovell, Don stated several times that "he had a greedy sister and a worthless husband and he did not want them to share in anything that he and his wife had earned or acquired." Lovell stated that during his second meeting with the McManns, he explained to Shelnut, at the McManns' request, what they wanted to accomplish with their wills. Lovell testified that he believed that the McManns possessed testamentary capacity and that he witnessed no signs of any undue influence. Lovell further testified that, "Mr. McMann was a very educated — or, he appeared to me, a very knowledgeable fellow. And he knew what he wanted, and he told me what he wanted. And I simply did what he told me he wanted."

The transcript is evidence that clearly supports the chancellor's finding that summary judgment was appropriate. Moreover, it is axiomatic that once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Foreman Sch. Dist. No. 25 v. Steele*, 347 Ark. 193, 61 S.W.3d 801 (2001); *Pugh v. Griggs*, 327

Ark. 577, 940 S.W.2d 445 (1997). Here, once Shelnut submitted her evidence in support of summary judgment, the Lairds failed to offer any proof that material questions of fact were still in dispute. Thus, we cannot say that it was error for the trial court to grant Shelnut's motion for summary judgment.

Alternatively, the Lairds argue that even if the chancellor did not err in granting summary judgement, the finding that $738,000 should be held in constructive trust was clearly erroneous. Specifically, the Lairds argue that the only evidence related to damages was in the form of Northern's testimony at the September 5 hearing and that Northern's conclusion was a mere estimate that did not take into consideration other sources of income deposited into the trust account. The Lairds, however, never raised this argument below, and we will not consider it for the first time on appeal. *See Hurst v. Holland*, 347 Ark. 235, 61 S.W.3d 180 (2001); *Ghegan & Ghegan, Inc. v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001).

Finally, we award Sandra Shelnut, as Appellee, costs in the amount of $250 as reimbursement for the cost of preparing the supplemental abstract in order to correct the Lairds' deficient abstract. *See* Ark. Sup. Ct. R. 4-2(b)(1) (2001).

Affirmed.

GLAZE, BROWN, and IMBER, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. I disagree with the majority that we can simply amend Rule 56(c) of our Rules of Civil Procedure relating to summary judgment, add a new category of proof, and apply it to the case at hand. The effect of doing that is to blindside opposing counsel by changing the summary-judgment rules while the case is pending on appeal. For that reason, I dissent.

In the present case, two wills of the decedent, Don McMann, are at issue: a 1998 Will naming Melba Laird as executrix and a 1995 Will naming Sandra Shelnut as executrix and executed as part of a reciprocal-will plan with his wife, Dixie McMann. The probate court held a hearing *In the Matter of the Estate of Don*

McMann, deceased, and entered an order admitting the 1995 Will to probate.

Sandra Shelnut then sued in Chancery Court to enjoin the Lairds from taking possession of the decedent's common stock and prayed for an order for them to return any common stock or other assets owned by Don McMann at the time of his death. She then moved for summary judgment and attached the transcript from the probate hearing in support of her motion. The Lairds contested the motion on the basis that there was no "admissible evidence" supporting Sandra's motion in the form of depositions, answers to interrogatories, affidavits, or admissions. The chancellor, nonetheless, agreed with Sandra and granted her motion. In that order, the chancellor stated that he based his decision on the court orders and the transcript from the probate case. The probate transcript contained testimony from John Lovell, the attorney who drafted the 1995 Will and a friend of Sandra's husband. Mr. Lovell testified that in his opinion, Don McMann had testamentary capacity and had not been coerced into executing the 1995 will.

A transcript from another proceeding is not listed as something to be considered under our Rule 56(c). That rule plainly states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact." Our case law has emphasized the importance of these Rule 56(c) parameters:

> "Moreover, by going beyond the pleadings, discovery, and affidavits, the trial court erred for purposes of summary judgment, and the procedure followed did not fall within the specific parameters of Rule 56."

Godwin v. Churchman, 305 Ark. 520, 524, 810 S.W.2d 34, 36 (1991). In *Godwin*, the trial court held a hearing and took testimony from all parties and accepted exhibits. That is what we said was inappropriate for summary judgment purposes, unless waived by the parties. *See also Montgomery Ward & Company, Inc. v. Credit*, 274 Ark. 66, 621 S.W.2d 855 (1981) (refusing to consider, on review, oral testimony taken at a hearing for a motion for sum-

mary judgment on the basis that there was no provision for the taking of such testimony in Rule 56).

A practicing attorney reading our Rule 56(c) and the *Godwin* case would reasonably have concluded that previous trial testimony was inappropriate for summary-judgment purposes, absent his agreement that the trial court could consider it. Trial testimony may well be more reliable than an affidavit for summary-judgment purposes, but if we are to change our civil rules, let's do so prospectively and not in the middle of a case. That is what we typically do. *See, e.g., In Re Arkansas Rules of Civil Procedure*, 347 Ark. Appx. 1048 (Jan. 24, 2002) (*per curiam*).

For these reasons, I respectfully dissent.

IMBER, J., joins.

ANNABELLE CLINTON IMBER, Justice, dissenting. My reasons for dissenting are twofold. First, I agree with Justice BROWN's dissenting opinion. Summary-judgment proceedings are governed by Rule 56 of our Rules of Civil Procedure, and a transcript from another proceeding is not listed as something to be considered under Rule 56(c). Second, even assuming that the chancellor properly considered the testimony from the probate court proceedings, I must conclude that genuine issues of material fact remain to be litigated. Both of these points of error have been raised and argued throughout the course of this case.

The moving party here, Sandra Shelnut, claims that she submitted "documentary proof of the entitlement to summary judgment being in the form of transcripts and *findings of fact*, . . . thus establishing the prima facie case." (Emphasis added.) Specifically, she relies on findings in the chancellor's opinion letter dated April 10, 2000, and in the probate court's order entered on April 19, 2000. As mentioned in the majority opinion, the probate court's order has been reversed by the Arkansas Court of Appeals on the basis of lack of subject-matter jurisdiction. *Laird v. Shelnut ex rel. Estate of McMann*, Slip Op., No. CA 00-1226 (Ark. App. Sept. 5, 2001), *pet. for review denied.*

Furthermore, Sandra Shelnut suggests that the issues of material fact in this case "are resolved" by the transcripts of Mr. Lovell's testimony in the probate court proceedings. Mr. Lovell testified that Dixie McMann called him and stated she and her husband wanted to visit with him about making their wills. He went to their house because Dixie indicated Don "had maybe had surgery. Or he had a problem . . . . And that she was kind of sickly." Furthermore, he agreed to visit with the McManns at their home because of his friendship with Alfred Shelnut. While Mr. Lovell did not recall ever representing Alfred Shelnut, he admitted that he may have answered questions for him. Mr. Lovell also confirmed that he had represented several members of Alfred's family, including his parents, his brothers, his niece and nephew, and his daughter. Mr. Lovell further testified that Sandra was present during the second visit with the McManns and that during this visit Alfred pulled up in front of the house. According to Mr. Lovell, he told the Shelnuts that under the reciprocal wills all of the McManns' assets would go to them after the second death.

While Mr. Lovell also testified that he was satisfied the McManns had testamentary capacity and that he had no indication they had been unduly influenced, this court is required to view his testimony in the light most favorable to the Lairds and resolve all doubts in their favor. Viewing the evidence in favor of the Lairds, I must conclude that Mr. Lovell's testimony is sufficient to raise issues of fact as to whether the 1995 will and the property deeds were the result of undue influence exerted by the Shelnuts over Don McMann.

The chancery court concluded there were no unresolved questions of fact because "all the facts pertaining to this proceeding have been *litigated fully* and were completely addressed to this Court in the form of the various filings herein." (Emphasis added.) The standard is whether there is evidence sufficient to raise a fact issue, rather than evidence sufficient to compel a conclusion on the part of a fact finder. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). Therefore, a review of a summary judgment is not a "sufficiency of the evidence" determination. *Id.* The chancellor ruled that the issues had been "litigated fully," an improper process in the summary-judgment context, and in so

doing, committed prejudicial error. For these reasons, I respectfully dissent.

GLAZE and BROWN, JJ., join in this dissent.

STATE of Arkansas *v.* Kenneth Andrew SULLIVAN

CR 99-1140 74 S.W.3d 215

Supreme Court of Arkansas
Opinion delivered May 16, 2002

[Petition for rehearing denied June 20, 2002*]

* GLAZE and IMBER, JJ., would grant.

Mark Pryor, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., and *Brad Newman*, Ass't Att'y Gen., for appellant.

John Wesley Hall, Jr., and *Kathy L. Hall*; *David M. Siegel*; and *F.N. "Buddy" Troxell*, for appellee.

ROBERT L. BROWN, Justice. This is a pretextual-arrest case. Kenneth Andrew Sullivan was arrested in 1998 in Conway. He was charged with, among other offenses, possession of methamphetamine with intent to deliver. The facts leading up to his arrest were set out in *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000) (*Sullivan I*). Sullivan moved to suppress the fruits of the arrest, including the methamphetamine, and the trial court granted his motion. We again are called upon to review the propriety of the trial court's decision. We affirm that decision on state law grounds.

The procedural history of this case follows. In *Sullivan I*, we affirmed the trial court's decision to suppress on the basis that the arresting officer's actions were pretextual. In the original briefing of the issues, neither party cited *Whren v. United States*, 517 U.S. 806 (1996), to this court. After our decision in *Sullivan I*, the State petitioned for rehearing, arguing that we did not follow the Supreme Court's decision in *Whren*. We denied the petition but issued a supplemental opinion addressing the *Whren* case. *See State v. Sullivan*, 340 Ark. 318-A, 16 S.W.3d 551 (2000) (Supplemental Opinion on Denial of Rehearing) (*Sullivan II*). In *Sullivan II*, we rejected the rationale of *Whren* and stated that we were free to grant Sullivan more protection under the United States Constitution than the federal courts have seen fit to provide.

After our decision in *Sullivan II*, the State petitioned the Supreme Court for a writ of *certiorari*. The Supreme Court granted the petition. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (*per curiam*), the Supreme Court reversed our decision in *Sullivan II*. The Court noted that we could grant Sullivan more protection under state law, but that we could not do so under the federal constitution. The Court said:

> The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon v. Hass*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975). There, we observed that the Oregon Supreme Court's statement that it could "'interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court'" was "not the law and surely must

> be inadvertent error." *Id.*, at 719, n. 4, 95 S. Ct. 1215. We reiterated in *Hass* that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Id.*, at 719, 95 S. Ct. 1215.

Arkansas v. Sullivan, 532 U.S. at 772 (emphasis in original). The United States Supreme Court remanded the case to us for further proceedings. Following the remand, we granted Sullivan's motion to rebrief the issues in this case. We now take up the State's appeal of the trial court's suppression decision for the third time.

Initially, we note that under federal law there is no longer a pretext inquiry. In *Whren v. United States*, *supra*, the United States Supreme Court foreclosed such inquiries into a police officer's subjective motivation, holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. So long as a police officer's actions are objectively reasonable, there is no Fourth Amendment violation even if the police officer's actions are wholly pretextual. Under *Whren*, for example, a law enforcement officer may use any violation of traffic laws to investigate an entirely unrelated criminal offense, regardless of whether the officer has probable cause or even reasonable suspicion that the unrelated offense has been committed. Under the Fourth Amendment, this is acceptable police conduct. Further, the *Whren* Court took pains to point out that the opinion did not announce a departure from its prior interpretations of the Fourth Amendment, citing *United States v. Robinson*, 414 U.S. 218 (1973), *Gustafson v. Florida*, 414 U.S. 260 (1973), *Scott v. United States*, 436 U.S. 128 (1978), and *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

In various search-and-seizure contexts, this court has viewed the protections of Article 2, section 15, of the Arkansas Constitution to be parallel to those provided by the Fourth Amendment. *See, e.g.*, *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997) (noting the "virtually identical" wording of the two constitutional provisions at issue); *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995). In *Stout*, for example, we said:

> Of course, we could hold that the Arkansas Constitution provides greater protection against unreasonable searches than does the Constitution of the United States, but we see no reason to do so. The wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the Supreme Court cases. . . . [W]e choose to continue to interpret "unreasonable search" in Article 2, Section 15 of the Constitution of Arkansas in the same manner the Supreme Court interprets the Fourth Amendment to the Constitution of the United States.

Stout, 320 Ark. at 557-58, 898 S.W.2d at 460. In *Stout*, we declined to depart from federal interpretation in the vehicular search-incident-to-arrest context, noting particularly that we had followed the United States Supreme Court's lead in this area: "*Belton* has provided a practical and workable rule for fourteen years, and we have followed it on many occasions." *Id.*

Nonetheless, in other search-and-seizure contexts, we have not been in lock-step with federal Fourth Amendment interpretation. This fact is illustrated by our recent decision in *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002). In *Griffin*, we relied on the Arkansas Constitution in declaring a nighttime incursion upon the defendant's curtilage to be an illegal exercise of law enforcement authority. In *Griffin*, we said:

> [W]hile we lack authority to extend the protections of the Fourth Amendment beyond the holdings of the United States Supreme Court, we do have the authority to impose greater restrictions on police activities in our state based upon our own state law than those the Supreme Court holds to be necessary based upon federal constitutional standards.

Griffin, 347 Ark. at 792, 67 S.W.3d at 584 (citing *Arkansas v. Sullivan*, *supra*). After setting forth the historical underpinnings of our decision, we held that Article 2, section 15, of the Arkansas Constitution prohibited the police conduct at issue in that case. The *Griffin* decision was in keeping with our Rule of Criminal Procedure 13.2(c), which forbids nighttime execution of a search warrant except in limited circumstances. Rule 13.2(c) is another instance in which this court has granted more protection under Arkansas law than the federal courts provide in interpreting the

Fourth Amendment. In sum, there are occasions and contexts in which federal Fourth Amendment interpretation provides adequate protections against unreasonable law enforcement conduct; however, there are also occasions when this court will provide more protection under the Arkansas Constitution than that provided by the federal courts.

One pivotal inquiry in this regard, as highlighted by *Stout, supra*, is whether this court has traditionally viewed an issue differently than the federal courts. *See also State v. Gunwall*, 720 P.2d 808, 814-15 (Wash. 1986) (noting that Washington State's "common law history" is one of several factors which may warrant a departure from Fourth Amendment standards). This case presents such a situation. Hence, we begin our analysis of the specific issue presented by this case by noting that this court has traditionally treated pretextual arrests differently than have the federal courts. Unlike the United States Supreme Court, this court has considered pretextual arrests to be unreasonable for over twenty years.[1] Our first case expressing that view was *Smith v. State*, 265 Ark. 104, 576 S.W.2d 957 (1979). In *Smith*, officers suspected the defendant of possessing stolen goods, but their suspicions did not rise to the level of probable cause. Thus, they located two entirely unrelated arrest warrants for the defendant and proceeded to use them to get into his home. Once inside, they searched for the stolen merchandise. We held in *Smith* that this was unreasonable police conduct and suppressed the fruits of the search.

In *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981), we again indicated that pretext was an issue that concerned this court. In *Brewer*, law enforcement officers arrested the defendant for participating in a burglary with the intention to question him about an unrelated homicide. They obtained an incriminating statement from the defendant regarding the homicide and charged him with that homicide, but never charged him with the burglary. The

[1] Our cases have not equated pretextual stops with pretextual arrests due to the different level of police intrusion involved with a traffic stop as opposed to a full custodial arrest. The intrusiveness of an arrest warrants inquiry into an officer's subjective intentions. *See, e.g.*, *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001); *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994).

defendant challenged the admissibility of the pretextually obtained statement. We held that the statement was admissible, but only because the taint of the illegal pretextual arrest dissipated when the defendant's girlfriend told the defendant that she had implicated him in the homicide. We made it clear in *Brewer* that we would have excluded the pretextually obtained statement had the taint not dissipated.

The next case in which pretext was a determinative issue was *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986). In *Richardson*, police officers brought the defendant in for questioning after his uncle's remains had been discovered in the charred ruins of his burned home. While at the police station, the defendant was surreptitiously drinking from a whiskey bottle hidden in his boot. After the defendant became obviously drunk, officers arrested him for public intoxication. On the basis of this arrest, they seized the defendant's clothing and sent it to the state crime laboratory for analysis. The defendant's uncle's blood was discovered on his clothing. We reversed the defendant's murder conviction based on the pretextual motives of the officers as well as various violations of the Arkansas Rules of Criminal Procedure:

> Regardless of whether we can technically justify the arrest on the charge of public intoxication, we can find no justification whatever for these rules violations. The appellant was clearly being held because he was suspected in the murder and arson case. The officers had a duty to charge him with that offense or let him go. Their failure to do so put them in violation of the rules mentioned and the realization of those violations makes it even clearer that the arrest which occurred was carried out as a pretext to permit the search.

Richardson, 288 Ark. at 414, 706 S.W.2d at 367.

Shortly thereafter, we decided another pretextual-arrest case, *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986). In *Hines*, law enforcement officers had connected the defendant's name with a murder. However, they did not have probable cause to arrest him for the murder, and they did not pursue him as a suspect. Almost three months later, the defendant's mother-in-law complained to the local prosecuting attorney that the defendant and two others tried to kill her by pouring formaldehyde on her

furniture. Police officers thereafter spent five days investigating the mother-in-law's claim and, after her repeated requests for action on the case, they procured arrest warrants for all three individuals involved in the formaldehyde incident. The first of the three to be arrested incriminated the defendant in the murder, and the defendant thereafter voluntarily appeared at the police station and confessed to the murder. In addressing the defendant's claim that his statement should have been suppressed on the basis of pretext, we said:

> Claims of pretextual arrest raise a unique problem in the law—deciding whether an ulterior motive prompted an arrest which otherwise would not have occurred. Confusion can be avoided by applying a "but for" approach, that is, would the arrest not have occurred but for the other, typically the more serious, crime. Where the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent.

Hines, 289 Ark. at 55, 709 S.W.2d at 68. Applying the newly articulated but-for test, we held that the defendant would have been arrested for the formaldehyde incident in any event, and we affirmed his conviction for murder.

We followed the *Hines* but-for test in *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894 (1991). There, the defendant was a suspect in the murder of his ex-wife's lover. Officers developed the defendant as a suspect early in the investigation due to several factors. One factor was an outstanding warrant for the defendant's arrest for the terroristic threatening of his ex-wife. Another was the identification of a shirt left at the scene of the crime as the defendant's shirt. On the basis of this information, a police officer went to the defendant's house. He observed the defendant get into his car and pull onto the road, at which time he pulled the defendant over. Smelling alcohol on his breath, he arrested the defendant and drove him to the police station. On appeal, the defendant claimed that the evidence seized and statements taken should have been suppressed due to pretext. We disagreed, noting that given the evidence against him in the homicide investigation,

he could not show that he would not have been arrested but for the pretext. In other words, there was probable cause to arrest him for the homicide, which obviated the need for a pretext analysis.

We have noted our concern with pretextual police conduct in a number of other decisions. *See Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000) (finding no pretextual arrest where officers approached defendant with an outstanding arrest warrant) (citing *Ray, supra*; *Hines, supra*); *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993) (finding no pretextual arrest where defendant was suspected in a homicide but was picked up on an unrelated outstanding arrest warrant); *State v. Shepherd*, 303 Ark. 447, 454, 798 S.W.2d 45, 49 (1990) (finding pretextual conduct, based on "the law of Arkansas," where five police officers entered and searched defendant's property with the ostensible purpose of serving a prosecutor's subpoena); *Thomas v. State*, 303 Ark. 210, 795 S.W.2d 917 (1990) (finding no pretextual search incident to arrest where defendant was stopped for speeding, but arrested because an NCIC search revealed that a person with defendant's name was wanted in Texas for escape); *Guzman v. State*, 283 Ark. 112, 672 S.W.2d 656 (1984) (finding pretextual police conduct where police entered defendant's property with the stated purpose of searching for illegal aliens, when in fact they were searching for drugs).

[redacted] As for the basis for our pretextual-arrest decisions, the State points out that some of the cases cited federal precedent. Sullivan likewise points out that others relied solely on state rules and case law. Both parties are correct. What is important to note in this regard is that this line of cases developed in our court despite the Supreme Court's decisions in *Gustafson, Robinson, Scott*, and *Villamonte-Marquez, supra*. While the United States Supreme Court was tilting in one direction in its pretext analysis — culminating finally in the plain statement of their position in *Whren* — we consistently took a different direction. Today, we solidify our position, based on the adequate and independent state grounds of Article 2, section 15, of the Arkansas Constitution, as well as our own pretext decisions. Under these authorities, pretextual arrests — arrests that would not have occurred *but for* an ulte-

rior investigative motive — are unreasonable police conduct warranting application of the exclusionary rule. The pretext inquiry is a threshold matter to be resolved before inquiring into other bases for suppression such as, for example, compliance with Ark. R. Crim. P. 4.1, which governs warrantless arrests.

Bearing these principles in mind, we now turn to the analysis of the present case. The arresting officer in this case was a narcotics officer. He admitted at the suppression hearing that he recognized Sullivan's name as one involved in narcotics in the area. He had no probable cause, however, to arrest him for any drug violation. The police officer instead performed a full custodial arrest of Sullivan and stated that the reasons for the arrest were speeding, illegal window-tinting, driving an unsafe vehicle, failure to produce registration and insurance, and possession of a "weapon": a roofing hatchet that had been on the defendant's floorboard for so long that it was rusting and corroding into the carpet. The trial court was bothered by the fact that the police officer arrested Sullivan rather than citing him for traffic violations and that the police officer used the roofing hatchet to bolster the case. We repeat the trial court's findings that resulted in the suppression of the methamphetamine:

> [F]ollowing our hearing yesterday, I have gone over the testimony and looked at what I believe to be the law in that case, and it's going to be my decision in this particular instance that based on the testimony, specifically that the officer testified that he stopped the car based on a charge of suspicion of speeding — which I have no problem with the stop. I think that was . . . there was radar. I don't have any problem with that.
>
> He testified that once he got him stopped, he recognized him as someone that he had seen intelligence on regarding narcotics, and he — rather than write citations, he physically arrested him. And the weapons charge, I think, was added to that. And I don't believe that in this particular instance that the — that that was appropriate, and I'm going to grant the defendant's motion to suppress the evidence seized as a result of that search.

The crucial question in this case becomes this: Would the arresting officer have effected the full custodial arrest but for

his suspicion that Sullivan was involved in narcotics? The trial court answered this question in the negative, finding that the arrest was pretextual. The trial court suppressed the fruits of the arrest on that basis. We cannot say that the court's findings and its decision were clearly against the preponderance of the evidence. *See also Sullivan I*, 340 Ark. at 318, 11 S.W.3d at 528; *Sullivan II*, 16 S.W.3d at 552.

Additionally, we observe that Sullivan urges this court to depart from the United States Supreme Court's holding in *Atwater v. Lago Vista*, 532 U.S. 318 (2001). In *Atwater*, the Court held that a full custodial arrest was a permissible law enforcement response to a fine-only traffic offense. In that case, it was failure of a driver to wear a seat belt that resulted in the full custodial arrest. The Court declined to draw a line between types of offenses for which a person may be arrested and booked, and those that warrant only a fine. While the holding in *Atwater* raises potential concerns, this is not the appropriate case in which to address those concerns. In this case, Sullivan was arrested for several offenses, one of which was an illegal window-tint, which is a violation of Ark. Code Ann. § 27-37-306(b)(1) (Repl. 1994). That offense is not a fine-only offense, but rather, as a Class B misdemeanor, is punishable with up to 90 days' imprisonment. *See* Ark. Code Ann. § 5-4-401(b)(2) (Repl. 1997). Thus, contrary to the United States Supreme Court's observation in *Arkansas v. Sullivan*, 532 U.S. at 771, this case does not involve an arrest for a fine-only traffic offense, and thus it does not present a compelling case for departure from *Atwater*.

In closing, we note an observation made in a concurring opinion in *Griffin v. State*:

> In the majority opinion, we now depart from our earlier decisions wherein this court has declared that the Arkansas Constitution provides no greater protection than the Fourth Amendment to the United States Constitution. We previously noted that the wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the United States Supreme Court's cases. Current inter-

> pretation of the United States Constitution in the federal courts no longer mirrors our interpretation of our own constitution.

Griffin, 347 Ark. at 804, 67 S.W.3d at 593 (HANNAH, J., concurring). This is another instance in which we depart from the standards established by the federal courts and rely instead on independent state grounds to determine what, in Arkansas, constitutes unreasonable police conduct warranting suppression.

Affirmed.

GLAZE and IMBER, JJ., dissent.

TOM GLAZE, Justice, dissenting. I dissent. The majority opinion claims that this court has traditionally treated pretextual arrests differently than have federal courts. However, the cases cited in the majority opinion do not support this contention. The questions of pretext in a majority of these cases were in fact analyzed under the Fourth Amendment and federal law, not under Arkansas law. *See Smith v. State*, 265 Ark. 104, 576 S.W.2d 957 (1979); *Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981); *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986); and *Thomas v. State*, 303 Ark. 210, 795 S.W.2d 917 (1990). In *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986), as the majority notes, the court adopted a "but for" approach in evaluating claims of pretextual arrest; however, the majority fails to note that this approach was taken from a mixture of federal law and the Professor LaFave treatise, *Criminal Procedure*, not from Arkansas law or historical precedent. *Ray v. State*, 304 Ark. 489, 803 S.W.2d 894 (1991), did follow the "but for" approach, but in 1993 the court decided *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), without using the "but for" approach, and instead cited to *Richardson v. State, supra*, a holding under federal analysis, for its precedent.

The majority opinion ignores the more recent holdings by this court regarding pretextual arrest. In *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994), this court implicitly overruled *Hines, supra*, and the "but for" approach by applying an objective test used by the Eighth Circuit. The court stated "that an otherwise valid stop does not become unreasonable merely because the

officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity." *Mings, supra,* (quoting *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990)). This standard was applied in the last case before this court on pretextual arrest prior to this appeal on remand. *See Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000).

The majority claims that the line of cases described above is proof that this court's pretextual analysis developed in a different direction than that of the Supreme Court. The majority points out that in *Whren v. United States*, 517 U.S. 806 (1996), Justice Scalia stated that the Court had decided on several previous occasions that an officer's motive does not invalidate objectively reasonable behavior under the Fourth Amendment. However, it is clear, and the majority opinion acknowledges this, that the Court did not directly address the issue of pretextual stops and arrests until *Whren*. Therefore, the Arkansas cases were not contrary to federal law until the holding in the instant case.

The majority further points out that Arkansas is not in "lockstep" with federal Fourth Amendment interpretation in other search and seizure contexts, specifically in the case of *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002). However, *Griffin* is distinguishable from the instant case in two fundamental aspects. First, the Supreme Court has not decided a "knock and talk" case, whereas *Whren* is a clear statement on pretextual stop and arrest. Second, this court and the Supreme Court have held that people have a lesser expectation of privacy in their vehicles than in their homes. *See Cardwell v. Lewis*, 417 U.S. 583 (1974); and *Tackett v. State*, 307 Ark. 520, 822 S.W.2d 834 (1992).

The majority opinion does not address that the holding in this case will overrule strong precedent that this court interprets Ark. Const. art. 2, § 15 in the same manner the Supreme Court interprets the Fourth Amendment to the Constitution of the United States. *See Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410 (1999); *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 146 (1998); *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997); and *Stout v. State*, 320 Ark. 522, 898 S.W.2d 457 (1995). There is a strong

presumption that the court's prior decisions are valid. *See Ray v. State*, 342 Ark. 180, 27 S.W.3d 384 (2000).

Further, the majority opinion does not address the fundamental facts of the case. Mr. Sullivan was stopped for speeding and having an illegal tint on his windshield, two violations that he does not deny. Both of the violations occurred in front of a police officer, thus triggering Ark. R. Crim. P. 4.1(a)(iii), "A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed . . . (iii) any violation of law in the officer's presence." There is nothing in the law that requires the officer to fine, rather than arrest, Mr. Sullivan. The contraband was discovered in a vehicle search pursuant to Ark. R. Crim. P. 12.6(b), and the search was completed following the Conway Police Department's Vehicle Inventory Policy. The stop, the arrest, and the search were all valid. To hold otherwise creates a constitutional challenge in every case where Rule 4.1(a)(iii) is used by an officer to make a warrantless arrest.

In summary, the trial court should be reversed for three reasons. First, Arkansas follows the Supreme Court's interpretation on search and seizure issues. Second, the current Arkansas law on this matter is the *Mings* objective standard. Third, there was a valid reason for the stop and for the arrest; therefore, the officer's motivation is irrelevant under both *Whren* and *Mings*.

IMBER, J., joins this dissent.

Lloyd STONE, Jr. *v.* STATE of Arkansas

CR 01-1239 74 S.W.3d 591

Supreme Court of Arkansas
Opinion delivered May 16, 2002

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T.B. Patterson, Jr., for appellant.

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

ROBERT L. BROWN, Justice. Appellant Lloyd Stone, Jr., appeals his judgment of conviction for manufacture of methamphetamine and his sentence of twenty-seven years. He raises six points on appeal. We reverse on the refusal of the trial court to suppress the evidence seized, and we remand for further proceedings.

For several months, Garland County Sheriff's Department Investigators Corey DeArmon and Danny Wilson had been monitoring Stone's home because they suspected that he was involved in the manufacture or sale of methamphetamine. On the night of September 17, 1998, at approximately 8:30 p.m., the two investigators knocked on the door of Stone's home. They had not obtained a search warrant but had decided to use the "knock and talk" procedure for obtaining a consent to search. When he answered the door, Officer DeArmon asked Stone if they could search the premises. After Stone answered the door, the officers could smell a strong odor which they associated with the manufacture of methamphetamine.

Stone refused to give his consent to search. Instead, he stated that he wanted to call his attorney, Hugh Alexander. He turned around and walked back into the house. When he did so, at least one police officer followed him.[1] It is a matter of some dispute as to why the police officer entered Stone's home. Stone called his attorney, and the police officer listened to his conversation. At one point, Stone put Officer DeArmon on the telephone with Hugh Alexander. What was said in that conversation is also matter of factual dispute. Officer DeArmon testified at the suppression hearing that Stone's attorney advised Stone to consent to the

[1] It is unclear from the record whether Officer Wilson entered the house for purposes of Stone's telephone call to his attorney.

search. Alexander disputed this assertion, noting that most of his law practice was criminal defense work and that he would not advise a client to consent to a warrantless search of that client's home. Alexander maintained that Officer DeArmon falsely told him that he and Officer Wilson had already found evidence of the manufacture of methamphetamine taking place in the home. Thus, Alexander claimed, he thought his client was about to be arrested, and he told Officer DeArmon not to question him until he could make it out to the house.

Another area of dispute is whether, after the telephone call, Stone consented to the police officers' search of his home. Stone maintained that he gave no consent. Officer DeArmon, on the other hand, stated that not only did Stone give his consent, he also escorted the police officers around his house and showed them the contraband. All parties agree that Stone was not offered a consent-to-search form. The two police officers found ingredients for making methamphetamine as well as containers they suspected to be involved in the manufacture of methamphetamine. They arrested Stone for attempted manufacture of methamphetamine, and he was later charged with that offense.

Stone moved to suppress the physical evidence seized at his house on the night in question. He argued that he did not give his consent for the officers to enter his home and that he did not give his consent to search the premises. Following a hearing on the motion to suppress, the trial court denied the motion. On April 3, 2000, the State amended the criminal information to change the charged offense from attempted manufacture, a Class A felony, to manufacture, a Class Y felony. The matter proceeded to a jury trial on May 23, 2000. Stone was convicted of manufacture of methamphetamine and sentenced as stated above.

Stone appealed his conviction to the Arkansas Court of Appeals. In an unpublished opinion, the Court of Appeals reversed Stone's conviction under Fourth Amendment principles governing consent to search. *See Stone v. State* (Ark. App. Oct. 24, 2001). The Court of Appeals held specifically that Stone gave no consent for Officer DeArmon's initial entry into his home. The State petitioned for rehearing and argued that any taint of this ille-

gal entry was attenuated by the subsequent consent to search that Officer DeArmon maintained Stone gave him after consulting with his attorney. That petition was denied. The State petitioned for review from the Court of Appeals' decision, and we granted that petition.

We review this case as if the appeal from the judgment of conviction was originally filed in this court. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001); *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998).

I. Sufficiency of the Evidence

For double jeopardy reasons, we first consider Stone's claim that there was insufficient evidence to support his conviction. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001). Though we are excluding the methamphetamine seized in this case, the proper disposition is to reverse and remand for the possibility of a new trial. *See Crisco v. State*, 328 Ark. 388, 393, 945 S.W.2d 582, 585 (1997) (supplemental opinion); *Nard v. State*, 304 Ark. 159, 163-A, 801 S.W.2d 634, 637 (1991) (supplemental opinion). Accordingly, the issue of whether sufficient evidence was presented by the State to support the conviction must be considered first, as lack of sufficient evidence would result in a reversal and dismissal of the case.

We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Burmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000); *Johnson v. State*, 326 Ark. 3, 929 S.W.2d 707 (1996); *Penn v. State*, 319 Ark. 739, 894 S.W.2d 597 (1995). This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Williams v. State,* 346 Ark. 304, 57 S.W.3d 706 (2001); *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998); *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992). We affirm a conviction if substantial evidence exists to support it. *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (2000); *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998). Substantial evidence

is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without having to resort to speculation or conjecture. *Haynes v. State, supra*; *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993); *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992). Further, this court will not second-guess credibility determinations made by the factfinder. *Hale v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000); *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000); *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996).

In challenging the sufficiency of the evidence supporting his conviction, Stone specifically argues that the State did not prove that he was manufacturing methamphetamine for anyone's use but his own. He points to the fact that under Ark. Code Ann. § 5-64-101(m), "manufacture" must be manufacture for a use other than one's personal consumption. *See* Ark. Code Ann. § 5-64-101(m) (Repl. 1997). That section reads:

> (m) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, *except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use* or the preparation, compounding, packaging, or labeling of a controlled substance . . . . (Emphasis added.)

Thus, "preparation or compounding" of an illegal substance for one's own use does not constitute "manufacture."

This Court has considered personal-use arguments in the context of the manufacture of methamphetamine in prior cases. *See, e.g.*, *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996). In *Owens*, this Court rejected a personal-use argument and adopted the rationale of the appellate court in a sister state:

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

Owens, 325 Ark. at 124, 926 S.W.2d at 658 (quoting *State v. Childers*, 41 N.C. App. 729, 255 S.E.2d 654 (1979)). The *Owens* decision distinguished between the "preparation or compounding" of a controlled substance for personal use such as the rolling of a marijuana cigarette and the creation of such a substance. *Owens*, 325 Ark. at 124, 926 S.W.2d at 658 (citing *State v. County Court for Columbia County*, 82 Wis. 2d 401, 263 N.W.2d 162 (1978); *People v. Pearson*, 157 Mich. App. 68, 403 N.W.2d 498 (1987)).

Here, the State produced sufficient evidence that Stone was indeed manufacturing methamphetamine by means of the necessary ingredients and required apparatus. The personal-use exception does not apply, and Stone's sufficiency argument is without merit.

Stone, however, makes an alternative sufficiency argument. He claims that the State failed to prove when any manufacture of methamphetamine took place. The State correctly points out that this argument is made for the first time on appeal. Accordingly, this court will not address it. *Hale v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000).

We affirm the trial court on the sufficiency point.

II. Suppression

Stone's central contention in this appeal is that the search of his home was illegal because he did not give valid consent to enter. Thus, any items seized such as the products used to manufacture methamphetamine constituted the fruit of the poisonous tree and should be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

In reviewing a trial court's ruling denying a defendant's motion to suppress, we make an independent determination based on the totality of the circumstances and view the evidence in the light most favorable to the State. We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997); *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997); *Norman v. State*, 326

Ark. 210, 931 S.W.2d 96 (1996); *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996).

As an initial matter, Stone argues in his supplemental brief after we granted the State's petition for rehearing that the search and seizure was illegal under the state constitution. We refuse to consider this argument since it was never made to the trial court or to our court of appeals. *See Scott v. State*, 347 Ark. 767, 67 S.W.3d 567 (2002) (declining to address unpreserved state constitutional argument in a knock-and-talk case).

We turn then to Stone's primary argument, which is that his conviction should be reversed under the Fourth Amendment of the United States Constitution. He premises his argument on the fact that he never gave a valid consent to law enforcement officers to enter his home. The State counters that this issue is really one of credibility for the trial court to resolve and that this court should defer to the trial court's finding not to suppress on that basis.

A warrantless entry into a private home is presumptively unreasonable under the Fourth Amendment. *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Scott v. State*, 347 Ark. 767, 67 S.W.3d 567 (2002); *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992). However, the presumption of unreasonableness may be overcome if the law-enforcement officer obtained the consent of the homeowner to conduct a warrantless search. *See Holmes v. State*, 347 Ark. 530, 65 S.W.3d 860 (2002) (citing Ark. R. Crim. P. 11.1; *Hillard v. State*, 321 Ark. 39, 900 S.W.2d 167 (1995)). This court has established that the State has a heavy burden to prove by clear and positive testimony that a consent to search was freely and voluntarily given. *Holmes v. State*, *supra*; *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999); *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980). A valid consent to search must be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). Any consent given must be unequivocal and may not usually be implied. *Holmes v. State*, *supra*; *Norris v. State*, *supra* (citing *U.S. v. Gonzales*, 71 F.3d 819 (11th Cir. 1996)).

This court recently decided a case that bears some similarity to the one at bar. *See Holmes v. State, supra.* In *Holmes,* we reversed a trial court's suppression decision where police officers followed an individual into a private home with no invitation to do so. Once inside, the officers discovered marijuana. The trial court denied the defendant's motion to suppress. We reversed the suppression decision and said:

> This court had held that consent to an invasion of privacy must be proved by clear and positive testimony, and this burden is not met by showing only acquiescence to a claim of lawful authority. *See, e.g., Martin v. State,* 328 Ark. 420, 944 S.W.2d 512 (1997); *Meadows v. State,* 269 Ark. 380, 602 S.W.2d 636 (1980)). The concept of "implied consent" was examined in *Norris v. State,* 338 Ark. 397, 993 S.W.2d 918 (1999), where this court looked to *United States v. Gonzalez,* 71 F.3d 819 (11th Cir. 1996), and wrote as follows:
>
>> The question of "implied consent" . . . was more closely examined recently in *U.S. v. Gonzalez, supra.* In *Gonzalez,* the officer approached an individual outside her home and asked if she would consent to a search of her home. Following a conversation with her daughter, she told the officer she wanted to go inside and get a drink of water. The officer then told her he "wanted to go in" with her, and when she did not bar him from going in, he followed her inside. The Eleventh Circuit held that there was no consent to enter:
>>
>>> We have previously noted our hesitancy to find implied consent (i.e. consent by silence) in the Fourth Amendment context, and we agree with our colleagues in the Ninth Circuit that *whatever relevance the implied consent doctrine may have in other contexts, it is appropriate to 'sanction entry into the home based upon inferred consent.'*
>>
> *Gonzalez* then quoted from *U.S. v. Shaibu,* 920 F.2d 1423 (9th Cir. 1990), to which it had referred above:
>
>> The government may not show consent to enter from the defendant's failure to object to the entry. To do so would be to justify entry by consent and consent by entry. "This will not do." *Johnson v. United States,* 333 U.S. at 17. *We must not shift the burden from the government—to show "unequivocal and specific" consent—to the*

> *defendant, who would have to prove unequivocal and specific objection to a police entry, or be found to have given implied consent.*
>
> *Gonzalez*, 71 F.3d at 830; *Norris*, 338 Ark. 409, 993 S.W.2d 918 (emphasis in original).

Holmes, 347 Ark. at 538-9, 65 S.W.3d at 865.

To justify the warrantless entry into Stone's home in the case before us, the State underscores one instance in Officer DeArmon's testimony at the suppression hearing when he testified that Stone said, "Come on, I'm going to call my attorney." At several other points in the police officer's testimony, however, he admitted that he was not invited into the home. The relevant part of Officer DeArmon's testimony at the suppression hearing follows:

> DEFENSE COUNSEL: Now, what led you to believe that Mr. Stone had invited you in when he said he wanted to call his lawyer?
>
> OFFICER DEARMON: 'Cause he said "Come on, I'm going to call my attorney." and [I] said "That's fine. I don't care."
>
> DEFENSE COUNSEL: So, he invited you in?
>
> OFFICER DEARMON: Sure, we went just right there in the door, right in the living room right there.
>
> DEFENSE COUNSEL: Why would he invite you in if he wanted to call his lawyer, Mr. DeArmon?
>
> > PROSECUTOR: Objection, calls for speculation. He can't testify as to what somebody else . . .
> >
> > COURT: That's sustained.
>
> DEFENSE COUNSEL: What conversations did you have? When he said he wanted to call his lawyer, did you say then "I'll follow you in" or "I'll step in," or did you just follow him in, Mr. DeArmon?
>
> OFFICER DEARMON: He said "I want to call my attorney." Just like I said, and we walked in the house.
>
> DEFENSE COUNSEL: Well, what right did you have to walk in the house? He didn't say "come in" did he?

OFFICER DEARMON: We walked right there to get the phone.

DEFENSE COUNSEL: Exactly, Mr. DeArmon. It's not in your report anywhere that he invited you in is it?

OFFICER DEARMON: He did not tell us not to come in.

DEFENSE COUNSEL: He didn't tell you to come in either, did he?

OFFICER DEARMON: We did — we's standing right there in the doorway. He was — we were right there in the doorway.

DEFENSE COUNSEL: You entered the house, didn't you, Mr. DeArmon?

OFFICER DEARMON: Yes, I entered the house.

DEFENSE COUNSEL: You entered the house without invitation?

OFFICER DEARMON: No, sir, with invitation. He didn't tell us to stay out.

DEFENSE COUNSEL: Why didn't you report that? Why isn't it written in your report that "Mr. Stone invited us in?" What's in your report is that he — he wanted to call his lawyer.

OFFICER DEARMON: Uh-huh (affirmative).

DEFENSE COUNSEL: And you followed him in. That's not being invited, is it, Mr. DeArmon?

OFFICER DEARMON: I went with him. I mean, he could have went in and got a gun for all I know.

DEFENSE COUNSEL: And he would have every right to do so? He didn't have — he had every right to exclude you from his home.

OFFICER DEARMON: He sure did. At any time.

DEFENSE COUNSEL: Except you followed him in, didn't you?

OFFICER DEARMON: We didn't — we didn't enter the — we walked right there to the doorway where he grabbed the phone, and that's where we did all the discussing.

DEFENSE COUNSEL: But you came inside the door, Mr. DeArmon. Is that correct?

OFFICER DEARMON: Yes, sir. I guess we passed the threshold.

DEFENSE COUNSEL: And he — and Mr. Stone did not say "come in." You followed him. Is that not correct?

OFFICER DEARMON: He said "I want to use the phone." Yes, I guess as your wording is, yeah, that'd be correct.

DEFENSE COUNSEL: Well, not in my wording. Your wording. He never invited you in. He said he wanted to use the phone. He wanted to call his lawyer.

OFFICER DEARMON: Yes, sir.

We disagree with the State's casting of this issue as merely one of credibility. Under our caselaw, the State must show that in the context of a warrantless entry, the State must prove by clear and positive testimony that the consent to enter and search was unequivocal and specific. *See Holmes v. State, supra*; *Norris v. State, supra.* That heavy burden has not been met in this case. Officer DeArmon's testimony at the suppression hearing is far from unequivocal. At various times, he says he simply followed Stone into his house and that Stone never invited him in. What is clear is that when Officer DeArmon asked for a consent to search, which Stone declined. Stone then said he wanted to call his attorney. When Stone walked back into his house to do so, Officer DeArmon followed him.

We hold that the police officer's entry into Stone's home was illegal and not supported by the clear, positive, and unequivocal proof of consent required by our caselaw. We add as a corollary to this holding that were we to sanction a warrantless entry into a home solely based on a police officer's security concerns, we would be allowing that justification to be used for entry into any home under any circumstance. In effect, we would be significantly undermining the search warrant or consent requirement, which we will not do.

The State next contends that even assuming the police officer's entry was illegal, this defect was cured by Stone's consent to search after his conversation with his attorney. In analyzing this issue, we must determine whether Stone's consent to search was "sufficiently an act of free will to purge the primary taint." *United States v. Ramos*, 42 F.3d 1160, 1164 (8th Cir. 1994) (quoting *Wong*

Sun v. United States, 371 U.S. 471 (1963)). Further, the attenuation must be determined by weighing the seriousness of the police misconduct. *Brown v. Illinois*, 422 U.S. 590 (1975). This court has previously held that a lapse of time can dissipate the taint of illegal police conduct. *See, e.g., Mitchell v. State*, 271 Ark. 512, 609 S.W.2d 333 (1980) (a confession given 18 days after an illegal arrest was admissible, because the intervening time period sufficiently dissipated the taint.). We have also held that an intervening event can be an attenuating circumstance. *See, e.g., Brewer v. State*, 271 Ark. 810, 611 S.W.2d 179 (1981) (taint of pretextual arrest attenuated when defendant's girlfriend told defendant that she had already implicated him in the criminal activity).

In this case, we have neither time nor intervening events to dissipate the taint of Officer DeArmon's illegal entry into Stone's home. There clearly was very little time lapse between the police officer's entry and Stone's consent. The only real question is whether the telephone call to Stone's attorney constituted an event which would cure the illegal entry. We conclude that it did not. There was much confusion and contradictory testimony about what transpired with Stone's attorney. Officer DeArmon was present during the entire telephone conversation and was listening. When the police officer got on the telephone himself, Stone's attorney testified that he was misled by the police officer about what was occurring. Any consent that was given immediately thereafter can not be said to be attenuated from the taint of the illegal entry. As the United States Supreme Court has noted in this regard, the purpose and flagrancy of the violation is always relevant. *See Brown v. Illinois, supra.*

We hold that Stone's consent to search following the telephone conversation with his attorney was not sufficiently attenuated from Officer DeArmon's illegal entry in the house. The methamphetamine and methamphetamine-manufacturing products seized as a result of the illegal entry and search are the fruit of the poisonous tree and must be suppressed. *Wong Sun v. United States, supra*; *Holmes v. State, supra.*

The other points raised by Stone (the refusal to grant a continuance, the change in the form of the methamphetamine, the

trial court's interruption of counsel during cross examination, and the failure to give the personal-use instruction) have either been answered in this opinion or are not likely to recur in the event of retrial.

Reversed and remanded.

Robert WHITE *v.* Jim PERRY, David Hudson, Frank Atkinson, and Marcy Porter, In Their Official Capacities as Assessor, County Judge, Collector, and Treasurer for Sebastian County, Arkansas; Charlie Daniels, In His Official Capacity as Arkansas Land Commissioner; and Jimmie Lou Fisher, Arkansas State Treasurer; Greenwood School District; Hackett School District; Hartford School District; Lavaca School District; Charleston School District; Mansfield School District; Booneville School District; Westark Community College; City of Barling, Arkansas; City of Greenwood, Arkansas

01-861 74 S.W.3d 628

Supreme Court of Arkansas
Opinion delivered May 16, 2002

Oscar Stilley, for appellant.

Thompson & Llewellyn, P.A., by: *James M. Llewellyn, Jr.*, for appellees Greenwood School District; Hackett School District; Hartford School District; Lavaca School District; Charleston School District; Mansfield School District; and Booneville School District.

Smith, Maurras, Cohen & Redd & Horan, PLC, by: *S. Walton Maurras*, for appellee Westark Community College.

ROBERT L. BROWN, Justice. Appellant Robert White raises one issue in his appeal: whether the trial court had authority to deny his motion for a nonsuit in favor of deciding the appellees' motions to dismiss with prejudice. We agree with White that a plaintiff's right to a nonsuit before submission of the case for decision is an absolute right and that the trial court erred in refusing to enter an order granting it. We reverse the order of dismissal and remand this matter with directions to enter an order granting the nonsuit.

On October 10, 2000, White, on his own behalf and on behalf of all other taxpayers similarly situated, filed a complaint in the Sebastian County Circuit Court, Greenwood District, alleging

an illegal exaction as a result of taxes collected pursuant to Act 758 of 1995 in violation of Arkansas Constitutional Amendment 59. White named several state and county government officials, school districts, a community college, and a county and cities as defendants. It is these defendants who are the appellees in this matter. Following White's filing of a First Amended Complaint on January 19, 2001, each defendant moved to dismiss the complaint.

On February 20, 2001, White moved for an extension of time in which to file a response to the various motions to dismiss. The trial court granted White's motion and allowed him until March 12, 2001, to respond. The trial court then sent a letter to all parties, scheduling a hearing on the motions to dismiss. Instead of responding to the various motions to dismiss, White filed a Motion to Nonsuit on March 12, 2001.

On March 30, 2001, both the motions to dismiss and White's motion to nonsuit were taken up at the called hearing. At that time, the court considered the motions to dismiss first. After hearing arguments from the parties, the court issued its ruling, stating in part:

> The Court is of the opinion that while a plaintiff has a right to take a voluntary nonsuit, it is not effective until the Court signs the order granting the nonsuit. I have not done so because I felt that it was important for the Court to make a ruling on the Motions to Dismiss.
>
> I have reviewed all the material submitted by the defendants. The plaintiff has not responded to the Motions to Dismiss because he thought his action by taking the voluntary nonsuit would alleviate him of that responsibility.
>
> I have tried to go through his Complaint and see that there's any differential between that Complaint and the Complaint that the Supreme Court ruled on in Oxford. I can discern none; that there is no difference, and the rationale for the filing of the Complaint escapes me.
>
> I'm going to dismiss this Complaint with prejudice. The dismissal is being granted upon the defendants', all their Motions to Dismiss, based upon the aspect of res judicata, that this was previously litigated and that the Supreme Court has settled the law.

On April 11, 2001, the trial court entered its order granting the motions to dismiss. Specifically, the court ruled:

> 7. The Plaintiff's Motion to Nonsuit has not been ruled on by this Court. Rule 41 of the Arkansas Rules of Civil Procedure provides that a nonsuit is not effective until the court enters an order granting same. For the reasons set forth herein the court exercises its discretion to consider the Motions to Dismiss first.
>
> 8. The Court finds that the Plaintiff's complaint is identical to the complaint that had been filed by Mr. Stilley on behalf of Earl Oxford in both the Greenwood District (case No. 99-35-G) and the Fort Smith case filed by Mr. Stilley in the District of Sebastian County, Arkansas. On March 9, 2000 the Arkansas Supreme Court in both the Oxford case filed in the Greenwood District (Sup. Ct. 99-1141) and the case filed in the Fort Smith District determined that the trial courts' decisions to dismiss both cases because of the failure of the Plaintiffs to comply with the voluntary payment of taxes rule was correct and affirmed the dismissals with prejudice. The Plaintiff herein, by Mr. Stilley, filed an identical complaint some seven months after the Supreme Court reached its decision. The Supreme Courts [*sic*] decision clearly established the law as it applies to this case. The Plaintiff's action is barred by the prior decision of the Supreme Court. The Complaint should be dismissed with prejudice upon the Defendant's [*sic*] Motions to Dismiss because of *res judicata.*

In his appeal from this Order, White contends that he had the right to bring this lawsuit, as well as the absolute legal right to take a nonsuit. He further maintains that an order for nonsuit, effective upon the trial court's signature, does not permit the trial court the option of holding that order to decide other motions first.

Appellees WestArk Community College and the School Districts, in separate briefs, raise several arguments to counter White's claim of an absolute entitlement to a nonsuit. They both argue that White never received a ruling from the trial court on his motion for a nonsuit; thus, they contend that the issue is not preserved for our review. They further assert that even if the trial court erred in denying White's motion to nonsuit, White was not prejudiced by the court's order. The reason for this, they claim, is

that White's complaint is the same as a previous lawsuit filed by Earl Oxford, which was decided adversely to Oxford. *See Oxford v. Perry*, 340 Ark. 577, 13 S.W.2d 567 (2000). They maintain that when a second taxpayer such as White files an illegal-exaction lawsuit raising matters already concluded in an earlier suit, the second action is barred by the doctrine of *res judicata*. As authority, appellees cite *Rigsby v. Ruraldale Consol. Sch. Dist. No. 64*, 180 Ark. 122, 20 S.W.2d 624 (1929), and *McCarroll, Comm'r of Revenues v. Farrar*, 199 Ark. 320, 134 S.W.2d 561 (1939). In sum, they argue that White could never legitimately refile his lawsuit regardless of whether he voluntarily dismissed it without prejudice or whether the trial court dismissed it with prejudice. The School Districts further maintain that White failed to state sufficient facts in his complaint, as required by Arkansas Rule of Civil Procedure 8(a), showing the court's jurisdiction and that he and the affected taxpayers are entitled to relief.

A nonsuit by a plaintiff is governed by Rule 41(a) of the Arkansas Rules of Civil Procedure, which sets forth the criteria for the voluntary dismissal of actions. Rule 41(a) provides, in pertinent part:

> (a) *Voluntary Dismissal: Effect Thereof.*
>
> (1) Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.
>
> (2) A voluntary dismissal under paragraph (1) operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based upon or including the same claim, unless all parties agree by written stipulation that such dismissal is without prejudice.

Ark. R. Civ. P. 41(a)(1-2).

This court has been resolute in holding that the right to nonsuit, as outlined by the rule, is absolute. *See, e.g., Whetstone v. Chadduck*, 316 Ark. 330, 871 S.W.2d 583 (1994); *Duty v. Watkins*,

298 Ark. 437, 768 S.W.2d 526 (1989); *St. Louis, Iron Mountain & S. Ry. Co. v. Ingram*, 118 Ark. 377, 176 S.W. 692 (1915). An absolute right has been defined as one that "gives to the person in whom it inheres the uncontrolled dominion over the object at all times and for all purposes." *Black's Law Dictionary* 1324 (6th ed. 1990). The absolute right to nonsuit may not be denied by the trial court. 24 AM. JUR. 2D *Dismissal, Discontinuance, and Nonsuit* § 12 (1998).

This absolute right to nonsuit exists so long as the nonsuit is requested prior to submission of the case to the jury or to the court. *See Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997). Where the nonsuit is requested prior to the final submission of the case, the voluntary nonsuit is an absolute right; however, when it is requested by the plaintiff after final submission of the case, whether to grant a motion for voluntary nonsuit lies within the discretion of the trial court. *See Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995). A case has not been finally submitted where, even though it has come to a hearing, the argument has not yet closed. *See Duty v. Watkins, supra.* This court has further held in accordance with Rule 41(a) that in order to be effective, a court order must be entered granting the nonsuit even when the nonsuit is a matter of absolute right and not subject to the trial court's discretion. *See Blaylock v. Shearson Lehman Bros., Inc., supra.* Unlike Federal Rule of Civil Procedure 41(a), which limits the plaintiff's unqualified right to a voluntary nonsuit up to the time that a defendant files his answer, the Arkansas rule follows prior Arkansas caselaw and permits the right to nonsuit until the case is submitted for decision. *See* Reporter's Notes to Ark. R. Civ. P. 41.

In this case, we have two time-honored principles that are in conflict: that of a plaintiff's absolute right to nonsuit, and the preclusion of repetitive illegal-exaction suits by various plaintiffs under the doctrine of *res judicata.* In the past, when a motion to dismiss filed by a defendant was in conflict with a plaintiff's right to nonsuit, this court gave preference to the absolute right to nonsuit. *See Brown v. St. Paul Mercury Ins. Co.*, 300 Ark. 241, 778 S.W.2d 610 (1989); *Duty v. Watkins, supra.* For example, in the *Duty* case, Duty had filed suit, and the defendant moved to dismiss

because of a discovery violation. A hearing was called on the motion to dismiss, and Duty appeared and asked to nonsuit. The trial court refused and granted the motion to dismiss with prejudice. We reversed the dismissal and held that the nonsuit should have been granted because the case had not yet been submitted for decision. In *Brown v. St. Paul Mercury Ins. Co., supra,* we held similarly when the trial court granted an order of dismissal in the face of the plaintiff's move to nonsuit.

Here, because argument had not yet closed, White's motion was clearly presented to the court prior to submission of the case for decision. Accordingly, appellant had an absolute right to a nonsuit, regardless of the merits of his case. Because White exercised his absolute right to dismiss his claim, this first voluntary dismissal is without prejudice under Rule 41(a) and not an adjudication on the merits. *See Beverly Enters.-Arkansas, Inc. v. Hillier,* 341 Ark. 1, 14 S.W.3d 487 (2000). The trial court erred in not entering an order granting White's motion for a nonsuit without prejudice.

As to appellees' argument that White's nonsuit issue fails for lack of preservation because he did not obtain a ruling on his motion, we disagree. The trial court clearly announced it would consider the appellees' motions to dismiss first. After the court granted those dismissals with prejudice, White's motion to nonsuit was moot. That was precisely the situation in *Duty v. Watkins, supra.* There was no procedural bar in *Duty,* and there is none here.

Finally, we consider the appellees' contentions that the trial court reached the right result, albeit for the wrong reason, and that in any event, White was not prejudiced by the trial court's dismissal order. Again, we disagree. Were we to permit a trial judge to exercise his or her discretion in deciding a nonsuit before submission to the court or jury, we would be significantly eroding a plaintiff's absolute right to nonsuit before submission of the case. We would further be authorizing trial courts to examine the merits of a case, including affirmative defenses, in assessing whether to enter the nonsuit order prior to submission of the case

for decision. This we will not do. In short, the entry of an order granting a nonsuit before submission of the case, as required by Rule 41(a), is not discretionary with the trial court nor subject to an analysis based on an affirmative defense included in a defendant's motion.

The same holds true for the School Districts' contention that White's complaint fails to state sufficient facts showing jurisdiction and entitlement to relief and, therefore, violates Ark. R. Civ. P. 8(a). In making this argument, the School Districts are simply restating their *res judicata* defense. Again, raising this defense cannot thwart White's absolute right to nonsuit before submission of his case.

This does beg the question of what protections are in place to protect against a multiplicity of suits, if White is permitted to voluntarily dismiss his lawsuit. The specter raised by the appellees is that a nonsuit will allow such a multiplicity of suits, contrary to what we said in *McCarroll, Comm'r of Revenues v. Farrar, supra*:

> If a suit of this character is not a bar, then one citizen after another might institute a suit for himself and others against the Commissioner of Revenues, and if the judgment in one suit was not a bar, this could continue until every citizen in the state had brought suit. The doctrine of *res judicata* is not only to protect the individual, but it is a matter of public policy.

199 Ark. at 325, 134 S.W.2d at 564. We discount the specter, because we conclude that sufficient protections exist under our rules to curb such abuse.

First, there is Rule 41(a), which clearly provides that only one voluntary dismissal without prejudice is allowed. A second nonsuit will be with prejudice. But more to the point, an abuse of the nonsuit procedure by substituting plaintiffs for the same cause of action would subject the attorney to Rule 11 sanctions. *See* Ark. R. Civ. P. 11. That is precisely the relief that was sought by the appellees in this case, though they subsequently withdrew their Rule 11 motion. It is also the avenue that the trial

court stated it would pursue as a matter of its own inquiry. The court said in its order:

> 9. Rule 11 of the Arkansas Rules of Civil Procedure provides that the signature of an attorney constitutes certificate by him that he has read the pleading and that to the best of his knowledge, information and belief formed after a reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation. If a pleading is signed in violation of this rule the Court upon motion or its own initiative shall impose upon the person who signed it an appropriate sanction.
>
> 10. The Court is greatly concerned that the Complaint was filed in direct violation of the Supreme Court's prior law and rulings and may be a violation of Rule 11. The Court on its own motion is initiating a Rule 11 inquiry which will be set for hearing at some time in the future at which time Mr. Stilley will be given the opportunity to explain why the Complaint in this case was not in violation of Rule 11.
>
> . . .
>
> FURTHER ORDERED the Court retains jurisdiction of this matter to conduct the Rule 11 hearing mentioned above.

We believe that Rule 11 is the proper vehicle for correcting any abuse related to multiple filings.[1] This court, of course, has invoked Rule 11 of the Arkansas Rules of Appellate Procedure—Civil to sanction counsel for filing an appeal on an issue that has recently been decided by this court. *See, e.g., Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001).

For the foregoing reasons, we reverse the order of the trial court dismissing White's complaint and remand with directions to enter an order granting White's motion for nonsuit.

Reversed and remanded.

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[1] In his Reply Brief, Mr. Stilley, on behalf of White, states that the trial court ruled in his favor in its Rule 11 inquiry. That assertion, if true, is not in the record before us.

GLAZE, J., concurs.

IMBER, J. not participating.

TOM GLAZE, Justice, concurring. I concur. While the court reverses and remands this case because of an error, such reversal in no way means the trial court may not consider any collateral Rule 11 issue that might still be pending. Although the appellant had an absolute right to a nonsuit in the circumstances here, an appellant (or anyone entitled to a nonsuit) is never automatically relieved of the duty and responsibility under Rule 11 to certify that, to the best of his knowledge, information, and beliefs formed after reasonable inquiry, his pleading, motion, or other paper is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Appellants' counsel, Mr. Oscar Stilley, submits the trial court ruled in his favor on the Rule 11 issue, which the trial court raised on its own initiative due to its concern that appellant and Mr. Stilley filed a complaint that was in direct violation of the Arkansas Supreme Court's prior law and rulings. If the trial court has ruled on the Rule 11 issue, no further action may be warranted; however, if that issue has not been dismissed, nothing in this court's decision today automatically disposes of the issue.

Mervin JENKINS *v.* STATE of Arkansas

CR 01-081 75 S.W.3d 180

Supreme Court of Arkansas
Opinion delivered May 16, 2002

[Petition for rehearing denied June 20, 2002]

Tom M. DeMers, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. Appellant Mervin Jenkins appeals his conviction for the capital murder of twenty-year-old Brian Young. A jury convicted Mr. Jenkins of capital murder and sentenced him to life imprisonment without the possibility of parole. Mr. Jenkins raises four points on appeal: (1) there was not sufficient evidence to support his conviction; (2) he was denied effective assistance of counsel in violation of his Sixth Amendment rights; (3) the trial court erred in refusing to suppress his custodial statement; and (4) the trial court erred in denying his request for a mistrial. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and affirm.

The record reveals that Brian Young was murdered on September 24, 1997. Trial testimony from Brian Young's girlfriend,

Iris Northrop, indicated that, on the evening of the murder, Mr. Young was talking with her on a payphone outside a Delta convenience store located on Asher Avenue. In the middle of their conversation, the victim stated, "That looks like the guys that tried to jump on me earlier." Ms. Northrop then heard seven shots and heard the victim yell. An autopsy revealed that the cause of Mr. Young's death was seven gunshot wounds "from the back to the front."

Tanisha Franklin testified that she came into contact with Mr. Jenkins on September 24 at the home of Lisa Bowman, Mr. Jenkins' girlfriend at the time. According to Ms. Franklin, she heard Mr. Jenkins bragging about shooting Brian Young at the Delta station and swearing Ms. Bowman to secrecy. Ms. Franklin also heard Mr. Jenkins say that he shot Mr. Young six times in the back and that it was "a Crip putting it on a Blood."

On December 26, 1997, Mr. Jenkins was brought into the Little Rock police station in connection with an aggravated robbery and battery. At the time of his arrest, Mr. Jenkins was in the tenth grade at Central High School. While in custody, he was questioned regarding the September 24, 1997 murder of Brian Young, and he gave a taped statement to police in which he admitted to shooting at Brian Young with a .38 caliber revolver. In his statement, Mr. Jenkins said that he had some problems with Brian Young that began when he started dating Lisa Bowman. He told police about an occasion on which he was riding his bicycle and saw Mr. Young pointing his finger "like . . . I'm gonna mess you up or I'm gonna shoot you or something like that." About one week after that incident, on September 22 or 23, Mr. Jenkins was riding his bicycle near 17th and Schiller when a car pulled up near him and someone started shooting. Mr. Jenkins told police that, on the following night, he rode his bicycle to the Delta store by Asher where he saw "[Mr. Young] up there at the pay phone." Mr. Jenkins stated: "[He] gave me a real you know what I'm saying, nasty look like — I fixing to get out and shoot you or something like that — a real you know crazy look so I just started shooting at him." After firing three or four shots, Mr. Jenkins ran away and threw the revolver into the river.

In his statement, Mr. Jenkins indicated that he did not go to Lisa Bowman's home on the night of the shooting; but, in a statement given on September 25, Lisa Bowman told police that Mr. Jenkins did come to her house that night around 10:00 p.m. Ms. Bowman stated that she was asleep when he arrived and that he woke her up. She then went back to sleep. Mr. Jenkins was at her home when she awoke the next morning; however, she admitted that she did not know if Mr. Jenkins left during the night.

A felony information charging Mr. Jenkins with capital murder was filed on April 13, 1998.[1] Subsequently, the defense requested a mental evaluation of Mr. Jenkins. A forensic psychiatric evaluation conducted by Dr. Alan Newman at the Arkansas State Hospital showed that Mr. Jenkins had a severe conduct disorder and "borderline intellectual functioning" due to his IQ of 75. Dr. Newman nonetheless concluded that Mr. Jenkins was aware of the charges against him and capable of cooperating effectively with his attorney. Dr. Newman further concluded that, at the time of the commission of the alleged offense, Mr. Jenkins did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the law.

Initially, Mr. Jenkins filed a motion for transfer to juvenile court. After the trial court denied his motion, Mr. Jenkins filed an interlocutory appeal. The trial court's ruling was affirmed by the Arkansas Court of Appeals. *Jenkins v. State*, CA CR 99-693 (Ark. App. Dec. 15, 1999). Mr. Jenkins also filed a motion to suppress his custodial statement. That motion was likewise denied. He proceeded to trial on May 9, 2000, when a jury found him guilty of capital murder and sentenced him to life imprisonment without the possibility of parole.

On June 7, 2000, the trial court granted Mr. Jenkins's request that the public defender be relieved as counsel and that Tona DeMers be substituted as retained counsel for Mr. Jenkins. His new attorney then filed a motion for new trial based upon ineffective assistance of counsel. Attached to the motion for new trial

[1] According to an amended felony information, Mr. Jenkins was charged as a habitual offender.

was a statement given to the police by Johnny Williams on September 26, 1997. According to this statement, Mr. Williams told police he had information that his vehicle was involved in the September 24 shooting on Asher Avenue. He stated that, on Sunday morning, September 21, he loaned his vehicle to an individual he knew only as "B.A." Mr. Williams advised police that "B.A." was in possession of a weapon with a clip at that time. The next day, Mr. Williams filed a report claiming that his vehicle, a white GMC Jimmy with blue, factory pin-stripes, was being driven without his consent. Mr. Williams would not tell police what information led him to believe that his vehicle was involved in Mr. Young's murder.

Also attached to Mr. Jenkins's motion for new trial was the signed statement of Chris Johnson. This statement was given to the police on September 25, 1997. According to Mr. Johnson, he was in his home near the area of the shooting on September 24. He heard shots around 11:40 p.m., and looked out his window to see a blue short-bed pick-up truck with tinted windows leaving the area from which he heard the shots.

Following a hearing on Mr. Jenkins's motion for a new trial, the trial court entered an order denying his request for a new trial. On appeal, Mr. Jenkins challenges both his capital murder conviction and the trial court's denial of his motion for new trial.

I. Sufficiency of the Evidence

This court treats a motion for directed verdict as a challenge to the sufficiency of the evidence. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999). When reviewing the sufficiency of the evidence, we determine whether there is substantial evidence to support the verdict, viewing the evidence in a light most favorable to the State. *Id.* The evidence to support a conviction, whether direct or circumstantial, must be of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. *Smith v. State*, 308 Ark. 390, 824 S.W.2d 838 (1992). It must force the mind to go beyond speculation or conjecture and is not satisfied by evidence which gives equal support to inconsistent

inferences. *Id.* We look only to the evidence which supports the verdict. *Id.* It is for the jury to resolve inconsistencies in testimony, and we will not disturb their credibility assessment. *Ellis v. State*, 279 Ark. 430, 652 S.W.2d 35 (1983).

■ ■ Mr. Jenkins moved for a directed verdict at the close of the State's case. He presented no evidence and rested immediately after the State. On appeal, he contends that the State did not exclude every other reasonable hypothesis except for his guilt, claiming that the State provided no proof that he acted with premeditation and deliberation as well as insufficient evidence that he murdered Brian Young. First, Mr. Jenkins contends that the testimony of Tanisha Franklin should have been corroborated. He focuses on the fact that Ms. Franklin did not tell police about overhearing him admit to Mr. Young's murder until December 26 when she was arrested with Mr. Jenkins on charges of aggravated robbery. The charges against her were eventually dropped. Mr. Jenkins asserts that this likened Ms. Franklin to an accomplice whose testimony should have been corroborated. However, the appellant bears the burden of proving that a witness is an accomplice whose testimony must be corroborated. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110. A defendant must either have a trial court declare a witness to be an accomplice as a matter of law or submit the issue to the jury for determination. *Id.* Here, there was no request by Mr. Jenkins that the trial court declare Ms. Franklin to be an accomplice; nor did he seek to have the issue submitted to the jury. Thus, this challenge to her testimony is not preserved for our review.

■ ■ Mr. Jenkins also asserts that his taped confession statement is not reliable. A confession made by a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed. *Tinsley v. State*, 338 Ark. 342, 993 S.W.2d 898 (1999). *See* Ark. Code Ann. § 16-89-111(d) (Supp. 2001). This requirement for other proof, sometimes referred to as the corpus delicti rule, mandates only proof that the offense occurred and nothing more. *Id.* Under the corpus delicti rule, the State must prove the existence of an injury or harm constituting a crime and that the injury or harm was caused by someone's criminal activity. *Id.* Here, the

victim's body and the physical evidence found at the scene establish the crime of murder. The victim sustained seven gunshot wounds "from the back to the front."

As a part of his sufficiency challenge, Mr. Jenkins denies that his statement amounted to a confession. He claims that, during police questioning, the premise was usually contained in the detective's questions rather than in his answers. He also asserts that, though he admitted to shooting at Mr. Young in response to perceived acts of aggression, he did not admit to killing him. In addition, Mr. Jenkins points out that Lisa Bowman stated Mr. Jenkins was at her home on the night of the murder, whereas he told police that he did not go to Ms. Bowman's home after the shooting. We do not consider these arguments as we need only consider the evidence that supports the guilty verdict. *Leaks v. State*, 345 Ark. 182, 45 S.W.3d 363 (2001). The evidence supporting the verdict revealed (1) that Mr. Jenkins admitted firing three to four shots at Mr. Young while the victim was outside a Delta convenience store on Asher Avenue, and (2) that Mr. Young died at that location as a result of multiple gunshot wounds.

Next, Mr. Jenkins asserts that the State did not produce a murder weapon. Mr. Jenkins admitted shooting at Mr. Young with a .38 caliber revolver, and now contends such a revolver only contains six shots. He alleges that Brian Young was shot seven times with a 9mm semi-automatic handgun. In addition, he contests the identity of the assailant who committed the murder. He points out Iris Northrop's testimony that Mr. Young's last words to her were: "[t]hat looks like the guys that tried to jump on me earlier," focusing on the reference to multiple assailants and the lack of reference to Mr. Jenkins himself. Mr. Jenkins suggests that Mr. Young knew who he was and, yet, did not identify him to Iris Northrop as the assailant. Mr. Jenkins also refers the court to his statement indicating that he committed the shooting while alone and riding a bike. He then contends it is unlikely that he could have hit the victim seven times while riding a bicycle. Again, we do not consider these arguments as we need only consider the evidence that supports the guilty verdict. *Leaks v. State*, 345 Ark. 182, 45 S.W.3d 363.

As for proof of the premeditated and deliberate intent necessary for capital murder, the State points out that a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Leaks v. State*, 345 Ark. 182, 45 S.W.3d 363. Intent may be inferred from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds. *Id.* In this case, the evidence revealed that Mr. Young died while standing at a payphone near a convenience store and talking to his girlfriend. His death was the result of seven gunshot wounds to the back made with the equivalent of .38 caliber caliber-class bullets. The crime scene was littered with 9mm shell casings. In this case, the jury could have used those circumstances to infer that Mr. Jenkins acted with premeditated and deliberate intent.

Finally, Mr. Jenkins argues that information in the police file provides him an alibi and a strong suspect other than himself. These allegations were not before the court during the trial of this matter. The failure to challenge the sufficiency of certain evidence in a directed-verdict motion at trial precludes appellate review. *See Hutts v. State*, 342 Ark. 278, 28 S.W.3d 265 (2000). As the evidence in question was not raised at trial, it cannot now be considered in relation to the sufficiency of the evidence on appeal.

Overall, the evidence shows that Mr. Jenkins admitted to firing shots at the victim near the location where the victim's death occurred. In addition, testimony from Tanisha Franklin indicated that she heard Mr. Jenkins confess to murdering Mr. Young at the Delta store on the night of the crime. The jury alone determines what weight to give the evidence, and may reject it or accept all or any part of it they believe to be true. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002). Viewing the evidence in a light most favorable to the State, we hold that the evidence presented at trial was sufficient to sustain Mr. Jenkins' capital-murder conviction.

II. Ineffective Assistance of Counsel

In his motion for new trial, Mr. Jenkins argued that his trial counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, the petitioner must first show that counsel's performance was deficient. *Farmer v. State*, 321 Ark. 283, 902 S.W.2d 209 (1995) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* 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. *Id.* 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. *Id.* A court must indulge in a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. *Id.* The petitioner has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

Even if counsel's conduct is shown to be professionally unreasonable, the judgment must stand unless the petitioner demonstrates that the error had a prejudicial effect on the actual outcome of the proceeding. *Id.* 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. *Farmer v. State*, 321 Ark. 283, 902 S.W.2d 209. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* In making a determination on a claim of ineffectiveness, the totality of the evidence before the judge or jury must be considered. *Id.*

For his second point on appeal, Mr. Jenkins contends that his trial counsel was ineffective for failing to contact a potential alibi witness and for failing to contact two other poten-

tial witnesses in pursuit of a lead on another suspect. He first alleges that trial counsel was ineffective for failing to call Lisa Bowman, who could have testified at trial to a potential alibi. At the new trial hearing, Mr. Jenkins' trial counsel admitted he did not interview Ms. Bowman. However, due to her statement in the police file, he knew what her recollection of the night in question would be. Brian Young's murder occurred shortly before midnight on September 24. Ms. Bowman's statement indicated only that she saw Mr. Jenkins near 10:00 p.m. that night and again the next morning. She had no knowledge of whether he left her house during that time frame. Thus, contrary to Mr. Jenkins's claim, Ms. Bowman's statement did not provide him with an alibi. Trial counsel testified that he did not call Ms. Bowman for reasons of trial strategy. In view of the fact that Mr. Jenkins confessed to shooting at Mr. Young and denied going to Ms. Bowman's house on the night of the shooting, trial counsel feared that calling Ms. Bowman to testify as to an alibi would inflame the jury. Trial counsel testified that his theory of the defense was to admit that Mr. Jenkins had killed the victim and attempt to get a conviction on a lesser degree of homicide. According to trial counsel, he discussed his strategy with Mr. Jenkins, who approved it. This court has held that an attorney's decision not to call a particular witness is largely a matter of professional judgment. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001). We have held that Rule 37 appeals asserting ineffective assistance of counsel do not provide a forum to debate trial tactics or strategy, even if that strategy proves improvident. *Id.* As such, we hold that Mr. Jenkins's counsel was not deficient in failing to call Lisa Bowman.

In his next claim based on ineffective assistance of counsel, Mr. Jenkins alleges that his trial counsel failed to pursue a lead on another suspect implicated by the statements of Johnny Williams and Chris Johnson or to call those witnesses at trial. He argues that his case is similar to that of *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991). In *Henderson*, the United States Court of Appeals for the Eighth Circuit found counsel to be ineffective for failing to interview witnesses in connection with the pursuit of evidence implicating another suspect. *Id.* However, in that case, there was substantial evidence that at least 3 other specific and

named individuals had motive, opportunity, and ability to kill the victim. The defendant's counsel had access to the information but failed to investigate the possibility of these other suspects; thus, none of the other evidence was presented at his trial. *Id.* In addition, the defendant had recanted his confession, thereby leaving counsel free to pursue other theories of the case.

In this case, however, trial counsel had to plan his strategy around Mr. Jenkins's admission that he shot at Brian Young. In addition, from statements contained in the police file, we know what the testimony by Mr. Williams and Mr. Johnson would have been. Mr. Williams could only say that he thought his white GMC Jimmy, which he had loaned the previous Sunday to an individual called "B.A." who had a semi-automatic weapon, might have been used in the commission of the murder. Mr. Johnson could say only that he saw a blue short-bed truck leaving the area after the shots were fired. Neither statement offers evidence exonerating Mr. Jenkins. Moreover, it cannot be said that the information contained in either statement would have changed the outcome of the trial.

Mr. Jenkins further alleges that his trial counsel was ineffective for failing to have a fingerprint analysis conducted on the shell casings found at the crime scene. He offers no proof that exculpatory evidence could have been obtained through a fingerprint analysis. Accordingly, this argument is without merit. As Mr. Jenkins has not demonstrated a reasonable probability that any potential error by his trial counsel would have provided the jury with a reasonable doubt respecting his guilt, we affirm the trial court's denial of his ineffective-assistance-of-counsel claims.

III. Denial of Motion to Suppress Custodial Statement

In his third point on appeal, Mr. Jenkins claims that the trial court erred in refusing to suppress his custodial statement for two reasons: (1) the statement was involuntary, and (2) he was not allowed to have his mother present during questioning after he requested her presence. In reviewing a trial judge's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances, viewing the evidence

in a light most favorable to the State, and we reverse only if the ruling is clearly against the preponderance of the evidence. *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998). The credibility of witnesses who testify at a suppression hearing about the circumstances surrounding the appellant's in-custody confession is for the trial judge to determine, and we defer to the superior position of the trial judge in matters of credibility. *Id.* Conflicts in the testimony are for the trial judge to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused since he is the person most interested in the outcome of the proceedings. *Id.*

A statement made while the accused is in custody is presumptively involuntary, and the burden is on the State to prove, by a preponderance of the evidence, that a custodial statement was given voluntarily and was knowingly and intelligently made. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998). We make an independent review of the totality of the circumstances surrounding a confession to determine whether the appellant knowingly, voluntarily, and intelligently waived his constitutional rights. *Id.* There are two components to the inquiry into the validity of a defendant's waiver. First, we examine whether the statement was voluntary. *Id.* The "voluntary statement" argument addresses whether the statements were the product of a free and deliberate choice rather than intimidation, coercion, or deception. *Id.* We look at the following factors to aid us in making our determination: "age, education, and intelligence of the accused, lack of advice as to his constitutional rights, length of detention, repeated and prolonged nature of questioning, or the use of physical punishment." *Id.* Second, we examine whether the waiver was knowingly and intelligently made. *Id.* The "waiver of rights" argument focuses upon whether the waiver was made with a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," as well as whether the accused was "uncoerced by police" when he made the choice to waive his rights. *Id.*

Mr. Jenkins asserts that he was only sixteen years old at the time of the questioning and had an IQ of only 75. In addition, he claims that the detectives questioning him never

inquired as to whether he was under the influence of drugs or alcohol. In his interview with a state forensic psychiatrist and during his testimony at the omnibus hearing, Mr. Jenkins stated that he was on "sherm," or PCP, at the time he gave his statement to police. This court has previously said that evidence of intoxication reflects only on the credibility of a statement, not its admissibility. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427. Detectives Weaver and Simpson, who took the statement from Mr. Jenkins, testified that he appeared to understand the rights form presented to him and that he told them he understood the form. He signed and initialed each statement on the *Miranda* rights form. The detectives also testified that, at the time of the confession, Mr. Jenkins did not appear to be under the influence of alcohol or drugs. His answers to questions were coherent, and his speech patterns were normal. The detectives stated that they made no threats or promises to Mr. Jenkins. Viewing the evidence in a light most favorable to the State, the trial court was not clearly erroneous in finding that Mr. Jenkins's custodial statement was given voluntarily and that the waiver was knowingly and intelligently made.

Without regard to the voluntariness of his statement, Mr. Jenkins alleges that, despite his request, he was denied the right to the presence of his mother while making his statement to police. At the omnibus hearing, Mr. Jenkins testified that he requested his mother while the police were questioning him about the murder. He stated that the police would not allow his mother to come see him. His testimony was not refuted by the State. Mr. Jenkins claims that the law can be found at Arkansas Code Annotated § 9-27-317(i)(2)(C)(ii) (2002), providing that a law enforcement officer "shall not question a juvenile who has been taken into custody for a . . . criminal offense if the juvenile has indicated in any manner that he or she: (ii) Wishes to speak with his or her custodial parent, guardian, or custodian or to have that person present."

According to our recent decision in the case of *Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001), the provisions of Ark. Code Ann. § 9-27-317(g)(2), now codified at Ark. Code Ann. § 9-27-317(i)(2)(C) and (D), are applicable only to matters

being considered by the juvenile court.[2] As the felony information charging Mr. Jenkins with capital murder was not filed in juvenile court, he had no right to assert that his mother should have been present during his questioning.

IV. Denial of Request for Mistrial

For his final point on appeal, Mr. Jenkins asserts that the trial court erred in denying his request for a mistrial. A mistrial is a drastic remedy and should be declared only when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when the fundamental fairness of the trial itself has been manifestly affected. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000). The trial court has wide discretion in granting or denying a motion for mistrial, and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Id.*

Mr. Jenkins's motion for mistrial followed the trial testimony of Tanisha Franklin. On direct, Ms. Franklin testified:

> Q: Now, you said that you heard the Defendant say why he shot him.
>
> A: Yes.
>
> Q: What did he say specifically in that regard?
>
> A: It's a Crip putting it on a Blood.
>
> Q: Okay. And you're talking about a Crip and a Blood. Are those street gangs to your knowledge?
>
> A: . . . Yes.

Later, during cross-examination, the witness was asked by defense counsel: "Now, you said that you heard him say, it's a Crip putting it on a Blood." Defense counsel then asked Ms. Franklin if

[2] In so holding, we distinguished the following statement in *Conner v. State*, 334 Ark. 457, 465, 982 S.W.2d 655, 659 (1998), as *obiter dictum*: "[A] juvenile has the right to speak to a parent or have a parent present during questioning in juvenile and criminal proceedings." *Ray v. State*, 344 Ark. at 146-47, 40 S.W.3d at 249-50.

she remembered telling police that she heard Mervin say "put this on Elizabeth [Ms. Bowman's infant daughter]? . . . Not put it on a Crip?" In response, Ms. Franklin testified that she heard Mr. Jenkins make both statements. Defense counsel then referred Ms. Franklin to her police statement in which she said: "I don't know. It's like another word. It's like putting it on a Crip, putting it on a Blood."

On redirect examination, the following colloquy occurred:

> Q: And when you said in your statement that the Defendant said, "Put it on Elizabeth," what does that mean to you? When you say put it on somebody, what are you talking about?
>
> A: It's like — Doing that it's like putting it on something that's close to you. Like you can say I put that on God, saying that you swear that you're not going to tell.
>
> . . . .
>
> Q: When you said a Crip putting it on a Blood, what does that mean to you?
>
> A: Okay. To me it meant at that time was that he was a Blood, so he was trying to get out the Blood gangs to become a Crip, and so he had to shoot a Blood to become a Crip.

Following Ms. Franklin's testimony, Mr. Jenkins objected to the inference that Mr. Jenkins was a member of a gang and made a motion for mistrial, suggesting that she had no personal knowledge of gang activity by Mr. Jenkins. The trial court denied the motion for mistrial, but admonished the jury not to consider the last response of the witness. Defense counsel indicated that the admonishment was satisfactory.

Without any citation to authority, Mr. Jenkins now argues that the mention of gang activity by Ms. Franklin was so prejudicial that the only sufficient recourse would have been to declare a mistrial. However, this court has held that, where similar evidence was previously admitted without objection, the admission of later testimony on the same subject is not prejudicial. *Hooper v. State*, 311 Ark. 154, 842 S.W.2d 850 (1992). No prejudice results where the evidence erroneously admitted was

merely cumulative. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547. As defense counsel questioned Ms. Franklin about the statement "It's a Crip putting it on a Blood" on cross-examination, the later objected — to reference was merely cumulative. In any event, the defense was satisfied with the trial court's admonishment. Thus, the trial court did not err in denying Mr. Jenkins's request for a mistrial.

V. Arkansas Supreme Court Rule 4-3(h)

The transcript of the record in this case has been reviewed in accordance with our 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). None have been found.

As a result of two separate motions filed by the State, we directed Mr. Jenkins's attorney, Tona M. DeMers, to comply with Ark. R. Sup. Ct. 4-2(a)(6) and Ark. Sup. Ct. R. 4-3(h). Ms. DeMers failed to comply with our directives, and the State proceeded to prepare and file a supplemental abstract. Accordingly, a copy of this opinion will be forwarded to the Committee on Professional Conduct.

Affirmed.

WAL-MART STORES, INC. *v.* Andy LEE,
Benton County Sheriff, and David Clark

01-403 74 S.W.3d 634

Supreme Court of Arkansas
Opinion delivered May 16, 2002

Ranae Bartlett and *Todd P. Guthrie*; *Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A.*, by: *David Matthews* and *George R. Rhoads*, for appellant.

Odom & Elliott, by: *Bobby Lee Odom* and *Conrad T. Odom*, for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Wal-Mart Stores, Inc., appeals from a judgment entered on September 6, 2000, in favor of Appellee David Clark and from the denial of its posttrial motions. A jury found in favor of David Clark on the issues of defamation, false-light invasion of privacy, and intrusion invasion of privacy. The judgment awarded by the jury totaled $651,000 in compensatory damages and $1,000,000 in punitive damages, plus costs and interest. We affirm.

In 1998, employees in the Wal-Mart Maintenance Department informed their supervisors that fellow employees Gene Addington, Bob Kitterman, and David Clark were taking home tools and equipment from Wal-Mart without proper authorization. Wal-Mart Loss Prevention Officer Jim Elder was assigned to investigate potential theft. He interviewed the informants, who reiterated that they had observed David Clark taking Wal-Mart property and placing the items into his vehicle. Elder then conducted surveillance on Bob Kitterman, which revealed Kitterman removing tools from Wal-Mart and giving them to his son-in-law. Consensual searches of both Kitterman's and his son-in-law's residences resulted in the discovery of Wal-Mart property. According to Elder, Kitterman stated that he had given some stolen Wal-Mart merchandise to David Clark. Wal-Mart never conducted surveillance on Clark.

David Clark was employed by Wal-Mart from July 31, 1989, until he was officially terminated on August 24, 1998. On August

17, 1998, Elder interviewed David Clark in the Quail Room at Wal-Mart's Home Office in connection with Elder's theft investigation. What Elder and Clark discussed in that room was the subject of sharply conflicting testimony at trial. Clark testified that Elder told him Wal-Mart was investigating some missing life jackets and fishing poles and wanted to know if Clark had taken them. Clark stated that he consented to a search of his residence only to show Elder that he did not have any fishing equipment. Elder, on the other hand, admits to mentioning stolen fishing equipment in his conversation with Clark, but claims he did not indicate that was the thrust of his investigation. He testified that he also mentioned computers and tools. Wal-Mart contends that Clark gave an unlimited consent to search. Some handwritten notes made by Clark within a day after the incident recount:

> We were alone. Jim said I suppose you heard what happened to Mr. Kitterman. I replied No!! . . . Mr. Elder then said that Mr. Kitterman had been suspended after they had searched his shop. Now you need to be able to look Mr. Soderquist in the eye and say you didn't steal anything. We need to go to your house and look in your barn. I said OK! We left the Quail Room and started outside. . . . Mr. Elder then ask [*sic*] about some fishing equipment and life vests, and why I would let Kitterman drop them off at my house. I told him I had no idea and I didn't know anything about any life vests or fishing equipment.

At trial, counsel for Wal-Mart used Clark's notes to suggest that the fishing equipment and life vests were not mentioned inside the Quail Room where Clark gave Elder verbal consent to search.

After the Quail Room interview, Elder called Detective James Haskins of the Rogers Police Department and asked the detective to meet them at Clark's residence. Elder stated that, though Wal-Mart does it's own internal investigation, he always calls the police for safety reasons, as well as for the legality of the search and for evidence purposes. Detective Haskins stated at trial that Elder advised him "that Clark had given them permission to go over to his residence located in Rogers and . . . recover some property that belonged to Wal-Mart." Detective Haskins testified that he believed Elder was referring to stolen property. The police report stated that on August 17 "Elder advised [Haskins]

that he was en route to 402 East Spruce Street in order to conduct a consent search of this residence looking for stolen property." Detective Haskins arrived at the scene with Detective Scott Briggs, and the detectives presented Clark with a written consent-to-search form, which he signed. The detectives did not give Clark either verbal or written *Miranda* warnings. Clark's handwritten notes indicate that, prior to signing the form, Elder told him "Kitterman will be in jail tomorrow." The notes further describe Clark's recollection of the events that day:

> [T]he man with Rogers P.D. came over to me and said that he was there to protect Wal-Mart and he had a consent to search form allowing Wal-Mart to search my property. . . . After I had signed the form, Mr. Elder came over to where we were standing and ask [*sic*] if he was going to need a big truck like they had to have at Kittermans. I said I don't think so!! We then walked over to my shop building and I opened the door. Mr. Elder walked in and [Mr. Womack] said . . . I'm going to turn you in to the IRS. . . . I then went into the house . . . and gathered a handful of receipts from the Associate Store and went back outside to Mr. Elder. I held out the receipts to him and ask [*sic*] him to please look at them as all of the items in my shop belonged to me and that I used to repair equipment for Clarence Leis at the Associate Store for re-sale to our associates. Mr. Elder [*sic*] that doesn't matter Clarence Leis has got [*sic*] a lot of people in trouble. At this point . . . I became very devastated by the whole thing. I told Mr. Elder that I can prove what belongs to me. He then said we will load it all and you can prove what belongs to you later.

Detective Briggs testified that he called dispatch and asked for the assistance of more officers. The evidence shows that a total of five police detectives and one police officer were eventually involved in the search. The police assisted Elder and Kenneth Womack, another Wal-Mart Loss Prevention Officer, in a search of Clark's home and a shop building on his property. Elder and Womack also enlisted the help of approximately ten to fifteen additional Wal-Mart employees.

The search lasted approximately seven hours, during which time Wal-Mart seized over 400 items, including computer parts, printers, VCRs, TVs, camcorders, fax machines, typewriters, and

telephones, among other things. At the outset of the search, Clark told Elder that he repaired items for Wal-Mart and that Clarence Leis had given him some salvage merchandise to keep. As the items were being removed from Clark's home and shop, they were placed out in his yard so that they could be inventoried, photographed, and logged. Detective Haskins indicated that it was probably his decision to put the merchandise in the yard. However, Donna Jackson from Wal-Mart's Corporate Fraud Division testified that both Elder and Womack were instrumental in instructing other employees which property was to be taken out onto the lawn. After the items had been inventoried, Wal-Mart placed them into a U-Haul truck.

While most of the property was on Clark's lawn, local media arrived to cover the story. The next morning, *The Morning News* featured the merchandise seizure on its front page with the headline "Police seize stolen electronic equipment believed to have come from Wal-Mart." The story was accompanied by a photograph of the property laid out in Clark's yard. The caption under the photograph read: "Rogers police and Wal-Mart employees examine about $50,000 worth of items collected from a Spruce Street residence Monday as part of a continuing theft investigation." The article listed Clark's street address, and Clark's wife was one of several people identifiable in the photograph. The article quoted Detective Haskins as a source of some of its information. On August 19, 1998, the *Benton County Daily Record* published a similar article.

In his written notes, Clark stated that the contents of his home and shop which were seized by Wal-Mart amounted to an accumulation of over twenty years of business and hobby. In addition to his work at Wal-Mart, Clark had maintained a workshop in his home since the 1970's where he operated an electronics repair business known as Clark's Repair Service. Clark also performed electronics repair work for many different departments of Wal-Mart, including the Wal-Mart Associates' Store. Clark was a frequent customer of the Associates' Store, a store where damaged or salvage merchandise from the retail stores is sent for sale to Wal-Mart employees at discounted prices. During much of the time in question, Clarence Leis was the manager of the Associates' Store.

Leis often asked Clark to repair items for the store, and there was evidence that he informed Clark that he could keep some items that he could not repair. Clark did many of the repairs at home on his own time without charging Wal-Mart for anything other than the cost of parts. Elder stated that, during the course of his investigation of Clark, he interviewed a new manager of the Associates' Store. However, Elder admitted that he did not make any attempt to interview Leis before searching Clark's residence because Leis had not been with Wal-Mart for two years. Elder acknowledged that, on the day the property was seized from Clark's residence, Clark informed him that he was repairing items for Wal-Mart.

On August 25, 1998, loss-prevention officers Elder and Womack presented a case synopsis detailing the investigation to Wal-Mart supervisory personnel, the police, and the prosecutor's office. Melinda Hass, a Wal-Mart personnel manager, testified that David Clark was officially terminated from his employment with Wal-Mart, and that the decision to terminate him was based on Elder's report. According to both Melinda Hass and David Passmore, Wal-Mart's Director of Store Planning, Clark was officially terminated "[f]or violation of a company policy, not having a material pass or a proper permission from a supervisor to have Wal-Mart equipment."

Five months after the incident, the Benton County Prosecuting Attorney refused to formally file criminal charges against Clark. Wal-Mart filed an action in replevin to recover the property seized at Clark's residence, which was being held at the Benton County Sheriff's Office. Clark counterclaimed asserting violations of federal and state civil rights laws and six other causes of action: the tort of outrage, negligent supervision, deceit, defamation, false-light invasion of privacy, and intrusion invasion of privacy. The jury trial in this matter lasted for eleven days. Wal-Mart was granted a directed verdict as to thirty-seven items appearing on a property list compiled by Wal-Mart and purporting to contain the items taken from Clark's residence.[1] Those

[1] The property taken from Clark's residence was inventoried by the police on the day of the search. The police made a handwritten inventory which was later typewritten.

thirty-seven items did not appear in the police inventory of items seized from Clark, and Clark claimed that none of those items came from his residence. Wal-Mart dismissed its replevin action as to every item that Clark identified as being seized from his home. Those items included goods that Clark had purchased from Wal-Mart, the Associates' Store, and Wal-Mart's Used Asset Division; items he was repairing for other customers; and a "half a dozen" items given to him by Clarence Leis.

At Wal-Mart's request, the trial on Clark's counterclaims was trifurcated into separate phases on liability, compensatory damages, and punitive damages. Clark voluntarily dismissed his claim for negligent supervision, and Wal-Mart's motion for directed verdict was granted with respect to Clark's claims for civil rights violations, outrage, and deceit. The jury, in answers to interrogatories, returned a verdict in Clark's favor on defamation, false-light invasion of privacy, and intrusion invasion of privacy. Wal-Mart filed posttrial motions for judgment notwithstanding the verdict, new trial, and remittitur, which were denied after a hearing. Wal-Mart then filed this appeal.

Wal-Mart asserts four main points on appeal: (1) the trial court erred in submitting the intrusion invasion-of-privacy claim to the jury because Clark consented to the intrusion, and a finding of liability would violate due process; (2) the trial court erred in denying Wal-Mart's motion for judgment notwithstanding the verdict on republication defamation because there was no evidence that Wal-Mart made defamatory statements to the newspapers and because Clark failed to submit a jury instruction on republication; (3) the trial court erred in submitting the defamation claim to the jury because Clark failed to present substantial evidence to defeat Wal-Mart's qualified privilege and to show that his damages were proximately caused by the case synopsis; and (4) the trial court erred in submitting the false-light invasion-of-pri-

After the police inventory was complete, the property was loaded into a U-Haul truck and taken to a Wal-Mart facility where it was placed in a trailer with various items of property recovered from the homes of other Wal-Mart employees. Later, the property was removed from that trailer and placed into a separate trailer containing only the property presumed to have come from Clark's residence. At that point, Wal-Mart made its own inventory list of the property.

vacy claim to the jury because Clark failed to demonstrate by clear and convincing evidence either the elements of false light or that Wal-Mart was not entitled to a qualified privilege. We consider each argument in turn.

I. Standard of Review

Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). Similarly, in reviewing the denial of a motion for judgment notwithstanding the verdict, we will reverse only if there is no substantial evidence to support the jury's verdict and the moving party is entitled to judgment as a matter of law. *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000); *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991). Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481. It is not the appellate court's place to try issues of fact; rather, this court simply reviews the record for substantial evidence to support the jury's verdict. *Id.* In reviewing the sufficiency of the evidence as being substantial on appellate review, we need only consider the testimony of the appellee and the evidence that is most favorable to the appellee. *Wal-Mart Stores, Inc. v. Dolph*, 308 Ark. 439, 825 S.W.2d 810 (1992). Circumstantial evidence may meet the substantial-evidence test. *Id.*

II. Intrusion Invasion-of-Privacy Claim

Wal-Mart contends that Clark failed to establish the essential elements of the tort of intrusion. In *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), this court adopted the approach of the *Restatement (Second) of Torts*, which delineates four separate torts grouped under "invasion of privacy." The privacy tort covers behavior harmful to the plaintiff even though there is no injury to his reputation. *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984). Intrusion has been recognized in Arkansas as one of the four actionable forms of invasion of privacy. *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d

653 (1997). Intrusion is the invasion by one defendant upon the plaintiff's solitude or seclusion. *Id.*

Although Arkansas courts have seldom adjudicated intrusion claims, the United States Court of Appeals for the Eighth Circuit opined that, because this court adopted the Restatement approach, Arkansas courts would likely follow the Restatement's analysis of the tort of intrusion. *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871 (8th Cir. 2000). The Restatement defines liability for intrusion upon seclusion as follows:

> One who intentionally intrudes, physically or otherwise, upon the solicitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. at 875 (quoting *Restatement (Second) of Torts* § 652B (1977)). According to the Eighth Circuit, the tort consists of three parts: (1) an intrusion; (2) that is highly offensive; (3) into some matter in which a person has a legitimate expectation of privacy. *Id.* A legitimate expectation of privacy is the "touchstone" of the tort of intrusion. *Id.* at 877.

The instruction submitted to the jury on intrusion in this case was as follows:

> David Clark claims damages from Wal-Mart for intrusion invasion of privacy and has the burden of proving each of six essential propositions:
>
> First, that he sustained damages;
>
> Second, *that Wal-Mart intruded physically or otherwise, without permission, invitation, or valid consent upon the solitude of David Clark*;
>
> Third, that the interference with the seclusion of David Clark was a substantial one;
>
> Fourth, that the interference with David Clark's seclusion was of a kind that would be highly offensive to the ordinary person;
>
> Fifth, that the interference with David Clark's seclusion was a result of conduct to which a reasonable person would object;
>
> Six, that David Clark's damages were proximately caused by Wal-Mart's intrusion.

> *A person validly consents to an intrusion if, in the totality of the circumstances, the consent is given freely and without coercion.*

(Emphasis added.) The jury instruction was submitted without objection, and nine members of the twelve-person jury ultimately found that David Clark had proven by a preponderance of the evidence the six essential propositions showing that Wal-Mart invaded his privacy by intruding upon his solitude. Wal-Mart contends that Clark did not establish either a substantial intrusion or a legitimate expectation of privacy.

A. Substantial Intrusion

Wal-Mart first argues that there could be no substantial intrusion because Clark consented to the search by Wal-Mart. An intrusion occurs when an actor "believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d at 876 (quoting *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989) (applying § 652B of the Restatement per Pennsylvania law)). Wal-Mart asserts that its employees could not have intruded upon Clark's solitude because Clark consented to the search, thus giving Wal-Mart employees the necessary legal or personal permission to commit the intrusive act. Wal-Mart points to three instances of consent by Clark: Clark's verbal consent in the Quail Room; Clark's written consent at the scene; and Clark's tacit consent during the search.

Both Wal-Mart and Clark agree that Clark verbally consented to a search of his property during his discussion with Elder on the morning of August 17, 1998. However, they disagree as to the scope of that consent. The scope of Clark's consent was a question of fact for the jury. At trial, Clark testified that, when he met Elder in the Quail Room on August 17, Elder told him that Wal-Mart was investigating some missing life jackets and fishing poles. Elder also told Clark that Bob Kitterman had admitted to leaving such stolen items at Clark's house. Clark denied having any such equipment at his home, but Elder said he would need to go to Clark's residence to look for the items. Clark felt that Wal-Mart was accusing him of stealing and agreed to let Elder search

for the property. Clark contends that Elder tricked him into agreeing to the search by telling him that Wal-Mart was only looking for some missing life jackets and fishing poles. He maintains that any consent he gave was limited to a search for fishing equipment. Clark testified that Elder did not mention searching for electronic equipment in the Quail Room or at any time before Clark let Wal-Mart employees and police into his shop. He stated that Elder left him with the impression that he would be fired if he did not consent. Elder's version of the incident is that he informed Clark that Wal-Mart was going to conduct a broad search of his residence for fishing vests, skiing equipment, computers, and tools. Elder maintains that, during the meeting in the Quail Room, Clark admitted to having property at his home that belonged to Wal-Mart.

At trial, Clark testified that he was certain Elder mentioned fishing equipment in the Quail Room. Wal-Mart counters with handwritten notes made by Clark within one day after the events of August 17, 1998, in which Clark seems to indicate that he agreed to let Wal-Mart search his property before any mention of fishing equipment. At trial, Clark acknowledged that his written statement did not indicate any reference to fishing equipment by Elder until after the two had left the Quail Room. However, during cross-examination by Wal-Mart's counsel, Clark clarified that he did not remember the events occurring as they were set out in his written statement:

> COUNSEL: . . . the business about the fishing equipment and the life jackets, that didn't get talked about in the Quail Room either, did it?
>
> CLARK: I guess it was right outside the Quail Room.
>
> COUNSEL: Yeah, after you had already told him he could come and search your barn. All this business we've been through for two weeks about how you got taken there because you thought all he wanted to look for was fishing equipment and life vests is just flat wrong, isn't it, Mr. Clark?
>
> CLARK: No. I still was under the impression it was fishing equipment and life jackets he was wanting to look for.

> COUNSEL: Why? You write in your statement that he tells you about Kitterman, that he tells you that he needs to go to your house and look and that you said okay and there's not word one mentioned about fishing equipment or life jackets till you're on the way out to the car.
>
> CLARK: I don't remember it that way.

There is a second instance in Clark's testimony that Wal-Mart claims is an indication Clark later adopted the written version of his statement:

> COUNSEL: Okay. Now, I want — you just think she's mistaken about that?
>
> CLARK: Yes, sir.
>
> COUNSEL: Is it possible you are mistaken, Mr. Clark, that you are just as mistaken about that as you were that strongly-held belief that the talk about life jackets and fishing equipment happened in the Quail Room?
>
> CLARK: No, I'm not mistaken about that.
>
> COUNSEL: Can't you be the one mistaken? You're not?
>
> CLARK: No.
>
> COUNSEL: See, you remember I asked you this morning if you were just — if you were certain about the fishing equipment and life jackets in the Quail Room, if that was as true as all the rest of your testimony and you said it was.
>
> CLARK: Yes, sir.
>
> COUNSEL: But now we know that that wasn't true, don't we?
>
> CLARK: I was mistaken.

Though Wal-Mart utilizes this portion of the testimony to buttress its assertion that Clark adopted his written statement, the vagueness of the colloquy demonstrates that the proposition is not as conclusive as Wal-Mart contends. Clark repeatedly stated to the jury that, at the time he gave consent to search, he was "still [ ] under the impression it was fishing equipment and life jackets [Elder] was wanting to look for."

Even if Elder's statement about fishing equipment occurred outside the Quail Room, it was nonetheless evidence of notice to Clark prior to arrival at his residence that Elder intended to limit the scope of his search. Clark was entitled to rely on Elder's stated limitation in choosing not to revoke his verbal consent prior to the search, and the jury could have believed that he so relied. This court has often said that credibility is always a question of fact for the jury to decide. *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997). In this case, the jury heard the conflicting stories of Clark and Elder regarding the scope of Clark's verbal consent. As reflected by its verdict, the jury accepted Clark's trial testimony as more credible and concluded that his verbal consent was limited in scope.

In support of its contention that Clark consented to the search, Wal-Mart also relies on a written consent-to-search form signed by Clark. In this case, the court instructed the jury that a person validly consents to an intrusion if, in the totality of the circumstances, the consent is given freely and without coercion. Though the validity of Clark's consent in this civil case does not involve a defendant's motion to suppress evidence seized in a criminal case, the standard for determining valid consent in the criminal context is helpful. As stated in the jury instruction, consent must be given freely and voluntarily to be valid. *Scott v. State*, 347 Ark. 767, 67 S.W.3d 567 (2002). It must be shown that there was no duress or coercion, actual or implied. *Id.* The voluntariness of consent must be judged in light of the totality of the circumstances. *Id.* In a civil case, the issue of whether consent was valid is a question of fact that must be decided by the trier of fact. Thus, we look to the evidence presented to the jury that could have been construed as affecting the validity of Clark's written consent.

The evidence shows that, at Wal-Mart's request, Detective Haskins and Detective Briggs arrived at Clark's residence at about the same time that Clark, Elder and Womack arrived. Detective Haskins testified that he relied on information from Elder indicating that Clark had stolen Wal-Mart property at his residence. Before the search began, Clark went inside his home to explain the circumstances to his wife who was recovering from surgery.

Clark then went back outside where he witnessed Elder copying down the license-plate numbers of all the cars on his property. At that point, Detective Haskins presented Clark with a written consent-to-search form. According to Clark, the detective told him that the form gave the police *and* Wal-Mart employees consent to search his property. Detective Haskins stated that Clark appeared to understand the written form and asked no questions. However, Clark indicated that he had never been asked to sign a consent-to-search form before, and he stated that Detective Haskins did not inform him of his right to withhold consent. Clark was consistent in his testimony that, at the time he signed the form, no one had mentioned searching for electronics or computers. Though the consent form was broadly worded, Clark still thought the search was limited to life jackets and fishing equipment, and he knew that he did not have "a truckload of . . . life jackets or fishing equipment."

Clark told the jury that he felt threatened at the time he signed the consent-to-search form. He felt like Wal-Mart was trying to "railroad" him. Clark testified that, just prior to signing the form, Elder informed him that Kitterman would soon be arrested. Elder left Clark with the impression that he would be fired if he did not consent to the search. Additionally, due to the police presence, Clark feared that he would be arrested.

Detective Haskins testified that the police are often called to participate in what is termed a "civil stand-by." In such instances, the police go with one party to "keep the peace" while that party recovers property from another party. Detective Haskins told the jury that, if there is any question as to the ownership of the property, the police do not remove it. Detective Haskins acknowledged that, while Mr. and Mrs. Clark only showed him one receipt, they both informed him that they had receipts for all the property Wal-Mart was removing. However, the police assisted Wal-Mart in removing property from Clark's residence because Elder informed Detective Haskins that the property belonged to Wal-Mart. The detective later admitted to the jury that the situation at Clark's residence was not a "civil stand-by."

Clark testified that he was not aware that he could call off the search at any time. He stated that it never occurred to him to ask Wal-Mart and the police to get off his property because, once he signed the consent form, he was under the impression that they could do whatever they pleased. The jury determined that Clark's written consent was not given freely and without coercion and, thus, was not valid consent. Considering the totality of the circumstances now before us, we conclude that there is substantial evidence to support the jury's decision.

Finally, Wal-Mart argues that, assuming there had been confusion about the extent of the search contemplated by Wal-Mart, it would have become clear to Clark during the search that Wal-Mart was looking for more than fishing equipment. Wal-Mart alleges that Clark did not object to the scope of the search, and contends that such refusal to object amounted to tacit consent. Wal-Mart focuses on the facts that Clark unlocked the doors to his shop to let investigators in, that Clark stated "take it if you want it" with regard to some property, and that Clark's wife told them not to forget the property in the attic. Wal-Mart cites this court to *Alexander v. Pathfinder, Inc.*, 189 F.3d 735 (8th Cir. 1999), in which the Eighth Circuit, applying Arkansas law, found that a woman failed to state a claim for intrusion based on Pathfinder's tape-recording of conversations between her and her son. The decision was based upon evidence that the woman saw Pathfinder's employees with tape-recorders and failed to protest. *Id.*

In the case now before us, however, there is evidence that Clark objected to the search by Wal-Mart. Initially, according to Clark, the investigators explained to him that they were going to take what they wanted and he could prove what was his later. Clark testified that he attempted to show receipts and sign out sheets from the Associates' Store, but that no one was interested in looking at receipts. The police report indicated that both Clark and his wife informed officers that they had receipts for all of the property. Clark also told officers that he repaired items for Wal-Mart in his shop. Both Elder and Detective Haskins admitted to knowing that Clark repaired merchandise for Wal-Mart. According to Clark, however, no one asked him to help identify any of the property. He testified that he objected to Wal-Mart taking

certain items and admitted that he was stronger on his explanation of some items than others. Some of the specific items that Clark protested were left behind, and some were taken by Wal-Mart.

As to his state of mind at the time, Clark testified: "I was pretty rattled"; "I felt like they were trying to railroad me"; "I said 'take it if you want it' because I was pretty well defeated"; "I had given up"; "I was heartsick." Clark stated that, at one point during the search, Womack started beating his hands and said he was going to report Clark to the IRS. Others present at the search, including Elder, Detective Haskins, and Ted Brauburger, corroborated Clark's testimony that he was very distraught and upset, "defeated," "real sad," and "crushed." Thus, we hold there is substantial evidence upon which the jury could have based its conclusion that Clark did not tacitly consent to the search by Wal-Mart.

B. Legitimate Expectation of Privacy

Wal-Mart's next contention is that it did not intrude upon any legitimate expectation of privacy where Clark consented to the search. The plaintiff in an invasion-of-privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy. *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d at 877 (quoting *Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994)). Wal-Mart asserts that there is no legitimate expectation of privacy in one's home where that person signed a consent form allowing a search. Clark counters that his consent to search was limited, as well as obtained through fraud and misrepresentation. As previously discussed, substantial evidence supports the jury's verdict in favor of Clark on the validity of his consent to Wal-Mart's intrusion. The jury could have reasonably concluded from the record that any consent Clark may have given was both limited and obtained through duress or coercion and, therefore, invalid. As Wal-Mart's argument is premised on the assumption that Clark validly consented to a search of his residence, the argument must fail.

C. *Deprivation of Due Process*

Finally, Wal-Mart asserts that affording Clark recovery on the intrusion cause of action would operate to deprive Wal-Mart of its constitutional right to due process. Clark replies that Wal-Mart's due process argument is not preserved because it was not raised in Wal-Mart's motions for directed verdict. Wal-Mart argues that the due process argument is preserved because the argument was included in its motion for judgment notwithstanding the verdict, new trial, and remittitur. In *Willson Safety Products v. Eschenbrenner,* 302 Ark. 228, 788 S.W.2d 729 (1990), this court said "the motion for judgment N.O.V. is permitted by the rule for the express purpose of not only again raising the question of sufficiency of the evidence but also all other questions of law *properly preserved during trial. . . .*" *Id.* at 232, 788 S.W.2d at 732 (emphasis added). This language discounts Wal-Mart's argument for preservation, as Wal-Mart did not raise its due process challenge during trial. In addition, Rule 50 of the Arkansas Rules of Civil Procedure states that a party who has moved for directed verdict may, not later than ten days after entry of judgment, move to have the verdict set aside and to have judgment entered *in accordance with his motion for directed verdict.* Ark. R. Civ. P. 50(b)(2) (2001) (emphasis added). The language of this rule indicates that a motion for judgment notwithstanding the verdict can be made only upon grounds that were raised during the trial.

In its reply brief, Wal-Mart asserts that a due process challenge is precisely the type of argument that can only be raised in a motion for judgment notwithstanding the verdict. The argument is that the imposition of a civil penalty on a party, without notice, is a due process violation that occurs only when the jury decides to award punitive damages. Wal-Mart's argument is without merit. The trial in this case was trifurcated into separate phases on liability, compensatory damages, and punitive damages at Wal-Mart's request. Thus, Wal-Mart was on notice during the trial that a civil penalty might be imposed against it and had ample opportunity to raise the issue. This court has long held that an issue, to be considered on appeal, must be properly preserved at trial. *Willson Safety Products v. Eschenbrenner,* 302 Ark. 228, 788 S.W.2d 729. As Wal-Mart did not raise its due process argument

during trial, we hold that Wal-Mart's due process challenge is not preserved for appeal.

III. Republication Defamation Claim

On appeal, Wal-Mart claims that Clark's action for defamation was premised on republication of defamatory information in the newspaper articles. Wal-Mart then asserts that Clark should have proffered a jury instruction on republication because the basis of Clark's claim for damages was the republication of allegedly defamatory facts in the newspaper articles. Wal-Mart contends that Clark cannot now establish a republication claim because there is no evidence that Wal-Mart provided any information to the media in this case. Clark, on the other hand, asserts that Wal-Mart should have proffered an instruction on republication in its attempt to limit his right to recover on defamation because of the republication.

Courts are divided as to whether one accused of defamation is liable for the republication of another where it is shown that the republication was foreseeable as a natural and probable consequence of the original publication. *Luster v. Retail Credit* Co., 575 F.2d 609 (8th Cir. 1978). *See* M.C. Dransfield, Annotation, *Liability of Publisher of Defamatory Statement for its Repetition or Republication By Others*, 96 A.L.R.2d 373 (1964). In *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 345 S.W.2d 34 (1961), *overruled on other grounds by United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998), this court specifically refused to decide whether the law of Arkansas permitted recovery for unauthorized republication. In that case, the trial court instructed the jury not to consider any unauthorized republication in determining special compensatory damages. *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 345 S.W.2d 34. On appeal, we commented: "We see no need to discuss the issue of republication, i.e., when one may be liable for unauthorized republication of defamatory statements, since the instruction was favorable to the appellants, and appellee has made no complaint. . . ." *Id.* at 178, 345 S.W.2d at 40. The United States Court of Appeals for the Eighth Circuit, in *Luster v. Retail Credit Co.*, 575 F.2d 609, upheld a federal district court's ruling that this court, if directly confronted with the issue, would

hold that a defendant could be liable for unauthorized republications if such republications were reasonably foreseeable. Once again, that issue is not properly before us.

[redacted] In the instant case, Wal-Mart was charged with defamation, and the jury was not instructed on republication. On appeal, Wal-Mart claims that it should not have been found liable for damages caused by any republication of defamatory information by the newspapers. However, Wal-Mart did not make the proper objections at trial to preserve this argument on appeal. In *Luster v. Retail Credit Co.*, regarding the defendant's liability for republications of a report it compiled, the Eighth Circuit noted:

> [D]efendant objected to the admission of testimony concerning unauthorized republications; to the admission of testimony by plaintiff concerning damages which were the result of unauthorized republications; and the giving of a jury instruction which allowed the jury to find defendant liable for unauthorized republications if they found that such republications were reasonably foreseeable, while refusing defendant's requested jury instruction which stated that defendant could not be liable for unauthorized republications.

575 F.2d at 613. Here, Wal-Mart did not object to the admission of the newspaper articles in question or to the admission of testimony from witnesses concerning damages that were the result of the newspaper articles. In addition, Wal-Mart did not proffer a jury instruction that stated Wal-Mart could not be liable for the unauthorized republications by the newspapers. Any assertion by Wal-Mart that republication was a potential issue in this case made it incumbent upon Wal-Mart to proffer a jury instruction in support of its position. The failure to proffer or abstract a proposed instruction precludes this court from considering the argument on appeal. *United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998). Thus, we hold that any argument by Wal-Mart disputing liability for the newspapers' republication is not preserved for appeal.

IV. Defamation Claim

Wal-Mart contends there is no evidence that any Wal-Mart employee published defamatory information about Clark, pointing out that no Wal-Mart employee was quoted in either *The Morning News* or the *Benton County Daily Record*. Wal-Mart argues that there is evidence to support the conclusion that the newspapers obtained their information from police communications rather than from Wal-Mart employees. Clark, on the other hand, argues there is substantial evidence, both direct and circumstantial, that Wal-Mart published defamatory information about him.

The jury instruction on defamation read, in part, as follows:

> David Clark claims damages from Wal-Mart for defamation and has the burden of proving each of five essential propositions defining defamation.
>
> First, that he has sustained damages.
>
> Second, that Wal-Mart published a false statement of fact concerning David Clark.
>
> Third, that the statement of fact was defamatory.
>
> Fourth, that Wal-Mart acted with negligence in failing to determine the truth of the statement prior to its publication or with knowledge that the statement was false.
>
> And fifth, that the publication of the statement was a proximate cause of David Clark's damages.

The trial court further instructed the jury that a defamatory statement must be false and must actually cause harm to a person's reputation. The court informed the jury that "published" refers to the act of intentionally communicating a statement to someone other than David Clark or under circumstances in which it was foreseeable that a statement would be received by someone other than David Clark.

The evidence presented at trial reflects five separate publications upon which the jury could have found Wal-Mart liable for defamation. Clark asserts that Elder first published defamatory information about him when Elder untruthfully communicated to Detective Haskins that Clark admitted having property at his residence that belonged to Wal-Mart. The case synopsis prepared by Elder and Womack details Elder's view of the events that took

place on August 17, and, therefore, would be circumstantial evidence of what Elder told Detective Haskins on the telephone when he requested that Detective Haskins meet him at Clark's residence. The entry in Elder's case synopsis for August 17 reads, in relevant part, as follows:

> On this date associate David Clark was interviewed based on information obtained through a confidential Wal-Mart associate as well as information gathered through the confiscation of Wal-Mart merchandise at the residences of Bob Kitterman and Wesley Beights. During the course of the interview Clark admitted that he had received stolen Wal-Mart merchandise from Bob Kitterman and that such merchandise had been delivered to his home at 402 E. Spruce St. in Rogers, Arkansas. Clark also admitted taking Wal-Mart merchandise to his home under the guise of mechanical repair without either doing the repair nor [*sic*] returning the merchandise. Clark also admitted having his own personal computer and electronics repair business established in his home.

The statements in the report demonstrate Elder's version of the story that Clark admitted to receiving stolen Wal-Mart merchandise and admitted to taking Wal-Mart property to his home without repairing the merchandise or returning it to Wal-Mart. This circumstantial evidence of what Elder told Detective Haskins is corroborated by Detective Haskins's testimony that he believed Elder was referring to stolen property. At trial, Detective Haskins stated that he had nothing other than statements from Elder and Wal-Mart that Clark had stolen property from Wal-Mart. Moreover, as a result of Elder's statements to Detective Haskins, the police were dispatched to Clark's residence with the purpose of confiscating stolen property.

The publications concerning Clark that were disseminated over police radio form a second group of publications upon which the jury could have found Wal-Mart liable for the tort of defamation. According to Clark, Elder knew or should have known that his untruthful statements would be disseminated on police radio, where they would be picked up by the press and the public. In fact, Elder stated in his deposition: "I think if the police department does anything, that that's kind of public information for

people to gather." In addition, testimony from a reporter for *The Morning News* confirmed that police radio communications are regularly monitored on a scanner in the newsroom. Gail Mann, Clark's neighbor, testified that she owned a police scanner and that, on August 17, she heard a communication on her scanner dispatching a car to Clark's residence for "confiscation of stolen Wal-Mart property." Further, Detective Haskins testified that the press may be alerted when five detectives are dispatched to one residence as in the instant case.

Clark also points to circumstantial evidence to show that Wal-Mart published defamatory information to the media. Circumstantial evidence that a defamatory statement was overheard can be sufficient evidence of publication to support a verdict in favor of a defamation claim. *Wal-Mart Stores, Inc. v. Dolph*, 308 Ark. 439, 825 S.W.2d 810 (1992). In the *Dolph* case, Carolyn Dolph was accused of shoplifting in the presence of customers entering and leaving a Wal-Mart store. Although there was no testimony from individuals who actually heard the accusations, this court held that the attendant circumstances provided sufficient evidence that defamatory statements were made in the presence and hearing of other people. *Id.*

Likewise, in this case, there is circumstantial evidence that Wal-Mart employees made defamatory publications to third parties. The third and fourth instances upon which the jury could have based a finding of defamation involve Kenneth Womack. When asked if he had spoken with any member of the media on August 17, Womack responded: "Not that I am aware of. I hope I didn't. . . . It's a possibility that I could have." Later, on redirect examination, Womack clarified that he might have commented to someone he did not know about a piece of electronic merchandise, "about what type of computer is this or something like that," but not about the details of the investigation. Furthermore, Clark testified that, while on his property, he heard Womack mention a theft ring. Evidence was presented at trial showing that some neighbors were standing near Clark's residence and watching the search. As was the case in *Dolph*, due to attendant circumstances, the jury could have believed that defamatory statements were

made by Wal-Mart in the presence and hearing of either neighbors or media personnel who were present at the scene.

The fifth instance of defamation is the information contained in the two newspaper articles.[2] The newspaper article published on August 18 reported that the estimated value of the property seized from Clark's residence exceeded $50,000. That figure coincided with Wal-Mart's estimate as published in a case synopsis dated August 25, 1998.[3] According to the synopsis, the value assessment was made by police agencies and Wal-Mart Loss Prevention employees. The evidence shows that the items taken from Clark's residence were placed in a U-Haul truck, taken to Wal-Mart property, and transferred to a trailer containing other items allegedly stolen from Wal-Mart. This information about the property is circumstantial evidence that any estimate of the collective value of the items was made on August 17 while the items were being inventoried on Clark's lawn. In his deposition testimony, Elder acknowledged that the estimate in the newspaper placed the value of the property at $40,000 to $50,000, and went on to comment: "Originally. That was an estimate. Like I said, we took street value." Sharon Curry, Elder's supervisor, presented conflicting testimony that she thought Wal-Mart obtained its assessment of the property's value from Stacy Walton a few days after the incident. The police inventory of the property contains no assessment of the value of any of the items seized. As previously stated by this court, it is the province of the jury to decide the credibility of witnesses. *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997). Viewing the evidence in the light most favorable to Clark, we hold that there is substantial evidence from which the jury could have concluded that Wal-Mart published false and defamatory statements about Clark by intentional communications or under circumstances in which it was foreseeable

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[2] As previously discussed, Wal-Mart has not preserved for our review any challenge to liability for defamation based upon the unauthorized republications of others.

[3] Wal-Mart contends that, even if the value of property was communicated by Wal-Mart, the value is not defamatory. However, the fact that an estimate of the value of the items was made would easily lead to the conclusion that Wal-Mart assumed the property was stolen.

that the statements would be received by someone other than Clark.

Wal-Mart's next argument is that, even if the jury did find that Wal-Mart made defamatory statements about Clark that were communicated to third parties, Wal-Mart cannot be held liable for defamation because the information fell within a qualified privilege. Wal-Mart contends that Clark failed to present substantial evidence to defeat its qualified privilege. This court has 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.

Minor v. Failla, 329 Ark. 274, 283, 946 S.W.2d 954, 958-59 (1997), *overruled on other grounds by United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998) (quoting *Navorro-Monzo v. Hughes*, 297 Ark. 444, 451, 763 S.W.2d 635, 638 (1989); *Bohlinger v. Germania Life Ins. Co.*, 100 Ark. 477, 482-83, 140 S.W. 257, 259 (1911)). 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. *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954. The qualified privilege is lost if it is abused by excessive publication; if the statement is made with malice; or if the statement is made with a lack of grounds for belief in its truthfulness. *Id.* 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. *Id.*

Of the five instances upon which the jury could have based its conclusion that Wal-Mart was liable for defamation, the defense of qualified privilege only applies to Elder's case synopsis and the evidence of the statements made by Elder to Detective Haskins. Wal-Mart points out that the case synopsis prepared by Elder and

Womack was only provided to law enforcement officers, the prosecuting attorney, and Wal-Mart supervisory personnel. However, Clark argues that Wal-Mart exceeded the scope of any qualified privilege because Elder published statements about him with a lack of grounds for belief in their truthfulness. As previously discussed, the case synopsis is circumstantial evidence of the statements that Elder made to Detective Haskins on the morning of August 17. Clark pointed to three specific statements in the case synopsis that he contended were false. The first two statements challenged by Elder are: (1) "Clark admitted that he had received stolen Wal-Mart merchandise from Bob Kitterman and that such merchandise had been delivered to his home at 402 E. Spruce St. in Rogers, Arkansas"; and (2) "Clark also admitted taking Wal-Mart merchandise to his home under the guise of mechanical repair without either doing the repair nor [*sic*] returning the merchandise." The third statement in the report that Clark contended was false was a statement that, during the search, Clark identified merchandise belonging to Wal-Mart in his storage shed, house, attic, and personal vehicle.

According to Wal-Mart, Elder believed his statements to be true based on his impressions of his interview with Clark, the observations he made during the search of Clark's home, and the information he had from two confidential informants. Wal-Mart further asserts that when Elder made his report a week after the search of Clark's residence, he still believed that Clark had stolen Wal-Mart property. For these reasons, Wal-Mart maintains that the statements contained in the case synopsis are protected by qualified privilege. There is no cause of action for negligently reporting activity thought to be criminal in nature. *DeHart v. Wal-Mart Stores, Inc.*, 328 Ark. 579, 946 S.W.2d 647 (1997). The critical consideration is Elder's belief in the truthfulness of the statements contained in the synopsis, which statements were also circumstantial evidence of what Elder communicated to Detective Haskins. *See, e.g., Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991).

The three statements in the case synopsis that Clark alleges to be fabrications cannot be justified through Elder's negligence or his alleged belief in their truthfulness. This is so

because, in the first two statements, Elder states that, during the course of the interview in the Quail Room, "Clark admitted" to receiving stolen Wal-Mart merchandise and taking Wal-Mart merchandise home without authorization. Elder's personal observations during the search of Clark's house and the information he received from confidential informants have no bearing on what Clark actually admitted to Elder. According to Clark, he never made such admissions to Elder. The third statement by Elder indicates that, during the search, Clark pointed out merchandise belonging to Wal-Mart. Clark testified, however, that he did not assist in the identification of merchandise at his residence. His testimony was corroborated by Detective Haskins who verified that "Wal-Mart had a large part in determining what items were removed from Mr. Clark's" home. Again, the credibility of witnesses is an issue for the jury and not this court. *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576. The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). Here, the jury could have concluded that Clark did not admit receiving stolen property or taking Wal-Mart property home without authorization and that Clark did not identify merchandise belonging to Wal-Mart at his residence. Under this view of the evidence, Elder would not have had any grounds to believe that his statements in the case synopsis were truthful. Statements are not protected by a qualified privilege where the author of the statements lacks a belief in their truthfulness. Viewing the evidence in the light most favorable to Clark, we hold that substantial evidence supports the jury's conclusion that Wal-Mart exceeded the scope of its qualified privilege.

For its final argument on the defamation claim, Wal-Mart contests proximate causation of damages. As for any damages flowing from the newspaper articles, Wal-Mart assumes there can be no liability for such damages because there is no evidence that Wal-Mart provided any information to the newspapers. Wal-Mart thus concludes that it can only be held liable for information published in Elder's case synopsis. Wal-Mart argues that, because there was no testimony regarding reputational damage resulting

from the case synopsis, there is insufficient evidence to support the jury's finding that Clark's damages were proximately caused by Wal-Mart. As previously discussed, Wal-Mart has not preserved any challenge to its liability for defamation based upon the republication of information by the newspapers. Thus, we consider proximate causation of damages with respect to each of five instances of defamation.

In order for liability to attach, there must be evidence that demonstrates a causal connection between defamatory statements made by Wal-Mart and the injury to Clark's reputation. *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999). A plaintiff must establish actual damage to his reputation, but the showing of harm may be slight. *Id.* A plaintiff must prove that the defamatory statements have been communicated to others and that the statements have affected those relations detrimentally. *Id.*

At trial, Clark presented testimony from two individuals who commented on reputational damage suffered by Clark as a result of the information in the newspaper articles. Hayes Buenning testified that other people he knew changed their view of Clark for the worse after the newspaper articles came out. Doug Laman indicated that the newspaper articles made it look like Clark had stolen all that merchandise and testified that the articles raised concerns about Clark and caused him to change the way he viewed Clark.

Causation is a question of fact for the jury to decide. *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576. In this case, the five instances upon which the jury could have based its finding of defamation could each have been seen by the jury as the proximate cause of Clark's reputational damages. The case synopsis is circumstantial evidence of the statements made by Elder to Detective Haskins regarding Clark. Those statements caused defamatory information about Clark to be disseminated over police radio, where such information could be heard by third parties. A reporter for *The Morning News* testified that reporters listen to police radio communications in the newsroom. Additionally, Womack testified that he may have talked to someone he did not know at Clark's residence, and Clark testified that he overheard

Womack mention a "theft ring" while on Clark's property. Either of those two statements by Womack could have been communicated to any media personnel who might have been present. There is also circumstantial evidence that someone from Wal-Mart may have either directly or indirectly communicated to the media the value of the items seized from Clark's residence. Thus, we hold that there is substantial evidence to support the jury's finding that the damages suffered by Clark resulting from defamatory statements were proximately caused by Wal-Mart's publication of defamatory statements.

V. False-Light Invasion-of-Privacy Claim

For its final point on appeal, Wal-Mart contends that the trial court erred in submitting the false-light invasion-of-privacy claim to the jury because Clark failed to demonstrate the elements of false light by clear and convincing evidence.[4] The trial court instructed the jury that, to prevail on his claim of false-light invasion of privacy, Clark was required to prove six essential propositions:

> First, that he has sustained damages.
>
> Second, that Wal-Mart gave publicity to a matter concerning David Clark that placed him before the public in a false light.
>
> Third, that the false light in which David Clark was placed would be highly offensive to a reasonable person.
>
> Fourth, that Wal-Mart had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which David Clark would be placed.
>
> Fifth, that Wal-Mart had serious doubts as to the truth of the matter publicized.
>
> And sixth, that David Clark's damages were proximately caused by Wal-Mart's giving of such publicity.
>
> . . . .
>
> David Clark must prove his false light invasion of privacy claim against Wal-Mart by clear and convincing evidence.

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[4] A cause of action for both false-light invasion of privacy and for defamation can be joined in the same action; however, there can be but one recovery for any particular publication. *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979).

This court has said that, where the plaintiff is not a public figure and the publication is of matters of general or public concern, the plaintiff must prove actual malice by clear and convincing evidence. *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991) (citing *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979)). Statements made with actual malice are those made with knowledge that the statements were false or with reckless disregard of whether or not they were false. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The constitutional definition of malice is concerned with showing the author's subjective disregard for the accuracy of his statements. *Id.*

The jury instruction given in this case conforms to our precedent in *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), as well as the *Restatement (Second) of Torts* § 652E (1977). In *Dodrill*, this court followed the rule set forth in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), where the Supreme Court held that First Amendment protection precluded recovery upon a false-light cause of action by a private individual against a publishing company in the absence of proof that the defendant published the information with knowledge of its falsity or in reckless disregard of the truth. The commentary to the Restatement notes the effect of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), a later case that restricted the requirement of showing actual malice to public officials and public figures. *Restatement (Second) of Torts* § 652E, Clause (b) to commentary (1977). Under *Gertz*, other plaintiffs are required only to show that the defendant was, at least, negligent with regard to truth or falsity. *Gertz v. Robert Welch, Inc., supra.* As noted in the Restatement commentary, the effect of the *Gertz* decision upon the Court's holding in *Time, Inc. v. Hill* has been left in a state of uncertainty. *Restatement (Second) of Torts* § 652E, Clause (b) to commentary (1977). For this reason, the American Law Institute added a caveat to section 652E leaving open the question of whether there may be liability based upon a showing of negligence as to truth or falsity. *Restatement (Second) of Torts* § 652E, Caveat (1977). However, because neither party challenged the jury instruction in the case now before us, the actual malice standard is applicable.

In regard to the false-light claim, Wal-Mart first asserts that Clark did not prove by clear and convincing evidence that Wal-Mart created publicity that placed Clark in a false light. The evidence reflects three separate episodes upon which the jury could have based liability for false light: (1) the case synopsis, (2) the newspaper articles, and (3) the publicity created on Clark's lawn. As to the case synopsis, Wal-Mart argues that there is no evidence the synopsis was ever communicated beyond the limited audience of Wal-Mart management, law enforcement, and prosecutors. Wal-Mart thus concludes that the case synopsis could not have been the basis for a false-light claim. This assumption and conclusion is not supported by the evidence when it is viewed in a light most favorable to Clark. The case synopsis was published to police, Wal-Mart supervisory personnel, and the prosecuting attorney, and the synopsis branded Clark as an "admitted thief." Thus, Wal-Mart created publicity placing Clark in a false light. In addition, the case synopsis is circumstantial evidence of what Elder told Detective Haskins, leading Detective Haskins to believe there was stolen property at Clark's residence. Elder's indication to Detective Haskins that Clark admitted to having stolen property at his residence created an additional type of publicity that placed Clark in a false light. It led Detectives Haskins and Briggs to call for additional police detectives to meet them at Clark's residence. Furthermore, this communication created publicity over the police radio indicating there was "stolen property" at Clark's residence. At least one of Clark's neighbors testified to hearing the police radio communication.

With regard to the newspaper articles, Wal-Mart again argues there is not clear and convincing evidence to support the conclusion that Wal-Mart published information to the newspapers placing Clark in a false light. As discussed earlier in connection with the defamation claim, the record reveals circumstantial evidence of at least five instances involving statements by Wal-Mart that placed Clark in the false light of being an "admitted thief."

Finally, Clark asserts that the display of items of property on his lawn during the inventory and seizure process created publicity placing him in a false light. The evidence presented at trial indicates that anywhere from ten to fifteen Wal-Mart employees were

present at Clark's residence and were removing electronic items from Clark's home and shop and placing them on his lawn to be photographed and inventoried. Five police detectives and one police officer from the Rogers Police Department were at the scene. Detective Haskins told the jury that, "it is usually a bigger scene if a detective goes out because we are only called out for major crimes or major happenings." In addition to the fifteen to twenty people occupying Clark's yard and the over 400 items of property placed on Clark's lawn, Wal-Mart rented a U-Haul truck in which to load the items. The truck was parked on Clark's lawn between his house and shop building.

The nature of the scene itself could have potentially alerted newspaper reporters, leading to the published article indicating that Clark was a thief. There is also testimony that several individuals watched as the police and Wal-Mart employees carried items out onto Clark's lawn. In particular, a UPS delivery man testified that he saw several policemen at Clark's house in addition to "the Loss Prevention truck from Wal-Mart . . . and . . . [Loss Prevention people and police] pulling stuff out of a garage and laying it out on the driveway there." This caused him to think that Clark had been arrested for drugs. Thus, we hold that the record in this case reveals evidence of a clear and convincing nature upon which the jury could have based its verdict that Wal-Mart created publicity that placed Clark in a false light.

Wal-Mart next contends there is no evidence of its knowledge or reckless disregard with respect to the falsity of the publicized matter. Wal-Mart maintains that the record affords no evidentiary basis for the conclusion that it acted with reckless disregard as to the falsity of the publicized matter. The arguments by Wal-Mart are based on Elder's testimony that he believed the statements in the case synopsis to be true and the claim that Elder had a legitimate basis for the conclusions in the synopsis. In response, Clark refutes Wal-Mart's arguments by stating that Elder must have at least entertained serious doubts about the truth of the synopsis because, according to Clark, Elder's statements about Clark's alleged admissions were outright fabrications. In addition, Clark contends that the synopsis must have been written with at least reckless disregard as to its truth due to the fact that Clark

informed Elder that he repaired merchandise and had permission to have the merchandise at his home. According to Clark, Elder should have taken steps to verify whether Clark had permission to possess the items before continuing with the seizure. Clark points to the testimony of Ted Brauburger, Clarence Leis, Brett Stine, Hayes Buenning, and others who testified it was common knowledge that Clark repaired merchandise for Wal-Mart.

A failure to investigate alone does not establish the bad faith inherent in malice. *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97. However, once Clark informed Elder that he had permission to possess the property, the jury could have believed that Elder was reckless and acted with actual malice in refusing to inquire further before continuing the seizure. The jury could have also inferred that, based on what Elder knew, he must have had serious doubts as to the truth of the statements he communicated to Detective Haskins and included in the case synopsis. These same conclusions would also apply to the public display created around Clark's residence. The evidence, when viewed in a light most favorable to Clark, shows that the display was set in motion due to Elder's reckless disregard as to the falsity of his statements that Clark admitted to stealing items from Wal-Mart. Accordingly, we hold that the record reveals evidence of a clear and convincing nature upon which the jury could have based its verdict that Wal-Mart had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which Clark would be placed.

Finally, Wal-Mart once again asserts the defense of qualified privilege. As discussed above, a communication may be held to be qualifiedly privileged when it is made in good faith and in reference to a subject-matter in which the communicator has an interest or duty and to a person having a corresponding interest or duty. *See Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997), *overruled on other grounds by United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998). The qualified privilege is lost if abused by excessive publication, where a statement is made with malice, or where a statement is made with a lack of grounds for belief in its truthfulness. *Id.* Again, the question of whether a

particular statement falls outside the scope of the qualified privilege is a question of fact for the jury. *Id.*

Of the publications upon which the jury could have based its finding of false light, the defense of qualified privilege applies only to Elder's publicity to Detective Haskins and the publicity to Wal-Mart supervisory personnel through the case synopsis. As previously discussed in relation to the defamation claim, Clark contests three specific statements made by Elder. Wal-Mart claims that the statements are privileged because they were only made to police, the prosecuting attorney, and Wal-Mart supervisory personnel. However, Clark asserts that the statements exceeded the scope of any qualified privilege because they are fabrications and, therefore, were published without any grounds for belief in their truthfulness. As with Wal-Mart's claim of qualified privilege in regard to the defamation claim, we hold that the jury could have concluded that Elder would not have had any grounds to believe that the statements in question were truthful. Thus, we are satisfied that the record does not lack clear and convincing evidence upon which the jury could have based its verdict that Wal-Mart was not entitled to the defense of qualified privilege.

With regard to damages on the false-light cause of action, Wal-Mart includes only a footnote in its argument on defamation suggesting that its argument on damages relating to defamation applies equally to the false-light invasion-of-privacy claim. Our earlier discussion on this point also applies to this summary argument.

In the damages phase of this case, the court instructed the jury that Clark was not entitled to recover damages for more than one cause of action based upon a single set of facts or events, even though more than one cause of action might be applicable to the facts or events. Accordingly, this court's affirmance of the jury's verdict in Clark's favor on at least one cause of action means that the jury's award of compensatory and punitive damages totalling $1,651,000 must stand.

Affirmed.

CORBIN, J., not participating.

THORNTON, J., dissenting.

RAY THORNTON, Justice, dissenting. In its analysis of the intrusion invasion-of-privacy claim, the majority has concluded that there was substantial evidence to support the jury's verdict that Clark established a legitimate expectation of privacy in his property because the scope of the verbal consent Clark gave to Elder was limited in scope to a search for missing life jackets and fishing poles and that his written consent was not given freely and without coercion. I cannot agree with the majority's conclusion regarding Clark's verbal and written consent. For this reason, I respectfully dissent.

As the majority acknowledges, our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). We will reverse only if there is no substantial evidence to support the jury's verdict and the moving party is entitled to judgment as a matter of law. *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000); *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991). Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or another. *George, supra.* It is not the appellate court's place to try issues of fact; rather, this court simply reviews the record for substantial evidence to support the jury's verdict. *Id.* In reviewing the sufficiency of the evidence as being substantial on appellate review, we need only consider the testimony of the appellee and the evidence that is most favorable to the appellee. *Wal-Mart Stores, Inc. v. Dolph*, 308 Ark. 439, 825 S.W.2d 810 (1992).

In addition, the majority correctly acknowledges that intrusion has been recognized in Arkansas as one of the four actionable forms of invasion of privacy. *Milam v. Bank of Cabot*, 327 Ark. 256, 937 S.W.2d 653 (1997). The majority also notes that the Eighth Circuit has opined that while Arkansas courts have seldom adjudicated intrusion claims, we would likely follow the *Restatement (Second) of Tort*'s analysis of the tort of intrusion, whereby a plaintiff must establish that there has been (1) an intrusion; (2) that

is highly offensive; (3) into some matter in which a person has a legitimate expectation of privacy. *See Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871 (8th Cir. 2000) (citing *Restatement (Second) of Torts* § 652B (1977)).

In the present case, I am unable to agree that there was substantial evidence that Clark, who gave both verbal and written consent to a search of his property, had a legitimate expectation of privacy of this case. Clark testified that the verbal consent he gave Elder when Elder interviewed him in the Quail Room was limited in scope to a search of his property for missing life jackets and fishing poles. However, Clark's own handwritten notes, which were written the day after the search, indicate that his verbal consent was not limited to a search for missing life jackets and fishing poles, but, rather, was broadly given. When asked about his handwritten notes, Clark conceded that he was mistaken in his testimony and adopted the recitation of the facts regarding his verbal consent as he had written in his handwritten notes. Clark testified on recross examination:

> The discussion about the life jackets and the fishing equipment didn't happen in the Quail Room. I guess it was outside the Quail Room. I was still under the impression that it was fishing equipment and life jackets he was looking for even though the conversation happened *after I told him he could search my barn.* I don't remember it that way. *I possibly had it closer to right when I wrote the statement.* I don't know.

(Emphasis added.) Clark also testified on recross examination:

> I remember you asked me this morning if I [was] certain about the fishing equipment and life jackets in the Quail Room and I said I was. *I was mistaken about that.*

(Emphasis added.)

The majority concludes that this conflict between Clark's initial testimony and his corrected testimony after reviewing his own prior handwritten notes was an issue for the jury to decide. However, what the majority fails to recognize is that Clark repudiated his own prior statement when he adopted as true his handwritten notes, which reflected that he consented to a general search when first asked for consent. Only two people were in the

Quail Room at the time that Mr. Elder asked for permission to search and Mr. Clark gave his consent. That oral consent was reaffirmed by a written consent to a general search, and Mr. Clark certainly understood that the search was general. On unlocking his shop door, he pointed to an air compressor and said that it belonged to Wal-Mart.

With reference to the initial oral request, it is clear that Mr. Elder's testimony was an unequivocal statement that a general consent was given. However, the majority finds that there was a credibility question as to which of two statements by Mr. Clark the jury would believe: (1) his first testimony that his consent in the Quail Room was limited to a search for fishing equipment, or (2) his repudiation of that testimony after being confronted with his own contemporaneous notes. When resolving a discrepancy in the testimony of a witness, the general rule is that a credibility question is presented to the jury. *See Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997). However, this is not the rule when a witness is also a party to the action, and his testimony amounts to a judicial admission. A judicial admission is conclusive and bars the party himself from disputing it. *See* 9 John H. Wigmore, *Evidence in Trials at Common Law* § 2594a (Rev. ed. 1981). Wigmore refers to an Arkansas case on this point, *Missouri Pac. R.R. Co. v. Eubanks*, 212 Ark. 652, 207 S.W.2d 610 (1948), *rev'd on other grounds sub nom. Eubanks v. Thompson*, 334 U.S. 854 (1948), where we held that plaintiff's testimony that warning signals were given by the train was conclusive on that point, and that the testimony of other witnesses that they heard no warning signals did not raise a credibility issue for determination by the jury. *See* Wigmore, *supra* n. 1, at 834 (citing *Eubanks*, 212 Ark. 652).

In the case before us, the trial court apparently recognized this principle, but failed to go to the record to resolve the question, as is reflected in the following colloquy that occurred between the trial court and Ranae Bartlett and George Rhoads, the attorneys for Wal-Mart:

Ms. BARTLETT:

> The cornerstone of the tort of intrusion is legitimate expectation of privacy. The key to Wal-Mart's defense is the consent.

We have three places where the consent occurred. Consent occurred at the Home Office at the initial interview when he said he would go ahead and show them his property. Consent occurred when they arrived at the property and the police came with a broadly written, very simply worded written consent form that he signed with no limitations. And then consent occurred throughout the process. His tacit consent, his failure to object, his failure to withdraw the consent. In light of the consent to search, there can be no tort of intrusion.

The court has expressed concern about Mr. Clark's allegation that the only reason he consented was because he thought that they were looking for fishing equipment. First, Mr. Clark has two different versions of this story. The first version was that Mr. Elder told him at the beginning that he was looking for fishing equipment. The second version from Mr. Clark is that he was at the Home Office and agrees to the search of his property and as they are going out to the car, that's when Elder refers to fishing.

THE COURT:

That was in Mr. Clark's handwritten statement that was admitted. But that doesn't make it substantive evidence. It's just impeachable.

MR. RHOADS:

Well I think he changed his story on the stand to coincide with the written statement.

THE COURT:

I thought he just simply said he couldn't remember, that he didn't agree. I think it is fairly critical, and I am willing to review the record. The defense used it to demonstrate that Mr. Clark was telling two different stories. The reason I think that is critical is because I don't recall him conceding that it was all outside when the fishing stuff came up. The point I am making is there was something admitted that contradicted his live testimony to the jury but it was up to the jury to decide whether that impeached his credibility.

MR. RHOADS:

My recollection of the trial is that he did change his story and adopt the written version. That's my recollection of what happened.

THE COURT:

> *If Mr. Rhoads is right that he then, when confronted with this written statement, he changed his testimony to the jury, that's one thing. But otherwise, it looks like a credibility issue and the jury arguably accepted his live testimony versus what he wrote.*

(Emphasis added.)

The trial court apparently recognized that there would be no credibility issue for the jury if the record showed that Mr. Clark adopted his contemporaneous written notes that the consent given in the Quail Room was a general consent. The trial court stated that he was willing to review the record on this point. However, he did not do so, but relied on his memory to the effect that Mr. Clark did not withdraw his testimony that the search agreed upon was limited to fishing equipment.

The record reflects otherwise. Mr. Clark admits that his contemporaneous notes are correct and states that he was mistaken in testifying that the search agreed to in the Quail Room was a limited search. No question of credibility remains when the party plaintiff makes a judicial admission of a point that is vital to the determination of whether a valid general search was agreed upon.

Because the oral consent to a general search was given, the next question is whether the written consent to a general search modified or limited the oral consent. Mr. Clark testified that he felt threatened and believed that Wal-Mart was trying to "railroad" him. However, the evidence overwhelmingly establishes that Clark's consent was knowing and voluntary. First, Clark signed the form, which specifically authorized a search of the entire premises by Rogers police and Wal-Mart Loss Prevention Officers. The written consent authorized the officers to take from the premises any property that they deemed necessary, and Clark never indicated that the search should be limited in any way. Second, Clark testified on direct examination that he did not tell the police or loss-prevention officers to leave his property because he "figured they could do whatever they wanted to." Third, Clark testified that he unlocked the doors to his shop. Fourth, when asked about merchandise, Clark testified that he said, "take it if you want it." Fifth, Mrs. Clark testified that she served beverages

to people on that hot day during the search. Finally, at the conclusion of the search, Mrs. Clark testified that she indicated to the police and loss-prevention officers that there were also some things in the attic and suggested that they not forget those items.

I recognize that the jury's assessment of damages in this case is a reflection of the factual circumstances of this case, which also involve the defamation that followed after Wal-Mart's actions, but I cannot agree with the treatment of the intrusion invasion of privacy claim. Because I cannot agree with the majority's conclusion that there was substantial evidence that Clark had a legitimate expectation of privacy after he had given verbal and written consent to search his property, I respectfully dissent.

Timothy Wayne KEMP *v.* STATE of Arkansas

CR 00-482 74 S.W.3d 224

Supreme Court of Arkansas
Opinion delivered May 16, 2002

[redacted]

Sam T. Heuer, for appellant.

Mark Pryor, Att'y Gen., by: *Michale C. Angel*, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. This appeal arises from a trial court's denial of the Rule 37 petition. Appellant, Timothy Kemp, was arrested and charged with four counts of capital murder. He was convicted and sentenced to death by lethal injection on each count. The factual background surrounding appellant's conviction was outlined in *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996)(*Kemp I*).

In *Kemp I*, we affirmed the conviction and sentence pertaining to one victim, Richard Falls, and affirmed the convictions only as to the remaining three counts. We reversed the death sentences as to the three remaining counts and remanded for resentencing, as there was insufficient evidence to support the trial

court's instruction to the jury with respect to the statutory aggravating circumstance that the murders were committed for the purpose of avoiding arrest. *Id.*

Following resentencing, the trial court again imposed the death sentence as to each of the three counts. Appellant then appealed to this court. *See Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998), *cert.* denied 526 U.S. 1073 (1999) ("*Kemp II*"). On appeal, he challenged the admissibility of victim-impact evidence, the constitutionality of the victim-impact statute, and the applicability of the law-of-the-case doctrine. We affirmed appellant's three death sentences. *Id.*

Thereafter, appellant filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37. After a hearing on the matter, the trial court denied the Rule 37 petition. This order was appealed to our court in *Kemp v. State*, 347 Ark. 52, 60 S.W.3d 404 (2001)("*Kemp IV*")[1]. We determined that the trial court's order did not comply with the requirements of Rule 37.5(i) of the Arkansas Rules of Criminal Procedure, and remanded the matter

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[1] We note that the procedural argument raised by the State was addressed in *Kemp IV, supra.* Specifically, we held:

> In its brief, the State argues that appellant's claims pertaining to the death sentence for one victim, Richard Falls, should be procedurally barred because the Rule 37 petition was untimely. However, the State overlooks our decision of *Kemp v. State*, 326 Ark. 910, 934 S.W.2d 526 (1996) (*per curiam*) ("*Kemp III*"), where we concluded:
>
> > We recall the portion of the mandate affirming the conviction and death sentence and stay it until such time as a final disposition of the remaining counts is complete. As such, any petition under Ark. R. Crim. P. 37.2(c) must be filed within sixty days of a mandate following an appeal taken after re-sentencing on the remaining counts. If no appeal is taken after re-sentencing on these counts, the petition must be filed with the appropriate circuit court within ninety days of the entry of judgment.
>
> *Kemp III.*
>
> Here, appellant timely filed his Rule 37 petition. The mandate of our court was returned to the trial court on April 29, 1999, and on May 18, 1999, appellant appeared before the trial court, at which time the trial court appointed Mr. Heuer, counsel for appellant, who met the qualifications set forth in Rule 37.5(b)(2). On August 11, 1999, appellant filed his Rule 37 petition. Therefore, appellant's Rule 37 petition was not untimely with regard to the Falls's sentence.

Kemp IV.

to the trial court for specific factual findings. On April 5, 2002, the trial court's amended order, denying appellant's petition for postconviction relief, was filed.

It is from that order that appellant brings this appeal. Finding no reversible error, we affirm the trial court.

On appeal from a trial court's ruling on Rule 37 relief, we will not reverse the trial court's decision granting or denying postconviction relief unless it is clearly erroneous. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

The criteria for assessing the effectiveness of counsel were enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), which provides that when a convicted defendant complains of ineffective assistance of counsel he must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors the result of the trial would have been different. *Id.* We have adopted the rationale of *Strickland* and held that:

> To prevail on any claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Secondly, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial.

Thomas v. State, 330 Ark. 442, 954 S.W.2d 255 (1997)(internal citations omitted). In *Thomas*, we further held:

> In reviewing the denial of relief under Rule 37, this court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must show that there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt in that 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.

Id. (internal citations omitted). Remaining mindful of the applicable standard of review, we turn now to appellant's points on appeal.

For his first allegation of error, appellant argues that trial counsel was ineffective for failing to investigate the ownership of a weapon found at the crime scene. Specifically, he argues that a further investigation into this matter would have had bearing on his "imperfect self-defense" claim.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988). A decision not to investigate must be directly assessed for reasonableness under all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.* (*citing Strickland, supra*).

At the hearing on appellant's petition, trial counsel testified that the "imperfect self-defense" was the heart of appellant's defense in the mitigation phase of the trial. Specifically, in mitigation, trial counsel argued that appellant believed, because he was intoxicated, that he acted in self-defense. At the hearing, trial counsel also offered his rationale for not investigating the gun's ownership. He testified that:

> In the penalty phase in the first trial, the jury made a finding, and I do not recall whether it was unanimous or not unanimous, but the record would reflect whatever it was — that — with my proposed mitigator—our proposed mitigator of he believed he was acting in self-defense.
>
> * * *
>
> There was a weapon found that was not associated with Mr. Kemp. And he had indicated — he had indicated to me in the trial preparation that one of the people had a weapon, and of course, there was a weapon found. We did elicit that fact, which again played into our he thought he was acting in self-defense.
>
> * * *

> In terms of presenting this, of course Mr. Kemp did not testify.
>
> * * *
>
> So , we had — we — we had some limitations on exactly what we could allege that Mr. Kemp perceived when he did not testify.
>
> * * *
>
> It [the weapon that was found] was a different caliber from the weapon that was the homicide weapon.
>
> * * *
>
> No, [I did not take steps to ascertain ownership of the weapon] I don't recall having done so. Of course, it was present at the scene and which for our purposes was — it was present at the scene; it was associated with one of the deceased individuals. And, for our purposes, that — that's what we needed — needed to know.

On this issue, the trial court found:

> in light of the circumstances of this case, the decision of Kemp's counsel not to further investigate the ownership of the weapon was not unreasonable. For example, as explained previously by this court at Kemp's postconviction relief hearing, the issue of ownership of the weapon was raised at trial, and the jury had ample opportunity to consider that issue as part of Kemp's self-defense claim. Further, Kemp failed to articulate how he was prejudiced by the fact that his attorney failed to further investigate the ownership of the weapon. Kemp merely states that had his attorney further investigated this matter, it would have affected his self-defense claim.

After reviewing the facts surrounding this issue, we conclude that trial counsel's failure to investigate the ownership of the gun found at the crime scene did not constitute ineffective assistance of counsel. Specifically, we hold that determining who owned the weapon would not have changed the outcome of the trial. Moreover, we note that trial counsel fully developed appellant's self-defense claim without knowing the identity of the gun's owner. The jury was informed that a gun was found at the scene and that the gun did not match the weapon that was used to com-

mit the murders. From this evidence, the jury could have determined that one of the victims had a gun and that appellant was forced to use his gun in self defense. Accordingly, the trial court's finding on this issue was not clearly erroneous.

For his second allegation of error, appellant argues that trial counsel was ineffective for failing to correctly cite Ark. Code Ann. § 5-2-614 (Repl. 1997), the statute regarding the "imperfect self-defense," in a proffered jury instruction. Specifically, he argues that omitting a phrase from the statute constituted ineffective assistance of counsel.

The statute provides:

> (a) When a person believes that the use of force is necessary for any of the purposes justifying that use of force under this subchapter but the person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the justification afforded by this subchapter is unavailable in a prosecution for an offense for which recklessness or negligence suffices to establish culpability.
>
> (b) When a person is justified under this subchapter in using force but he recklessly or negligently injures or creates a substantial risk of injury to a third party, the justification afforded by this subchapter is unavailable in a prosecution for such recklessness or negligence toward the third party.

Ark. Code Ann. § 5-2-614.

The instruction that trial counsel proffered at trial on the issue of appellant's claim of self-defense is as follows:

> When a person believes that the use of force is necessary in defense of himself but that person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the defense of justification—use of deadly physical force in self-defense—is unavailable as a defense to any offense for which recklessness or negligence suffices to establish culpability.

The trial court refused the proffered jury instruction.

At the Rule 37 hearing, when asked about the jury instruction, trial counsel testified:

> There were two statutory provisions dealing with what amounts to mistakenly, recklessly, or negligently forming the belief that one is acting in self-defense. They're in the statutes. They are not in the AMCI jury instructions. So, I proposed instructions based upon the statutes which deal with this precise situation. They were rejected by this court. We appealed on this basis and pointed out that they were specifically relevant because of the jury's findings in the penalty phase that Mr. Kemp felt he was acting in self-defense.
>
> * * *
>
> Judge Humphrey turned these instructions down on the basis they weren't in the AMCI.
>
> * * *
>
> What I did was I tried to make the jury instruction fit. You know, I used language that would be appropriate for a jury instruction.
>
> * * *
>
> It was an instruction that went to the heart of our defense which was that Mr. Kemp had — had thought, perhaps wrongfully or mistakenly, that he was acting in self-defense.

On this issue, the trial court found:

> the failure of Kemp's counsel to properly cite the model jury instruction was reasonable in light of the circumstances of this case, and that Kemp has failed to prove that he was prejudiced by his counsel's action. In so finding, the court notes that at trial, the jury heard evidence as to the amount of force used by Kemp and the reasonableness of his belief that such force was justified under the circumstances. Thus, that counsel omitted the phrase, ". . .is necessary for any of the purposes justifying that the use of force under this sub-chapter" does not amount to a showing that Kemp was denied a fair trial or that the trial would have been different but for counsel's error. Indeed, there is no showing that the court would have given this instruction even if counsel had cited it properly.

■ We must determine whether trial counsel's failure to cite Ark. Code Ann. § 5-2-614 correctly in the proffered jury instructions constituted a deficient performance that so prejudiced appellant that he was deprived of a fair trial. We have held that

there must be a rational basis in the evidence to warrant the giving of an instruction. *Allen v. State*, 326 Ark. 541, 932 S.W.2d 764 (1996). A party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996). Where the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction. *Id.*

A person may not use deadly physical force in self-defense if he knows that he can avoid the necessity of using that force with complete safety by retreating. *See* Ark. Code Ann. § 5-2-607(b)(1) (Repl. 1997). Additionally, this defense is not applicable when one arms himself and goes to a place in anticipation that another will attack him. *See Girtman v. State*, 285 Ark. 13, 684 S.W.2d 806 (1985).

In the present case, there was no basis to provide the jury instruction for the "imperfect self-defense." At trial, the State established that appellant and his girlfriend, Becky Mahoney, rode around Little Rock drinking beer, before they stopped at the home of one of the victims, David Wayne Helton. After spending time at the residence, appellant asked Ms. Mahoney to leave with him. She declined, and another victim, Cheryl Phegley, asked him to leave as well. The evidence revealed that appellant left the crime scene, returned with a weapon, and killed the four victims while Ms. Mahoney hid in a closet. During the course of the shooting spree, appellant followed Cheryl Phegley down the hallway and shot her a second time. There was a total of twelve spent shell casings at the crime scene.

Additionally, Bill Stuckey, appellant's best friend, testified that appellant told him that Cheryl Phegley had started all the argument. Mr. Stuckey also testified that appellant was drinking when he came to his trailer, but that he was not as drunk as he had seen him before.

Based upon the evidence presented at trial, we conclude that there was no rational basis for the "imperfect self-defense" instruction. Although appellant had been drinking prior to the murders, there was testimony that appellant was not drunk. More significantly, we note that appellant left the residence, armed himself with a gun, returned to the residence, and opened fire upon entering the front door. Therefore, appellant could not rationally argue that he recklessly or negligently formed the belief that the use of deadly force was necessary to protect himself.

After reviewing the record before us, we cannot say that the trial court's finding that a different sentence would not have resulted if trial counsel had accurately cited Ark. Code Ann. § 5-2-614 in his proffered jury instruction was clearly erroneous. Accordingly, we hold that appellant failed to establish a claim for ineffective assistance of counsel on this point.

For his third allegation of error, appellant contends that trial counsel was ineffective for failing to request a severance of the trial. Specifically, he argues that counsel should have requested a severance of the separate counts of capital murder because a severance would have allowed the jury to consider each offense separately and would have ensured that there was no spilling-over of victim-impact testimony.

At the Rule 37 hearing, trial counsel offered an explanation as to why he chose not to request a severance. He stated:

> I did not [move to sever the four counts] because inasmuch as they were all at the same time. I mean they were—they were—the four people who were killed were killed one right after the other in the same place, at the same time. And I did not perceive any ground for a successful severance.

On this issue, the trial court found:

> Kemp's attack on the strategy of his trial counsel is not persuasive, and does not state a ground for Rule 37 post-conviction relief.
>
> * * *
>
> The decision to ask for severance is generally a matter of trial tactics and hence, not reviewable under Rule 37. Further, this

> court finds that Kemp has failed to demonstrate how he was prejudiced, or that he was denied a fair trial due to counsel's failure to request and/or obtain severance.

Rules 21.1 and Rule 22.2 of the Arkansas Rules of Criminal Procedure discuss the procedures whereby offenses are either joined or severed in criminal cases. Rule 21.1

> Two (2) or more offenses may be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Id. Rule 22.2 provides:

> (a) Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.
>
> (b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:
>
> (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (ii) if during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

Id. We have explained that the decision to sever offenses is discretionary with the trial court. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992). We have also held that we will affirm a trial court's denial of a motion to sever if the offenses at issue were part of a single scheme or plan or if the same body of evidence would be offered to prove each offense. *Id. See also Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996).

After reviewing the evidence surrounding the crimes, we conclude that if trial counsel had filed a motion to sever the offenses his motion would have been denied. Specifically, the four murders, which occurred at the same location, at the same time, were clearly the result of a single scheme or plan. Moreover, the evidence offered at trial to establish each offense would be identical. Accordingly, a severance of the offenses was not proper. Because trial counsel's severance motion would not have been successful, appellant has failed to support a claim of ineffective assistance of counsel. *See Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000)(holding that trial counsel cannot be ineffective when he fails to make an argument which has no merit). Therefore, the trial court properly denied appellant's claim of ineffective assistance of counsel on this point.

Additionally, as noted by the trial court, it can be argued that whether or not to move for a severance is a matter of trial strategy. We have held that matters of trial strategy and tactics, even if arguably improvident, are not grounds for a finding of ineffective assistance of counsel. *Williams v. State*, 347 Ark. 371, 59 S.W.3d 432 (2002).

For his fourth point, appellant reargues several issues which we have previously addressed. Rule 37 does not allow appellant to reargue points decided on direct appeal. In *Davis, supra*, we discussed the nature of Rule 37 and the type of claims which may or may not be pursued in this type of action. We explained:

> Rule 37 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000). The rule does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999). Rule 37 does not permit a petitioner to raise questions that might have been raised at the trial or on the record on direct appeal, unless they are so fundamental as to render the judgment void and open to collateral attack. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980). Postconviction relief is not intended to permit the petitioner to again present questions that were passed upon on direct

> appeal. *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934 (1980). Rule 37 is a narrow remedy designed to prevent incarceration under a sentence so flawed as to be void. *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999).

Davis, supra.

Because appellant's arguments involve issues that are direct attacks on the judgment rather than collateral attacks, and because these issues have already been considered on direct appeal, these issues are not cognizable under Rule 37. However, in *Kemp IV*, out of an abundance of caution, and because this appeal involved a case in which the death penalty was imposed, we directed the trial court to make specific findings with regard to these issues that we now briefly address.

First, appellant challenges the use of victim-impact testimony. Specifically, he argues that the victim-impact statute, Ark. Code Ann. 5-4-602(4) (Repl. 1997), is unconstitutional. Appellant notes that we addressed this issue in his prior appeals. In *Kemp I, supra*, appellant challenged the constitutionality of Arkansas's victim-impact statute. We rejected his arguments and declared the statute constitutional. *Id.* In *Kemp II, supra*, appellant attempted to reargue this issue, and we held that, pursuant to the law-of-the-case doctrine, appellant's arguments provided no basis for relief. *Id.* In *Kemp II*, we also noted that we have upheld the constitutionality of the victim-impact statute on "many occasions." Because appellant has failed to provide us a reason to depart from our previous holdings, we once again conclude that the Arkansas victim-impact statute is constitutional.

Appellant also argues that "the utilization of victim-impact evidence presented by the State in the sentencing phases of *Kemp I* and *Kemp II* was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment." Appellant once again notes that "this argument was considered in *Kemp I* and rejected." In that case, we held:

> When evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. After reviewing the victim-impact evidence presented in this case, we conclude that this line was not crossed here.
>
> * * *
>
> We cannot say that this testimony was so unduly prejudicial that it rendered appellant's trial fundamentally unfair; thus, we reject his argument.

Id. (internal citations omitted). After reviewing our prior holding on this matter, we decline to reach a contrary result on the same issue in this appeal.

Next, appellant seeks to reargue whether the trial court should have given certain proffered jury instructions. Specifically, appellant contends that the trial court erred in denying proffered jury instructions on the issues of "imperfect self-defense," based on Ark. Code Ann. § 5-2-614 and "mistaken belief of fact," based on Ark. Code Ann. § 5-2-206(d) (Repl. 1997). These instructions were written by trial counsel and rejected by the trial court. As noted by appellant, we addressed this issue in *Kemp I, supra.* We conclude that the analysis and reasoning articulated in *Kemp I* disposes of this issue.

Finally, appellant argues that the First Division of the Pulaski County Circuit Court was without territorial jurisdiction to preside over his case. This issue was decided in *Kemp I, supra,* where we held that territorial jurisdiction in the First Division of the Pulaski County Circuit Court was proper. We decline the request that we overturn our holding that venue was proper in the First Division of the Pulaski County Circuit Court.

Affirmed.

George WILLIAMS and Dorothy Cox *v.* CITY OF FAYETTEVILLE, Arkansas; Advertising and Promotion Commission of the City of Fayetteville, Arkansas; Bekka Development Co.; Nabholz Construction Corporation; and Wittenberg, Delony & Davidson, Inc.

01-211 76 S.W.3d 235

Supreme Court of Arkansas
Opinion delivered May 16, 2002

[redacted]

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Bassett Law Firm, by: *Woody Bassett* and *James M. Graves*; and *Kit Williams*, for appellee City of Fayetteville.

Davis, Wright, Clark, Butt & Caruthers, PLC, by: *Constance G. Clark* and *William Jackson Butt*, for appellee Bekka Development Co.

Boyer, Schrantz, Rhoads & Teague, by: *Ronald L. Boyer*; and *Friday, Eldredge & Clark*, by: *John Dewey Watson*, for appellee Nabholz Construction Corp.

Conner & Winters, PLLC, by: *John R. Elrod* and *Terri Dill Chadick*, for appellee Wittenberg, Delony & Davidson, Inc.

JIM HANNAH, Justice. This case involves the question of whether a bond measure presented to the public for approval pursuant to Amendment 62 of the Arkansas Constitution may not only approve issuance of bonds but may also act as a restraint on a municipality's ability to expend other funds on the same project. This case also presents questions of illegal exaction in expenditure of general funds.

Appellants present three issues in their brief. The first issue is whether the ballot measure on the bond issue set the total amount of money that could be spent by the City in building a civic center, commonly called the Town Center. The second issue is whether use of the city's general fund, derived in part from city sales taxes, for construction of the Town Center constitutes an illegal exaction in that the city sales tax was only to be used for

improvement of municipal services and financing of the same. The third issue is whether use of turn-back funds from the county sales tax that are in the general fund constitutes an illegal exaction in that they were only to be used for resolving a county financial crisis of 1981.

More specifically, appellants allege that by presenting a ballot measure to the public whereby the City of Fayetteville proposed to fund its debt on the construction of the Fayetteville Town Center by the issuance of bonds, it simultaneously committed itself to build the Town Center for the amount of revenue raised by the bonds.

We hold that neither the ordinance nor the ballot title speaks to anything but issuance of bonds under Amendment 62 as a means of financing debt and that no restraint on City spending was created thereby. We hold that the use of the city sales-tax revenue to pay a portion of the Town Center costs is not an illegal exaction. We also hold that there was no proof that the City was using County sales tax turn-back funds to pay for any of the Town Center costs.

Facts

In 1977, the City passed Ordinance 2310, which levied a 1% hotel, motel, and restaurant tax. The taxes generated were administered by the Advertising and Promotion Commission, which was created for that purpose. The Commission used the tax funds to promote the city, to encourage tourism, and to develop a convention center for the city. To this end, the Commission passed a resolution, earmarking $1,000,000 for the development of a convention center, which was accumulated by 1997.

In 1997, the City decided to move forward on construction of a convention center and calculated the amount of debt the tax revenues generated by the 1% hotel, motel, and restaurant tax could support to be $6,950,000. The City then passed Ordinance 4038 and set an election for a decision by the voters on whether to issue $6,950,000 in bonds under Amendment 62 of the Arkansas Constitution to finance debt on the construction of the convention center. By this point, the convention center was being called

the Fayetteville Town Center. The measure passed. The City then had a total of $7,950,000 to build the Town Center.

On August 3, 1999, the City entered into construction contracts on the Town Center in the amount of $7,346,408. On August 4, 1999, this lawsuit was instituted claiming that the ballot measure under Amendment 62 limited the total sum the City could spend on construction of the Town Center to the $6,950,000 of the bond measure.

Some additional funds beyond the 7.9 million dollars available were needed for further contracts, and the City determined to pay for them first with parking fees and the balance with general funds. It appears that the total cost of the Town Center was about 8.4 million dollars.

Amendment 62

Appellants argue that the ordinance and ballot title on the bond measure to finance the debt on the Town Center project not only authorized issuance of the bonds, but also by its wording limited the expenditures on the project to the amount of the bonds. This issue does not involve a claim of illegal exaction. The parties agree that there was no diversion of funds by way of the bond issue and, therefore, no issue of illegal exaction. *Maddox v. City of Fort Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001); *Oldner v. Villines*, 328 Ark. 296, 943 S.W.2d 574 (1997).

In *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993), this court stated:

> Amendment 62 to the Constitution of Arkansas was approved at the November 1984 general election. It is entitled "Local Capital Improvement Bonds" and repealed Amendments 13, 17, 25, and 49. Section 1(a) of Amendment 62 authorizes municipalities to issue bonds, upon approval by the voters, for capital improvements of a public nature and authorizes an ad valorem tax to repay the capital improvement bonds. The same section, 1(a), permits other taxes to be used to repay capital improvement bonds if authorized by the General Assembly.

Hasha, 311 Ark. *at* 463.

Arkansas Code Annotated § 14-164-302 (Repl. 1998) provides additional clarity:

> The people of the State of Arkansas by the adoption of Arkansas Constitution, Amendment 62 have expressed their intention to provide county and municipal governments expanded powers and authority with respect to the creation of bonded indebtedness for capital improvements of a public nature and the financing of facilities for the securing and developing of industry, and have empowered the General Assembly to define and prescribe certain matters with respect to the exercise of this power and authority. To that end this subchapter is adopted to enable the accomplishment and realization of the public purposes intended by Arkansas Constitution, Amendment 62 and is not intended to otherwise limit in any manner the exercise of the powers of counties and municipalities.

Thus, the purpose of Amendment 62 is to authorize municipalities to issue bonds upon approval of the voters. Also, it does not otherwise limit the exercise of power by municipalities and counties.

Ordinance 4038 complied with Amendment 62 in calling for a special election to put the question of a bond issue to finance the Town Center project before the voters. The ordinance provides:

> WHEREAS, the City can finance the Town Center including incidental expenses and expenditures in connection with constructing and equipping the Town Center and expenses in connection with authorizing and issuing bonds by the issuance of bonds in an amount not to exceed $6,950,000.00.

The ballot title provides similarly:

> VOTE FOR OR AGAINST the issuance of bonds of the City of Fayetteville to finance the construction of the Fayetteville Town Center as a new, multi-purpose, civic center for meetings, conventions, exhibitions, entertainment events, related uses an parking. The bonds will be issued in an amount not to exceed $6,950,000.00 and for a term not to exceed twenty-two years and will be retired from all or any part of the proceeds of the city's existing 1% hotel and restaurant gross receipts tax.

Both the ordinance and the ballot title discuss the issuance of bonds to finance debt. That is the purpose of Amendment 62. There is no discussion in Amendment 62, nor in the ordinance, nor in the ballot title, regarding anything but issuance of bonds as a means of structuring debt of $6,950,000 to be used in the construction of the Town Center. To read into the ordinance or ballot measure a restriction on how much the City may expend on the Town Center is to read into them something that was never contemplated, something that is not there, and something that is not provided for by Amendment 62, which is the only authority by which the measure was presented to the voters. Appellants want to characterize the ballot measure as one that placed before the voters the decision on total costs for the Town Center when what it was, was a request for authorization to issue bonds.

Appellants assert *Arkansas-Missouri Power Corp. v. City of Rector*, 214 Ark. 649, 217 S.W.2d 335 (1949), is dispositive and requires that we rule in their favor. We disagree. *City of Rector* is inapposite to the facts of this case. First, the present case involves Amendment 62, and *City of Rector* involved Amendment 13. Second, the ordinance in *City of Rector* stepped beyond structuring debt. In that case, the Ordinance recited, "The Council finds that the estimated cost of said plant is Sixty-Five Thousand Dollars. . . ." *City of Rector*, 214 Ark. *at* 652. There is no such issue in this case. Amendment 62 speaks to financing by issuing bonds. The amount of debt undertaken on the project that is debt on the amount of the bond issue. The ordinance and the ballot title only speak to financing debt on the project. There was no misrepresentation. The bond measure passed by the voters only authorized the City to issue bonds and did not bind it to the bond sum as the total sum it could spend for construction of the Town Center.

City Sales Tax

Appellants argue that the use of city sales tax funds in the general fund to pay for a portion of the costs of construction of the Town Center Project is a misappropriation of tax funds and a violation of Arkansas Constitution Art. 16, § 11, in that taxes levied to use in improvement of municipal services are being used to make capital improvements. An illegal exaction is a tax that is

either not authorized by law or is contrary to law. *Tucker v. Holt*, 343 Ark. 216, 33 S.W.3d 110 (2000); *Hartwick v. Thorne*, 300 Ark. 502, 780 S.W.2d 531 (1989). Article 16, § 11, of the Arkansas Constitution provides:

> No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose.

An illegal exaction also occurs where tax revenues are shifted to a use different than the use authorized. *Oldner v. Villines, supra*; *Daniel v. Jones*, 332 Ark. 489, 966 S.W.2d 226 (1998). Further, where there is no statement of purpose for use of the taxes in the ordinance or ballot title, the revenues may be used for general purposes. *Maddox, supra*. However, if a purpose for the tax is stated either in the ordinance or in the ballot title, use of the funds for another purpose constitutes an illegal exaction. *Maas v. City of Mountain Home*, 338 Ark. 202, 992 S.W.2d 105 (1999).

In 1993, the City passed Ordinance 3688, which provided in pertinent part:

> AN ORDINANCE PROVIDING FOR THE LEVY OF A ONE PERCENT SALES AND USE TAX WITHIN THE CITY OF FAYETTEVILLE, ARKANSAS; PROVIDING FOR AN EXPIRATION DATE FOR SUCH SALES AND TAX OF JUNE 30, 2003 AND PRESCRIBING OTHER MATTERS PERTAINING THERETO.
>
> WHEREAS, the City Council of the City of Fayetteville, Arkansas (the "City") has determined that there is a great need for immediate improvement of municipal services and for a source of revenue to finance such services, and. . . .

The ballot title provided:

> AN ORDINANCE PROVIDING FOR THE LEVY OF A ONE PERCENT SALES AND USE TAX WITHIN THE CITY OF FAYETTEVILLE, ARKANSAS; PROVIDING FOR AN EXPIRATION DATE FOR SUCH SALES AND USE TAX OF 30 JUNE, 2003 AND PRESCRIBING OTHER MATTERS PERTAINING THERETO.

Appellants argue that the city sales tax could only be used for municipal services and that construction of the Town Center is a capital improvement, not municipal services. Neither the ordinance title nor the ballot title make mention of municipal services. That is found in the body of the ordinance. Just what was contemplated as municipal services in the ordinance was not defined. The Town Center is to provide a number of municipal services and will provide for meetings, conventions, exhibitions, entertainment events, and related uses. The sales tax was to be used to improve services and to finance improvement of services. Certainly, the construction of the Town Center could be construed to provide improvement of services.

The appellants bear the burden of showing that the use of city sales-tax funds constitutes an illegal exaction. *Rankin v. City of Fort Smith*, 337 Ark. 599, 990 S.W.2d 535 (1999). It is, therefore, appellants' burden to prove that use of the sales tax for construction of the Town Center was not provision of, or financing provision of municipal services. Appellants incorrectly state that the issue is what constitutes "improvement of municipal services." Appellants fail to include all the relevant language. The relevant language is "(the City) has determined that there is a great need for an improvement of municipal services and for a source of revenue to finance such services. . . ." Appellants are also incorrect in arguing that the nature and extent of municipal services may be determined from the services in existence in 1993. First, the language of the ordinance and ballot title do not state anything about services in existence in 1993. Further, the provision for financing infers an intent to provide for future eventualities. We do not agree that the sales tax was limited to maintaining existing services. There is no support for this narrow interpretation in the authority provided.

Appellants also argue that Ark. Code Ann. § 14-73-101(2) (Repl. 1998) defines improvements, and that every capital improvement listed in this section as well as in Ark. Code Ann. § 26-75-203 (Repl. 1997), is a structure or building, and that the tax cannot reasonably be used to build a structure. The Town Center would unquestionably increase and improve the municipal services the City could provide for its citizens. But for structures,

no services could be provided. Municipal services are not provided in a vacuum. We are controlled by the language in the ordinance and in the ballot title. Based upon the case presented, we cannot say that under the subject ordinance, financing the improvement of municipal services may not include capital improvements.

County Sales Tax

Appellants here assert that a countywide sales tax dating from 1981 was earmarked in the originating ordinance for countering a financial crisis existing in 1981 that threatened a reduction in "certain services." There was also a resolution by the county quorum court at this time indicating that additional funds derived from the tax could be used for county services and capital improvements. Finally, the tax provided that revenues not spent by the county would be returned pro rata to the municipalities.

Before we go further, we must note that the evidence presented to the trial court was that no turn-back funds were or would be used on the Town Center project. Appellants make no argument before this court that this is not so. If the funds are not being used on the project, there is no issue of illegal exaction in their use.

Other Arguments

There are other arguments that arise in the appellees' brief and in the reply brief. They will not be considered. Any alleged assignments of error must be argued in the original brief. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996); *Commonwealth Pub. Serv. Co. v. Lindsay*, 139 Ark. 283, 214 S.W. 9, (1919).

Affirmed.

CORBIN, BROWN and IMBER, JJ., concur.

ROBERT L. BROWN, Justice, concurring. The primary question in this appeal is whether language in the levying ordinance and in the ballot title itself for the 1997 bond issue can be read two ways. I believe it can. The levying ordinance and ballot title read in relevant part as follows:

Levying Ordinance

> WHEREAS, the City can finance the Town Center including incidental expenses and expenditures in connection with constructing and equipping the Town Center and expenses in connection with authorizing and issuing bonds by the issuance of bonds in an amount not to exceed $6,950,000.00(the "Bonds") under the authority of Amendment 62 to the Constitution of the State of Arkansas . . . .

Ballot Title

> VOTE FOR OR AGAINST the issuance of bonds of the City of Fayetteville to finance the construction of the Fayetteville Town Center as a new, multi-purpose, civic center for meetings, conventions, exhibitions, entertainment events, related uses and parking. The bonds will be issued in an amount not to exceed $6,950,000.00 and for a term not to exceed twenty-two years and will be retired from all or any part of the proceeds of the city's existing 1% hotel and restaurant gross receipts tax.

Williams argues that this language in the Ballot Title tells the voter that only $6,950,000 is needed to finance the Town Center. The City claims that neither instrument limits the City to a $6,950,000 price tag. I can read the instruments both ways, and because of this, I conclude that the language is unclear and ambiguous. The question is whether that fact, in and of itself, constitutes an illegal exaction.

This court has recognized two types of illegal exaction: (1) "public funds" cases where there is either a misapplication of public funds or recovery of funds wrongly paid to a public official; and (2) illegal tax cases where the tax itself is illegal. *See Barker v. Frank*, 327 Ark. 589, 939 S.W.2d 837 (1997); *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852 (1992). The instant case is not an illegal-tax case. Nor does it involve the diversion of funds from one purpose to another, at least with regard to the bond issue. What the voters approved is bond financing of $6,950,000 for the project. The fact that that represented part or all of the money necessary to do the job does not equate to an illegal exaction. Like the majority, I do not view *Arkansas-Mis-*

souri Power Corp. v. City of Rector, 214 Ark. 649, 217 S.W.2d 335 (1949), as holding to the contrary. In that case, a lack of clarity was not involved but a deliberate misleading of the voters. The voters were told in the Ballot Title that the "estimated cost" of the electric light plant was $65,000, when in point of fact a week later it was shown to be more than twice that amount. That type of deliberate subterfuge is not evident in the case before us.

Where I disagree with the majority is in its suggestion that the voters should have understood the bonds were only partial financing for the project because the bonds were to be issued in accordance with Amendment 62 to the State Constitution. Reference to Amendment 62 appears only in the ordinance, and that fact appears to me to be irrelevant to our inquiry. I would not require the voting public to have knowledge of the intricacies of the State Constitution, such as Amendment 62, when they vote. What we have said in the past is that it is only the plain language of the Ballot Title that the public should look to for information. *See Daniel v. Jones*, 332 Ark. 489, 966 S.W.2d 226 (1998); *Arkansas-Missouri Power Corp. v. City of Rector, supra.* Indeed, in *Daniel*, we made it clear that mere references to an Act of the legislature in a ballot title was not sufficient to inform the voters about what they were voting. Here, Amendment 62 was not even mentioned in the ballot title. Yet, somehow the majority believes that the voters should have been aware of Amendment 62 *and* understood it. That goes way beyond what our cases have said and puts a horrendous burden on the voter. I would adhere to our previous cases and look only to the levying ordinance for the City's stated purposes and to the ballot title for information to the voter. *See Daniel v. Jones, supra.*

Where I also disagree with the majority is over the definition of "municipal services," as referenced in the 1993 levying ordinance for the one percent sales and use tax. The majority concludes that "municipal services" includes capital improvements and building projects. A "service" is defined as "the duties, work, or business performed or discharged by a government official . . . useful labor that does not produce a tangible commodity." *Webster's Third New International Dictionary, Unabridged* p. 2075 (1993). Services such as police, fire, and sanitation services differ qualita-

tively from capital improvements, such as construction of the Town Center.

The City argues that a Resolution was passed by the City Board on the same day as the 1993 levying ordinance for the one percent sales and use tax which clearly specified that the tax revenues would be used for construction projects. But that information was not part of the levying ordinance, and this court has recently held that City resolutions and other extraneous information cannot supersede the purposes stated in a levying ordinance. *See Maddox v. City of Fort Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001). The majority opinion does not rely on the City's argument regarding the Resolution but, instead, concludes that a building project is a service.

As with the bond issue, the City's draftmanship suffers from a lack of clarity. Had the term "municipal services" been included in the 1993 Ballot Title, I would reverse on this point. Since it was not, I cannot say that this deficiency in the levying ordinance warrants reversal.

CORBIN, J., joins.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur in the result reached by the majority. In my view, our decision in this case should begin and end with this court's decision in *Oldner v. Villines*, 328 Ark. 296, 943 S.W.2d 574 (1997). As stated in the majority opinion, *Arkansas-Missouri Power Corp. v. City of Rector*, 214 Ark. 649, 217 S.W.2d 335 (1949), is inapposite to the facts of this case.

The Appellants' fourth amended complaint alleges that the City perpetrated an illegal exaction when it expended the "public's money from sources unauthorized by the voters and citizens [. . .] a violation of Article 16, § 11, of the Arkansas Constitution." That Article and section provides in relevant part: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, and no moneys arising from a tax levied for one purpose shall be used for any other purpose." In construing this constitutional provision, we have held that, "[i]t is only when a *diversion* of tax revenues occurs

from a specific purpose that has been authorized to an unauthorized purpose that an illegal exaction occurs." *Oldner v. Villines*, 328 Ark. at 305, 943 S.W.2d at 579 (1997)(emphasis added).

Here, there has been no diversion of funds derived from the bond issue, the city sales tax, or the county sales tax. That is, none of these funds have been used for a purpose not authorized by a city or county ordinance. Under *Oldner v. Villines, supra*, an illegal exaction does not occur until tax revenues are shifted to a use different from that authorized. Therefore, no illegal exaction in the expenditure of public funds has occurred in this case.

Jeremiah CLARK *v.* STATE of Arkansas

02-430 74 S.W.3d 215

Supreme Court of Arkansas
Opinion delivered May 16, 2002

Althea E. Hadden, for appellant.

No response.

PER CURIAM. Appellant Jeremiah Clark, by and through his attorney, has filed a motion for rule on clerk. His attorney, Althea E. Hadden, states in the motion that the record was tendered late due to a mistake on her part.

We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the

motion. *See In Re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam).

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Robert WHITE *v.* Sharon PRIEST, In Her Official Capacity as Secretary of State of the State of Arkansas; and Mark Pryor, In His Official Capacity as Attorney General of Arkansas

02-284 73 S.W.3d 572

Supreme Court of Arkansas
Opinion delivered May 17, 2002

Oscar Stilley, for petitioner.

No response.

PER CURIAM. Mr. Oscar Stilley has filed a petition for an original action wherein he asserts seven counts for relief. On April 10, 2002, this court granted his counts one and two, and denied the remaining counts. He had requested disqualification of all justices to recuse from hearing his petition because, he argues, they have demonstrated a hostility towards him and because the justices have an interest in the outcome in the case.

Mr. Stilley's arguments deal primarily with his belief that, over a ten-year period, this court ruled against him in five cases. He offers no other allegations bearing on any hostility issue, but seeks to "interrogate" the present justices "eyeball-to-eyeball" at a hearing in a discovery fashion in an attempt to find reasons why the court is hostile towards him. Instead of alleging reasons for the justices' recusing, he merely suggests he wants a hearing to "ferret out the facts" pertinent to disqualifications. Mr. Stilley also asserts the sitting justices have a pecuniary interest in this case because one of the ballot-title issues concerns a proposed amendment that could "cap" their salaries, if the proposed amendment is adopted. On April 10, 2002, this court granted Mr. Stilley's request to review that ballot title and proposed amendment.

Mr. Stilley presents no valid reasons or allegations that warrant a justice's recusal in this case. The only reason Mr. Stilley offers to show the court's hostility towards him is that he lost five prior cases before this court that he claims he should have won. Fourteen different justices served on this court during the ten-year period in which those five cases were decided. This argument is yet another disingenuous way to again show his dissatisfaction concerning earlier opinions of this court with which he disagrees. Such re-visits of earlier cases offer *nothing new* showing that the precedential value of those opinions should be reversed. In fact, Stilley's pleadings, motion, and argument constitute a clear violation of Ark. R. App. P.—Civ. 11. In this same vein, this court, on prior occasions, has expressed its displeasure with attorneys who have directed disrespectful language towards courts and judges. *See McLemore v. Elliott*, 272 Ark. 306, 614 S.W.2d 226 (1981) (striking appellant's brief due to "intemperate and distasteful language" directed toward trial judge, pursuant to former Ark. Sup. Ct. R. 6); *see also* Ark. Sup. Ct. R. 1-5 (captioned "Contempt," it provides, "No argument, brief, or motion filed or made in the Court shall contain language showing disrespect for the trial court"). In view of Mr. Stilley's continued strident, disrespectful language used in his pleadings, motions, and arguments, and his repeated refusal to recognize and adhere to precedent, Mr. Stilley's 70-page brief should be stricken entirely.

Examples of Mr. Stilley's remarks follow:

> It is also all too possible that the Court will simply decline to rule consistently, upholding *Kurrus* when that is convenient, blithely ignoring *Kurrus* when consistency of decision making will not bring the desired result.
>
> * * *
>
> Therefore, it appears that the only persons in this Act receiving more than $100,000 per year are judicial officers. Why then did the Court falsely claim that this Act supported their theory that many executive branch employees get over $100,000.
>
> * * *
>
> The Court's action in pretending to raise a claimed conflict on the part of the Governor, on such flimsy grounds, indicates a

fear on the part of the justices that an impartial tribunal will decide the case honestly but contrary to the way that this Court would decide the case.

* * *

It grieves undersigned counsel to be forced to recount part of the many serious and apparently intentional wrongs that the members of this Court has [*sic*] committed, as part of their claim for recusal. However, by refusing to honestly consider a fair claim for disqualification, made as gently as possible, the Court puts undersigned counsel in the position of having to raise these issues to protect his rights and the rights of his clients.

* * *

The Court simply left its decision intact even though its reasoning is wholly irreconcilable with prior decisions of the Court. This leaves two possibilities. One, the court, in its original opinion intentionally lied about the citation of these authorities. These authorities do in fact annihilate the Court's reasoning and ruling on the parol evidence question in this case. If this is the basis for the oversight, the Court and each of its members necessarily demonstrate rank prejudice against Appellant and should recuse.

* * *

The other possibility is that the Court accidentally overlooked these authorities, although they were cited and included in the lists of authorities, and although these cases were discussed at length at pages 2–4 of the Appellant's reply brief. If this is the problem, Appellant wishes to hear the reason, if any, that Appellant should be expected to trust the competence of the Court in the decision of this cause.

* * *

By this means, any reader of this motion may examine Exhibit "1," and compare same to the opinion in *Roberts v. Priest*, and thus know that the *Roberts* Court wilfully and knowingly ignored the principal argument of the Intervenors, because the argument was irrefutable.

* * *

The decision of the Court, coupled with the Court's history of refusing to correct blatant and manifest error upon request for rehearing, requires that undersigned counsel make this fact known to the public. Publicity is the cure for government evils. Most certainly, a refusal to acknowledge and adjudicate arguments, solely because they provide irrefutable proof in favor of a position disliked by the Court, is a government evil that must be stamped out.

* * *

It seems the Court knew in advance that its ruling would not withstand any critical analysis, and wished to stifle any pleading that would expose the weakness of the Court's opinion.

* * *

This simply shows that the Court reacts in anger to despised arguments by undersigned counsel that it cannot logically refute. This behavior is exactly the sort for which the bench and bar have fallen into great disfavor and distrust with the general public in Arkansas.

* * *

What is required, in other words, is a return to *stare decisis*, and adherence to established legal rules even when the judge or justice prefers a result different from that required by the law. This conduct has not stopped. Rather it has intensified.

* * *

The list of cases in which the Court has acted prejudicially to undersigned counsel is by no means complete. On the contrary, this is the tip of the iceberg. This Court has repeatedly shown that it will declare the law one way on undersigned counsel's cases, and the opposite on cases by other individuals.

* * *

We cite the foregoing examples of the general tone of disrespect for the code of ethics and Mr. Stilley's breach of his oath of office as an attorney-at-law. That disrespect for the court pervades Mr. Stilley's brief. As was the situation in *McLemore*, we examined Mr. Stilley's brief to see if we could strike only some parts, but find Mr. Stilley's intemperate and distasteful language

spread throughout all of his brief. Mr. Stilley asked to incorporate his brief as part of his petition. We conclude that Mr. Stilley's brief is an inexcusable breach of the obligation of professional conduct that this court expects of the members of the bar. Accordingly, we direct that all copies of his brief shall be stricken in their entirety from the files of this court.

Because this matter implicates a breach of the Model Rules of Professional Conduct, we refer Mr. Stilley to the Professional Conduct Committee and request the Committee to take whatever action it believes his actions warrant under the Model Rules of Professional Conduct.

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

ROBERT L. BROWN, Justice, concurring in part; dissenting in part. I agree with much of the majority's opinion. However, I have decided to recuse on one of the two ballot-title matters that remain before this court to be decided. The case on which I am recusing involves a constitutional amendment to reduce the salaries of state officers and employees. If passed, it would mean a reduction of the salaries of Supreme Court Justices by almost twenty percent.

On the issues not related to recusal, I agree that Mr. Stilley is attempting to resuscitate an issue long since laid to rest in *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), and that he has not shown sufficient reason why he should not be sanctioned for this conduct under Arkansas Rule of Appellate Procedure—Civil 11. I also agree that he is not entitled to a fact-finding hearing under Appellate Rule 11. I further agree that an Appellate Rule 11 sanction of striking *most* of his brief is warranted because Mr. Stilley has filed a frivolous matter in this court. I would not, however, strike that portion of Mr. Stilley's brief which suggests recusal of this court's members due to a financial interest in the subject matter. Finally, I agree that this court lacked original jurisdiction to hear his illegal exaction cause of action brought against the members of this court. We appropriately dismissed that claim.

On recusal, Mr. Stilley has requested a declaratory judgment from this court on his proposed Ballot Title and Popular Name

concerning a proposed amendment to cap the salaries of all state officers and employees at $100,000 and fringe benefits at 25% of that salary. The Ballot Title and Popular Name have been approved by both the Secretary of State and the Attorney General, as required by Ark. Code. Ann. § 7-9-501 to -506 (Repl. 2000). That issue has not been dismissed by this court. It is still viable and awaits this court's decision.

I first believe that while Mr. Stilley is not entitled to a fact-finding hearing regarding recusal of the members of this court under Appellate Rule 11, he is entitled to five minutes to argue his renewed motion that the members of this court recuse due to a financial interest in the subject matter of the proposed amendment. An opportunity to be heard on this matter is fundamental due process. We routinely allow movants five minutes to argue any motions prior to oral arguments at our Thursday sessions of court. We allowed Mr. Stilley the same privilege in September 2001 to argue that this court should recuse in a different matter. *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001) (*per curiam*). I would similarly grant him five minutes to be heard on this recusal motion on the Ballot Title issue involving capping our salaries.

Secondly, Mr. Stilley, in his renewed motion for recusal, counters this court's first opinion in *White v. Priest*, 348 Ark. 135, 73 S.W.3d 572 (2002), by pointing to the fact that the Governor of this state, who is authorized to appoint special justices under the State Constitution following recusal, does not have a direct conflict of interest in this matter because he makes less than $100,000. Thus, the argument goes, the Governor is not suffering under the same disability as the members of this court, and the Rule of Necessity, which requires otherwise disqualified judges to sit when there is no replacement judge available, does not apply. Simply stated his argument is: Because the Governor is not directly affected by the proposed initiative, but only certain employees of the Executive Branch are, the Governor does not suffer from a disabling conflict of interest, comparable to the members of this court, which prevents him from appointing special justices to replace us. Again, I believe that Mr. Stilley should have the opportunity to argue this issue before this court. In today's opinion, the majority addresses Mr. Stilley's Rule of Necessity argument in a footnote and refers to other state officers

and employees who make over $100,000 a year. At this juncture, I am not convinced that the Governor has a conflict of interest comparable to that of this court. Certainly, special justices appointed by the Governor and sitting on this case would not have the conflict of interest that this court has. The majority should also address the difference in the federal judiciary which has no mechanism for appointment of special judges. The Rule of Necessity obviously applies in federal judicial salary matters; however, our situation in Arkansas, where we do have an appointment process, is different.

Amendment 80, which recently amended our State Constitution with a new Judicial Article, reads:

> No Justice or Judge shall preside or participate in any case in which he or she might be interested in the outcome, in which any party is related to him or her by consanguinity or affinity within such degree as prescribed by law, or in which he or she may have been counsel or have presided in any inferior court.

Ark. Const. Amend. 80, § 12. The following section provides for appointment of special justices by the Governor of the State when a justice of our court disqualifies. Ark. Const. Amend. 80 § 13(A). My research has developed no case where the Rule of Necessity has been applied when a process exists for the appointment of a special judge to sit for the disqualifying judge. It occurs to me that the Rule of Necessity would only come into play if the Governor determined he had a conflict and could not appoint special justices.

Recusal is a matter left largely to the discretion of the individual judge. *SEECO, Inc. v. Hales*, 341 Ark. 972, 22 S.W.3d 157 (2000); *U.S. Term Limits, Inc. v. Hill*, 315 Ark. 685, 870 S.W.2d 383 (1994) (motion to recuse denied). I therefore recuse and will not participate in the Ballot Title issue on capping the salaries of all government employees at $100,000. My reason for recusal is solely based on my financial interest in the subject matter of the proposed amendment and is not due to any other reason raised by Mr. Stilley. I request Chief Justice ARNOLD to request that the Governor appoint a special justice as my replacement for this Ballot Title issue only.

Robert WHITE *v.* Sharon PRIEST, in Her Official Capacity as Secretary of State of the State of Arkansas, and Mark Pryor, in His Official Capacity as Attorney General of Arkansas

No. 02-284

SUPPLEMENTAL OPINION ON RECUSAL

May 23, 2002

ROBERT L. BROWN, Justice. On Friday, May 17, 2002, I issued an opinion in which I recused from sitting on the proposed constitutional amendment and Ballot Title which would cap the salaries of officers and employees of the state government at $100,000. My reason for doing so was that should the amendment pass, it would have a direct financial impact on me as it would reduce my salary by about twenty percent. I further disagreed with the majority that the Governor of the State has a comparable conflict of interest to mine and is foreclosed from making an appointment for a special justice in this case. My sole reason for recusal was my financial interest in the subject matter of the Ballot Title.

Mr. White has also proposed a second unrelated constitutional amendment and Ballot Title dealing with the State's penitentiary system under the same case number. It was not my intention to recuse on this discrete matter because it involved an entirely different proposed constitutional amendment.

However, there has been no motion to sever the two proposed constitutional amendments and treat them as different cases. Nor has the court decided that it will do so on its own motion. The net result of this is that because the two proposed constitutional amendments will be considered by the court at one time as one case, I must also recuse from participation in the proposed constitutional amendment that deals with the State's penitentiary system.

As I stated last week, our State Constitution provides that a justice shall not sit in a matter in which he or she is "interested."

Ark. Const. amend. 80, § 12. It further provides that in the event of such disqualification, the Chief Justice shall request that the Governor of the State appoint a special justice to sit on the case involved. Ark. Const. amend. 80 § 13.

I therefore request the Chief Justice, pursuant to Amendment 80, section 13, of the State Constitution of Arkansas, to appoint a special justice to sit for me in this case to decide the sufficiency of both the proposed salary-cap amendment and the proposed penitentiary amendment.

[redacted]

[redacted]